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NUCLEAR REGULATORY COMMISSION

Title: Louisiana Energy Services
Pre-Hearing Conference

Docket Number: 70-3103-ML; ASLBP No.: 04-0826-01-ML

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman

Dr. Paul B. Abramson

Dr. Charles N. Kelber

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IN THE MATTER OF: : Docket No. 70-3103-ML
LOUISIANA ENERGY SERVICES, L.P. : ASLBP No. 04-826-01-ML
(National Enrichment Facility) :

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Tuesday, June 15, 2004

Lea County Event Center

5101 Lovington Hwy.

Hobbs, New Mexico

The above-entitled matter came on for hearing
at 9:00 a.m.

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P R O C E E D I N G S

JUDGE BOLLWERK: Good morning. Today we're here to conduct an initial prehearing conference in the Louisiana Energy Services, LP proceeding in response to a Notice of Opportunity for a Hearing published on February 65, 2004, in Volume 69 of the Federal Register at pages 5873 to 5879.

Various petitioners, including governmental participants, the Attorney General of New Mexico, and the New Mexico Environment Department, and organizational participants, the Nuclear Information and Resource Service, and public citizens have requested an adjudicatory hearing.

The subject of the hearing would be the December 15, 2003, application of Louisiana Energy Services, LP, often referred to as LES, under Part 70 of Title 10 of the Code of Federal Regulations, for authority to possess and use source byproduct and special nuclear material and to enrich natural uranium to a maximum of 5 percent uranium 235 by the gas centrifuge process at a plant to be known as the National Enrichment Facility, or NEF, to be constructed near Eunice, New Mexico.

As is our usual practice, we scheduled this prehearing conference to provide these participants with an opportunity to make oral presentations on the contested

1 matters that are now before the Licensing Board as a
2 result of their various filings over the past several
3 months.

4 Because of earlier rulings by the five-member
5 Nuclear Regulatory Commission regarding the legal standing
6 of the various petitioners, the focus of this prehearing
7 conference will be the admissibility of the contentions or
8 issue statements proffered by the various petitioners.

9 Before we begin hearing the parties'
10 presentations on these matters I'd like to introduce the
11 Board members. To my left -- to my right is Dr. Paul
12 Abramson. Dr. Abramson, who is both an attorney and a
13 nuclear engineer, is a full-time member of the Atomic
14 Safety and Licensing Board panel. To my left is Dr.
15 Charles Kelber. Judge Kelber is a nuclear physicist and a
16 full-time member of the panel. My name is Paul Bollwerk,
17 and I'm an attorney and chairman of this Licensing Board.

18 At this point I'd like to have counsel for the
19 various participants identify themselves for the record.
20 Why don't we start with counsel for the Attorney General
21 of New Mexico, then counsel for the New Mexico Environment
22 Department, followed by counsel for the Nuclear
23 Information and Resource Service and Public Citizen, then
24 move to counsel for applicant, Louisiana Energy Services,
25 and, finally, to NRC staff counsel.

1 MR. COPPIN: Mr. Chairman, my name is Chris
2 Coppin, special counsel to the Attorney General. With me
3 is Mr. David Pato, Assistant Attorney General of New
4 Mexico. We also have Mr. Allen Messenger at the counsel
5 table, who's an expert on contract with the Attorney
6 General to answer questions -- to assist in answering
7 questions. Thank you.

8 JUDGE BOLLWERK: Thank you.

9 MS. FOX: Mr. Chairman, members of the board,
10 my name is Tannis Fox. I'm the deputy general counsel for
11 the New Mexico Environment Department. And with me today
12 is Secretary of the Environment Department, Ron Curry.

13 JUDGE BOLLWERK: Thank you very much.

14 MR. LOVEJOY: Your Honor, my name is Lindsay
15 Lovejoy. I'm an attorney for Nuclear Information and
16 Resource Service and Public Citizen. With me at counsel
17 table is Michael Mariotte of NIRS, and Michele Boyd from
18 Public Citizen.

19 JUDGE BOLLWERK: All right. Thank you.

20 MR. CURTISS: Mr. Chairman, I'm Jim Curtiss
21 appearing for the applicant, LES. And with me is John
22 Lawrence, general counsel of LES; Martin O'Neill, with
23 Winston and Strawn; and Rod Krich, who's the vice
24 president of LES for safety, environment and nuclear
25 engineering.

1 JUDGE BOLLWERK: Thank you.

2 MS. CLARK: My name is Lisa Clark. I'm counsel
3 for NRC staff. And with me today is Angela Coggins.
4 Sitting behind me are Timothy Johnson, our project manager
5 responsible for safety review; and Melanie Long, who is in
6 charge of the environmental review.

7 JUDGE BOLLWERK: Thank you very much. So
8 there's no misunderstanding, I would note as we stated
9 both in our April 22 and May 28, 2004, issuances,
10 presentations to the Board during this prehearing
11 conference will be limited to the participant counsel who
12 have just identified themselves.

13 As is our usual practice, following the Board's
14 ruling on the admissibility of the contentions of the
15 various petitioners, the Board will issue a Notice of
16 Hearing that, in accordance with 10 Code of Federal
17 Regulations, Section 2.315(a), will afford members of the
18 public an opportunity to provide, as appropriate, oral
19 limited appearance statements on the issues.

20 Further, in those issuances -- excuse me.
21 Further, in that issuance or a subsequent notice, the
22 Board will outline the times, places, and conditions of
23 participation relative to the opportunity for oral limited
24 appearances statements.

25 As the Board noted in its May 28 issuance,

1 however, in the interim, any member of the public can
2 submit a written limited appearance statement providing
3 his or her views regarding the issues in this proceeding.
4 Those written statements can be sent at any time by
5 regular mail to the Office of the Secretary, United States
6 Nuclear Regulatory Commission, Washington, DC, 20555-0001,
7 to the attention of the Rule Makings and Adjudication
8 Staff, or by e-mail to hearingdocket -- all one word --
9 H-E-A-R-I-N-G-D-O-C-K-E-T, at NRC.gov.

10 Then a copy of the statement should also be
11 provided to me as the chairman of this Atomic Safety and
12 Licensing Board Panel, sending it by regular mail to my
13 attention at the Atomic Safety and Licensing Board Panel,
14 Mail Stop T3F23, U.S. Nuclear Regulatory Commission,
15 Washington, DC, 20555-0001, or by e-mail to gpb@nrc.gov.

16 As to the order or presentation by the
17 participants in this prehearing conference, in our May 28
18 order, as amended on June 9, we outlined a schedule for
19 presentation that affords an opportunity for the
20 participants to address the various contested matters now
21 before the Board.

22 The Board will intend to follow that schedule
23 as closely as possible in terms of the issues and allotted
24 times for argument. In that regard, we will request that,
25 before starting on an issuance each -- for which each --

1 for which a participant has been afforded an opportunity
2 for argument and rebuttal, counsel should indicate how
3 many -- how much of the total time allocation he or she
4 wishes to reserve for rebuttal. The Board will be
5 providing counsel with notice of a need to finish his or
6 her presentation before the end of its allotted argument
7 time.

8 Finally, at some juncture we would like to
9 have a brief discussion regarding some of the
10 administrative details involved in this proceeding. And,
11 relative to administrative matters, I would note that,
12 while this proceeding is in session, all cell phones
13 should be turned off or placed on vibrate, and any cell
14 phone conversations should be conducted outside of this
15 hearing room.

16 All that being said, before we begin with
17 arguments regarding contention and admissibility issues, I
18 would like to visit briefly the question of participation
19 in this proceeding by petitioners New Mexico Attorney
20 General and New Mexico Environment Department.

21 Thereafter, we will move into the arguments on
22 the various contentions and, of course, in which we will
23 deal with the question that's been posed to us by the New
24 Mexico Environment Department regarding the argument times
25 for several of its contentions. And we may also need to

1 hear something about the LES proprietary information
2 provided.

3 Just briefly, in terms of the participation of
4 the Attorney General of New Mexico and the New Mexico
5 Environment Department, as the Commission's Federal
6 Register notice regarding the recent changes in the rules
7 indicated, if a constitutional provision or constitution
8 in some way or another provides for representation by two
9 different entities within the state government, the
10 Commission has no problem with that. And I take it
11 neither of you have a problem with either one of the
12 opposite parties sitting here.

13 MS. COGGINS: That's correct, Mr. Chairman.

14 MR. FOX: That's correct, Mr. Chairman, as long
15 as the Board recognizes the authority of the Attorney
16 General to participate.

17 JUDGE BOLLWERK: All right. Yours comes
18 directly from a constitutional provision.

19 And I take it yours comes through the Governor.

20 MS. COGGINS: That's correct -- which comes
21 through the constitution.

22 MR. COPPIN: That's correct.

23 JUDGE BOLLWERK: No one has a problem with that
24 interpretation. Okay. I just wanted to make -- all
25 right. Very good.

1 Before we start on the first argument, I guess
2 there had been a motion filed to provide for some
3 additional argument time on -- by the New Mexico
4 Environment Department on one of the groups. Currently
5 you have group -- time in group 1 and 2. And I guess you
6 wanted additional time in group 3. Is that correct?

7 MS. FOX: That's correct. We wanted time in
8 group 3.

9 JUDGE BOLLWERK: I guess what the Board's
10 thought on this is, given what's in 1 and 2, can't you
11 cover between the two of those what you would be arguing
12 in any event?

13 MS. FOX: Mr. Chairman, I think I set forth in
14 the motion for clarification the reasons for requesting
15 time on the storage. We actually will not be requesting
16 time on the cost estimate issue because we are not putting
17 forth conditions at this time on that issue.

18 As set forth in detail in our reply, we've set
19 forth bases for contentions that deal both with a
20 plausible strategy for disposal and for long-term storage.

21 JUDGE BOLLWERK: So if I understand what you're
22 telling me, you're not going to be presenting any
23 arguments under group 2?

24 MS. FOX: That is correct.

25 JUDGE BOLLWERK: And you said you'd rather

1 present those under group 3.

2 MS. FOX: That is correct.

3 JUDGE BOLLWERK: We may need to adjust the time
4 slightly for LES and the staff, given there may be two
5 presentations there. When we get to that contention we'll
6 make that adjustment.

7 MS. FOX: Thank you, Mr. Chair.

8 JUDGE BOLLWERK: All right. The -- and I
9 recognize this got complicated because, obviously, you all
10 were able to frame your contentions in any way you thought
11 appropriate, and we were trying to do the best we could to
12 get them organized into groups that would at least bring
13 some efficiency to the process. It may not have been a
14 perfect effort on our part, and I'll be the first one to
15 admit that.

16 Having said that, we will -- if you will work
17 with us then we'll work with you to make -- give you at
18 least within the time we've allotted an opportunity to
19 make the presentation. And, again, I think we mentioned
20 several times in the different orders that we put out that
21 we have read the briefs; what we're most interested in
22 hearing is not necessarily a recitation of what you've
23 already told us.

24 But, given all the filings we've had in this --
25 and I think we're up to about a stack that big

1 (indicating) -- that hopefully you all will now get to the
2 nub of your contentions and the disputes that you have and
3 really focus on those sorts of things.

4 The first category we have dealt with plausible
5 strategy for waste disposal. And there are several
6 contentions within this category. New Mexico Environment
7 Department had two, which we now label TC-1, meaning
8 technical contention 1, and EC-1, meaning environmental
9 contention 1.

10 EC-2 -- the New Mexico Attorney General had a
11 miscellaneous contention, I or 1, and environmental
12 contention, iii. And then NIRS and Public Citizen had
13 what we've labeled environmental contention 3/technical
14 contention 1 -- EC-3/TC-1.

15 Again, the reason I should mention that we were
16 trying to put these into these categories is because what
17 the Commission's rules generally make fairly clear is the
18 application is the focus of what we're going to listen to
19 issues about.

20 Within that application there are subdivisions,
21 whether it's technical issues or environmental issues.
22 And we do like to try to get them in those boxes if we
23 can. Obviously, there are some -- the word slop is not --
24 that's the right term -- but there is some migration from
25 issue to another, and we wanted to recognize that.

1 But, having said that, we also wanted to make
2 sure that we understood which contentions were really
3 technical contentions, which ones were really national
4 environmental policy contentions, and, if there was some
5 overlap, where that was.

6 All right. Within that group let me then ask
7 the New Mexico Environment Department -- you have 15
8 minutes. How much of that time do you want to allocate
9 for rebuttal?

10 MS. FOX: Three minutes, please.

11 JUDGE BOLLWERK: Three? Okay. And what about
12 the Attorney General?

13 MR. COPPIN: Three minutes for rebuttal, Mr.
14 Chairman.

15 JUDGE BOLLWERK: All right. And then what
16 about NIRS/PC, if I can refer to you that way?

17 MR. LOVEJOY: We'd like to -- yes, please.
18 We'd like to keep five minutes for rebuttal, if that's all
19 right.

20 JUDGE BOLLWERK: Five minutes. All right.

21 The New Mexico Environment Department, you are
22 first.

23 MS. FOX: Thank you, Mr. Chairman. In support
24 of the New Mexico Environment Department's contention that
25 the LES has not proposed a plausible strategy disposal for

1 the depleted uranium, NMED has put forth a number of
2 bases.

3 I appreciate that the Board has instructed
4 counsel to focus our presentations on the points in
5 controversy that have risen from the parties' pleadings,
6 and I will attempt to do so in my argument.

7 In its surreply, NRC staff spent most of its
8 brief arguing that the Environment Department had gone
9 beyond the bounds of its petition to intervene, and
10 therefore the Board should not at all consider NMED's
11 reply.

12 This argument has no merit. In its initial
13 answer to the Environment Department's petition to
14 intervene, NRC staff spent most of its brief then arguing
15 that the Environment Department's petition to intervene
16 was too vague and not sufficiently specific.

17 In requesting additional time to file our
18 reply, the New Mexico Environment Department acknowledged
19 that its petition may not have satisfied each of the
20 requirements of 10 CFR 2.309(f) for each of its
21 contentions, and we specifically asked for the extension
22 in order to provide more detailed support for our
23 contentions.

24 The NRC -- or rather the Board granted the
25 Environment Department's request for additional time,

1 noting that the Environment Department's reply should
2 focus on the legal or logical arguments presented in LES'
3 and staff's answers.

4 In its reply, the Environment Department has
5 done just as requested by the Board. NRC staff complained
6 in its answer that the Environment Department's petition
7 was too vague.

8 The Environment Department, in reply, provided
9 the specific bases to support its contention that LES's
10 application does not adequately provide for a plausible
11 strategy or provide for adequate long-term storage of the
12 depleted uranium on site.

13 NMED therefore directly addressed in its reply
14 the issues raised by staff in its answer. Staff's
15 objection has no merit.

16 Staff also argues that the Environment
17 Department should not be allowed to present new bases to
18 support its contentions. LES likewise makes this argument
19 with respect to the Environment Department's contention
20 that LES's emergency plan is inadequate.

21 These arguments also have no merit. The
22 Environment Department was clear that when it sought its
23 additional time to file its reply, that it needed to
24 gather additional support for its contentions.

25 The Board granted that request, presumably

1 allowing the Environment Department the time to gather
2 additional factual and legal support for its reply.
3 Therefore, the Environment Department's introduction of
4 new factual and legal bases in support of our contentions
5 raised in the petition is permissible.

6 Additionally, each of the additional bases set
7 forth in our reply is logically connected to our
8 contentions -- our main contentions regarding plausible
9 strategy and long-term storage.

10 And therefore, the Environment Department did
11 not go outside the bounds of the initial petition in its
12 reply. Moreover, staff and LES were given the opportunity
13 for a surreply, a pleading not expressly allowed by NRC
14 rules, in order to address each of these new bases.
15 Therefore, there is no prejudice to either party.

16 With regard to LES's surreply, LES concedes
17 that the Environment Department has raised a litigable
18 issue as to whether the DUF₆ is properly classified as a
19 low-level radioactive waste, but objects to all other
20 contentions in support raised by the Environment
21 Department.

22 LES states that the Environment Department's
23 bases for its contentions that LES has not put forth a
24 plausible strategy are similar to those raised by NIRS and
25 Public Citizen and the New Mexico Attorney General and

1 that LES opposes the Environment Department's bases for
2 the same reasons set forth in its answer to NIRS and the
3 AG's petitions.

4 The Environment Department therefore will
5 address the arguments made by LES in that answer.

6 At the outset it is worth observing that
7 disposal of uranium tails cannot be evaluated outside the
8 larger context of the Department of Energy's efforts to
9 dispose of its inventory of 732,000 metric tons of
10 depleted uranium, the largest inventory in the world.

11 It has taken many years and an act of Congress
12 for DOE to begin the process of stabilization and
13 disposition of the depleted uranium of Paducah, Kentucky;
14 Oak Ridge, Tennessee; and Portsmouth, Ohio.

15 Prior to Congress's action in 1998, there were
16 no viable conversion options and no viable disposal
17 pathway for the stockpile of depleted uranium. Even now
18 it's estimated that, after construction, it will take 25
19 years to convert the depleted uranium inventory at
20 Paducah.

21 LES has proposed two strategies for disposal,
22 both of which the Environment Department contends are not
23 plausible. LES proposes first to contract for private
24 DUF₆ conversion and disposal services. This is LES's
25 preferred strategy.

1 Toward this end, LES states in its application
2 that it has "held discussions with two companies, Cogema
3 and Congredyne [phonetic], concerning private conversion."

4 The Environment Department contends that
5 holding discussions does not constitute a plausible
6 strategy. Discussions mean nothing with respect to any
7 level of commitment and have little or no substance and/or
8 meaning.

9 Now, LES and staff are quick to point out that
10 a plausible strategy does not require certitude. And this
11 is true. All parties are arguing over the meaning of that
12 term and how it should be applied.

13 If, however, the term is to have any meaning
14 whatsoever, it requires a more reasonable showing than LES
15 has made, a showing demonstrating a greater likelihood of
16 success than merely holding discussions with two
17 companies.

18 Even if LES were to put forth a plausible
19 strategy for private conversion, it still needs to put
20 forth a plausible strategy for disposal of the uranium
21 oxide.

22 As to disposal, LES offers that one of the
23 Congredyne partners may have access to an exhausted
24 uranium mine, Cotter Mines in Colorado, where depleted
25 U₃O₈ could be disposed.

1 However, the Cotter Mines officials have
2 publicly stated that the mines have no intent to accept
3 this waste. The president of the corporation, Richard
4 Cherry, is quoted in the January 7, 2004, article as
5 saying, "That's not something we're interested in," adding
6 that, "We're not licensed to do that."

7 And in the same article, LES vice president Rod
8 Krich acknowledged that there have been no discussions
9 with Cotter.

10 LES contends in its surreply that the Cotter
11 Mine officials have stated that they were misquoted in the
12 article. LES, however, quotes the officials as stating,
13 in an e-mail to LES, that "disposal of tails material is
14 not something we are considering at this time," noting
15 that the mine is not currently licensed to take such
16 material.

17 LES's version -- therefore, Mr. Cherry's
18 position -- is the same in sum and substance as in the
19 article; that is, there are no plans, not even
20 discussions, for disposition at the Cotter Mines.

21 LES also counters that it did not intend in its
22 application to suggest it had "a specific plan or proposal
23 for disposition," only that "LES viewed Cotter Mines as
24 one potential example of a Western underground mine in
25 which disposal of depleted uranium could if certain

1 additional steps were taken."

2 However, at this point in time, according to
3 the Cotter Mine officials, disposition at that mine is not
4 a potential example, and LES has not come forth with any
5 other mine site as a viable option.

6 Therefore, LES does not offer a plausible
7 strategy for private disposition of the waste. In sum,
8 the Environment Department should be given the opportunity
9 to litigate this contention. Given the vagary of LES's
10 assertions regarding private conversion and disposition,
11 the Environment Department, through discovery and through
12 the hearing, should be allowed to question LES and
13 officials in the companies identified by LES to find out
14 the extent to which private conversion and disposition
15 represents a viable and realistic option.

16 LES offers a second plausible strategy for
17 disposition: DOE taking responsibility pursuant to the
18 USEC Privatization Act. Section 3113 of that Act directs
19 DOE to accept for disposal low-level radioactive waste,
20 including depleted uranium, if it were ultimately
21 determined to be low-level waste.

22 The NRC has found and LES and staff concede
23 that whether the depleted uranium can be considered low-
24 level waste is a litigable contention; therefore, there is
25 no need to present argument on that point.

1 The NRC also found in its January 30, 2004,
2 order that if the depleted tails are determined to be low-
3 level waste, LES's proposal for DOE disposal pursuant to
4 the USEC Privatization Act, constitutes a plausible
5 strategy.

6 With due respect to the NRC, the Environment
7 Department disputes the NRC's determination in this
8 regard, even assuming that the depleted uranium is
9 determined to be low-level radioactive waste.

10 Presumably the NRC made this determination
11 because the NRC considered this to be a purely legal
12 determination and that no factual inquiry was needed,
13 reasoning that the Act mandates the DOE Secretary to
14 accept the depleted uranium if found to be low-level
15 waste.

16 In the Environment Department's view, however,
17 this determination does require a factual inquiry, and the
18 State of New Mexico should be allowed to explore the facts
19 underlying the plausibility of DOE taking disposition
20 responsibility.

21 Government agencies are not always able to
22 comply with their statutory mandates. In this case there
23 are facts weighing against DOE's ability and willingness
24 to timely deconvert and dispose of LES's waste. These
25 facts, as outlined in the Environment Department's reply

1 and would be testified to by Robert Alvarez, former senior
2 level DOE official himself, include the many decades it
3 has taken the Department of Energy to establish a
4 disposition pathway for the large inventory of depleted
5 uranium at Paducah, Oak Ridge, and Portsmouth; the fact
6 that even after the two conversion facilities to be
7 constructed are built, the DOE estimates it will take 25
8 years to stabilize the inventory at Paducah; therefore,
9 there is no assurance or even likelihood that the depleted
10 uranium generated by LES will be disposed of in a timely
11 fashion.

12 In this regard

13 JUDGE BOLLWERK: Your time is about up. Can
14 you wrap up in about a minute?

15 MS. FOX: I can wrap up in less than two
16 minutes.

17 JUDGE BOLLWERK: That's almost a minute. All
18 right.

19 MS. FOX: Thank you, Mr. Chairman.

20 In this regard, it bears noting that LES stated
21 in its December 6, 2003, letter to Governor Richardson
22 that, "the DOE solution is not a preferred answer," and
23 that LES "commits to you that LES will exercise the DOE
24 option only if DOE commits to never store the uranium
25 byproduct cylinders permanently in New Mexico and DOE

1 further agrees to remove the UBCs from New Mexico in a
2 timely manner."

3 DOE has not committed to the State of New
4 Mexico that it will never store the UBCs permanently here,
5 and has not agreed to remove them in a timely manner, to
6 date.

7 Third, the Department of Energy has a long
8 history of project management difficulties that were cited
9 to in our reply brief. It is also worth noting that in
10 the December 6, 2003, letter to Governor Richardson, LES
11 represented that "there will be no disposal or long-term
12 storage beyond the life of the plant of UBCs in the state
13 of New Mexico. LES will only temporarily store UBCs on
14 the New Mexico site.

15 "The concrete pad to be initially constructed
16 on site for the storage of UBCs will only be a size
17 necessary to hold a few years' worth, no more."

18 And the LES application, in its environment
19 report, on page 4.13-8, LES cited these commitments to the
20 governor.

21 Despite LES's caveat that storage would not
22 extend beyond the life of the plant, the clear implication
23 of LES's statements to the governor and the State of New
24 Mexico is that storage of depleted uranium will only be
25 for a few years.

1 Given these representations by LES to the State
2 and the health and safety environmental concerns raised by
3 the Environment Department and public parties, the
4 Environment Department should be entitled to explore the
5 plausibility of DOE being able to timely remove the
6 depleted uranium from the state.

7 The Department therefore requests the
8 opportunity to explore these facts before the Board. That
9 concludes my argument, and I stand for any questions.

10 JUDGE BOLLWERK: I have two quick questions.
11 First of all, I take it -- what is this Board's authority,
12 assuming as your -- I think you stated that the Commission
13 has sort of established a baseline for plausibility. What
14 is our authority to basically reverse or do something
15 other than what the Commission directs?

16 MS. FOX: Mr. Chairman, members of the Board, I
17 believe the Board can defer the question to the NRC.

18 JUDGE BOLLWERK: Your contention would defer to
19 the Commission.

20 MS. FOX: Unless you all think that you have
21 more authority than that, yes.

22 JUDGE BOLLWERK: The second one: From your
23 argument I take it that you're now saying that the fact
24 that we allowed the surreply that followed the reply
25 essentially was endorsing what you did in terms of filing

1 your reply.

2 MS. FOX: We requested in our motion for
3 extension of time additional time in order to better
4 support our contentions, because we reviewed NRC staff's
5 answer and agreed that our petition needed more specifics,
6 and we expressly acknowledged that in our motion.

7 And therefore I believe in granting that motion
8 the Board appreciated, at a minimum, that we would be
9 supplying additional factual and legal support for our
10 contentions and that, in allowing a surreply, which is not
11 a pleading normally allowed, both NRC staff and LES were
12 given full opportunity to dispute on the merits any of
13 those contentions.

14 NRC staff chose not to dispute to a very great
15 extent the merits of our reply, but instead relied
16 primarily on these types of procedural arguments, which we
17 don't believe have merit.

18 JUDGE BOLLWERK: All right. Any other Board
19 members have questions?

20 JUDGE ABRAMSON: Yes. I have a question. Do I
21 understand that you feel that the Board's instructions to
22 you, in granting your time extension, were not clear as to
23 the focus of your reply?

24 MS. FOX: I think I took the Board's
25 instructions at -- in terms of their plain language, and I

1 believe we were instructed to address the arguments -- the
2 legal and logical arguments presented in LES's answer and
3 in the staff's answer.

4 And the staff in particular complained that our
5 petition was not specific enough, and therefore we made
6 our reply more specific in order to address those
7 arguments.

8 JUDGE BOLLWERK: All right. Any other
9 questions?

10 (No response.)

11 JUDGE BOLLWERK: All right. Let's move to the
12 Attorney General.

13 MR. COPPIN: Thank you, Mr. Chairman. Again,
14 my is Chris Coppin, special counsel to Attorney General
15 Patricia Madrid. And, again, Mr. David Pato is with me
16 and will be addressing some of the technical issues. We
17 have our expert, Mr. Allen Messenger, available to answer
18 questions.

19 The New Mexico Attorney General is charged with
20 the responsibility to appear before federal regulatory
21 agencies to represent and to be heard on behalf of the
22 State of New Mexico. The Attorney General is the chief
23 legal representative of state agencies and the people of
24 New Mexico.

25 The interest the Attorney General has

1 identified as being of primary importance to her is the
2 long-term impact of the project being discussed today.
3 The Attorney General assumes this project will go forward
4 and wants to make it clear she does not oppose this
5 project but believes that the State would be best served
6 if the long-term consequences of storage and disposal
7 costs are addressed before this project is authorized.

8 In addition, for this project to be successful,
9 it must have the support of the public. The public must
10 have confidence that an open and fair process has been
11 implemented by this Board, that form over substance will
12 not be allowed to derail public confidence in the process;
13 that the duly elected legal representative of the people
14 has the opportunity to participate in this process as a
15 party to address concerns regarding long-term consequences
16 of the project.

17 By form over substance I refer to the staff's
18 position that if a potential party to these proceedings
19 did not submit an adequate petition, in their opinion,
20 there is no opportunity in the reply to explain,
21 supplement, or bolster the party's position.

22 The Attorney General's position is that our
23 original petition was not deficient and that the reply was
24 used by the State to do just that: explain, supplement,
25 and bolster the Attorney General's contention.

1 This process should not discount legitimate
2 issues being raised by the State because of staff's
3 concerns over technicalities.

4 Mr. Pato will address each specific issue of
5 plausible strategy.

6 MR. PATO: Closely associated with the concern
7 for advancing public confidence in the operation of the
8 LES facility and public confidence that waste from LES's
9 disposal option will eventually be disposed of, the
10 Nuclear Regulatory Commission, in a series of decisions
11 called waste confidence decisions, held that it would not
12 license reactors that generated high-level waste unless it
13 had reasonable confidence that technology was available
14 for safe disposal, a program and schedule were in place
15 for development of the necessary disposal facilities, and
16 the waste would be safely stored pending disposal.

17 The Commission's concerns that informed the
18 waste decisions, particularly that there are certain
19 safety concerns where a license application seeks to
20 engage in activity that generates radioactive waste with
21 no licensed disposal option, are applicable to LES's
22 license application.

23 Similar to high-level waste, the depleted UF₆
24 is toxic and radioactive. Additionally, radiological
25 hazards associated with depleted uranium hexafluoride

1 include radiation-induced cancer and fatalities that can
2 occur a considerable time after exposure.

3 Chemical hazards include adverse health effects
4 such as kidney damage and respiratory irritation or
5 injury. These hazards provide a sufficient basis for
6 analyzing the LES application within the framework set
7 forth by the Commission.

8 The waste confidence decisions set for the
9 framework for the plausible strategy that LES must set
10 forth. Specifically, the waste confidence decisions set
11 forth four criteria that would provide both the Commission
12 and the public with reasonable confidence that the waste
13 would be handled in a manner not inimical to the public
14 health.

15 First, the Commission requires that technology
16 for safe treatment and disposal is available. Second, LES
17 must prove that a program is in place for applying that
18 technology and for development of a treatment and disposal
19 facility.

20 Third, LES must prove when disposal will become
21 available; fourth, the Commission requires that the tails
22 can and will be safely stored pending disposal.

23 While the Attorney General does not dispute
24 that technology for safe treatment and disposal is
25 available for disposal of depleted uranium hexafluoride,

1 she is positive there is no program in place for applying
2 that technology.

3 Additionally, LES has so far failed and must
4 still prove when disposal will become available.
5 Moreover, LES has so far failed and must still prove that
6 the tails can and will be safely stored until they can be
7 safely disposed of.

8 In its current application LES has identified
9 what it calls two plausible strategies for waste disposal.
10 The first is a plan under which other private investors
11 would construct a deconversion plant to change the
12 depleted UF_6 into U_3O_8 , whereupon the U_3O_8 would be buried in
13 an exhausted uranium mine.

14 Although it is the Attorney General's
15 understanding that the technology of this alternative is
16 available, there's no program in place for applying that
17 technology.

18 In fact, as referenced by NMED, the president
19 of Cotter Mines has made it clear that Cotter neither
20 could nor would accept the depleted uranium hexafluoride
21 to be produced by LES. Accordingly, the second criteria
22 under the waste confidence decisions has not been
23 satisfied.

24 Third, LES does not state when it will be able
25 to begin deconversion and burial, in contravention of the

1 third waste confidence -- Board criteria; I'm sorry.

2 Moreover, as we further discussed in the
3 Attorney General's discussion of storage concerns, LES has
4 failed to identify all the potential hazards of storage
5 and has not yet demonstrated that its tails can and will
6 be safely stored until they are disposed of.

7 As the second plausible strategy, LES provides
8 a mere citation to Section 3113 of USEC Privatization Act,
9 which staff contends is consistent with the Commission's
10 statement that the applicant need only present the
11 plausible strategy for disposition of DU.

12 Section 3113 of USEC, however, does not prove
13 any of the waste confidence elements. At best this
14 section constitutes a plausible strategy or framework for
15 doing the evaluation and planning that are necessary to
16 satisfy the needs of the waste confidence decisions and
17 the Commission's regulations. It does not, however,
18 address when disposal will become available or that the
19 tails can or will be safely disposed of.

20 Finally, there's a fifth element that LES must
21 satisfy which has not been addressed in the waste
22 confidence decision, because of the existence of the
23 disposal funding mechanism based on generator fees and a
24 trust fund.

25 There's no existing disposal funding mechanism

1 based on generator fees and trust fund in the case of LES.
2 So for LES the estimated cost for storage after cessation
3 of operations, treatment, and disposal of the tails must
4 be included in the decommissioning financial assurance
5 required by 10 CFR 40.36.

6 I will address this matter further in the
7 context of waste disposal and LES's cost estimate.

8 Given the Attorney General's unique statutory
9 role in advancing New Mexico's concerns regarding disposal
10 of the depleted uranium hexafluoride, she respectfully
11 requests that she be admitted as a party to this
12 proceeding and may assist in finding LES's plausible
13 strategy consistent with Commission precedent, and ensure
14 that the environment and the people are her state are well
15 protected.

16 JUDGE BOLLWERK: Given what -- again, your
17 argument's slightly different than New Mexico Environment
18 Department's. Does your argument that we should rely on
19 the waste confidence procedures or formula or policy, or
20 however you want to put it -- does that require us to send
21 something to the Commission as law?

22 MR. PATO: No, it does not. What it does is it
23 provides a framework within which to understand what the
24 plausible strategy is. I mean, the two plans set forth
25 by -- or the one plan set forth -- 3113 provides a

1 --framework for doing the evaluation of planning necessary
2 to satisfy the need for waste confidence and the
3 Commission's regulations. It doesn't meet the other
4 element.

5 The Attorney General simply asserts that the
6 waste confidence decisions provide a framework within
7 which to understand what a plausible strategy is.

8 JUDGE ABRAMSON: And in your view, the
9 Commission's description of what a plausible strategy is
10 needs to be expanded to look at these four tests -- five
11 as you had proposed it, and that we have the authority to
12 do that?

13 MR. PATO: Actually, could you repeat the
14 question? I'm sorry.

15 JUDGE ABRAMSON: Yes. The Commission has
16 defined what a plausible strategy is. Your view is that
17 this Board has the authority to apply the waste confidence
18 decision to the NRC's decision without conflicting with
19 its decision on what the definition of plausible strategy
20 is?

21 MR. PATO: That's correct.

22 JUDGE ABRAMSON: Do you have legal authority to
23 back that?

24 MR. PATO: In our original petition to
25 intervene, we discussed the ambiguity surrounding the term

1 "plausible strategy." I think the term's fairly
2 ambiguous, and the waste confidence decisions do provide a
3 framework within which to understand what plausible
4 strategy is.

5 JUDGE BOLLWERK: Let's turn then to NIRS/PC.

6 MR. LOVEJOY: Thank you, Your Honor. First on
7 behalf of all counsel I would thank the board for coming
8 to Hobbs to hear our concerns about this.

9 NIRS and PC contend, with respect to the
10 plausible strategy, that LES has not presented a sound,
11 reliable, or plausible strategy for disposal of the large
12 amounts of DUF₆ that will be generated during the
13 operation of its plant.

14 This is clearly a material contention, because
15 it relates to a finding that is I think implicitly called
16 for by the hearing order.

17 I think perhaps I should turn first to the
18 question that the Board has raised about the effect of
19 that hearing order with respect to the so-called DOE
20 option.

21 And as I read it, the hearing order says -- it
22 does say that if such waste meets the definition of waste
23 in 10 CFR 61.2, the depleted tails would be considered
24 low-level radioactive waste within the meaning of 10 CFR
25 Part 61, in which case an approach by LES to transfer to

1 DOE for disposal by DOE of LES's depleted tails pursuant
2 to Section 3113 of the USEC Privatization Act constitutes
3 a plausible strategy for disposition of the LES depleted
4 tails.

5 Well, that statement goes as far as it goes.
6 There are some issues that are clearly connected with if
7 they're not actually part of the plausible strategy
8 determination that are not resolved by that statement.

9 Certainly the Commission has not told this
10 Board that any and all approach by LES constitutes a
11 plausible strategy, regardless of the timing of
12 dispositioning that the approach contemplates; regardless
13 of the price, the cost to be paid by LES; and regardless
14 of the financial security afforded to guarantee that that
15 cost is paid.

16 These are all matters which are quite open and
17 quite connected with the issue of plausible strategy, and
18 they are certainly not predetermined by the Commission's
19 order.

20 And as previous boards have observed in dealing
21 with proposal to place this facility at other locations,
22 you can't deal with a plausible strategy issue without
23 getting concrete about what the proposal actually is,
24 because ultimately, to make determinations as to
25 decommissioning funding, you have to have what they call

1 and adequately described decommissioning strategy, because
2 without an adequate description, you can't estimate the
3 cost.

4 Those are findings that the Board and the
5 Commission have to make sooner or later, whether you call
6 them part of the plausible strategy determination or
7 separate.

8 So counsel for the AG's office and for the
9 Environment Department have referred in general to the
10 nature of the problem that already exists with the DUF₆,
11 that DOE has generated over about 57 years without finding
12 a solution.

13 At present there still is no plan available to
14 deconvert the UF₆ to be generated by the proposed plan to
15 U₃O₈, and there is no place to dispose of the depleted U₃O₈
16 once it's deconverted.

17 We have pointed out the omissions in the
18 application, and with statements generated by Dr. Arjun
19 Makhijahni, have pointed out some specifics of what might
20 have been presented but is not.

21 There is no showing that any private investors
22 have interest in establishing a deconversion plant to deal
23 with the output of this facility. Perhaps the output is
24 going to be much less predictable in volume and rate than
25 the existing DUF₆ that DOE has, which will provide a ready

1 market for some two plants for 25 years, but there's no
2 such plan proposed for this facility.

3 As has been said, there's been reference to a
4 possible mine disposal site, but on further inquiry it
5 turns out the owner doesn't want the material, and there
6 is no showing -- merely speculation -- that this mine site
7 might meet whatever criteria that will govern the disposal
8 site.

9 There are references to discussions with
10 potential investors -- Cogema, the French company, and
11 others -- to possibility of setting up a deconversion
12 plant, but there's no commitment. Talk is cheap.

13 The second choice, according to LES -- but
14 perhaps many think that this is really their first
15 choice -- is deconversion and disposal by DOE under the
16 USEC statute.

17 There are certainly certain determinations that
18 need to be made before that could be accepted, even under
19 the terms of the Commission's order, and it's quite clear
20 that the waste must be -- DUF₆ must first be found to be
21 waste, which has not happened.

22 Second, the Commission, the NRC, must find that
23 it is low-level waste, which is a determination which we
24 have waited more than 50 years for, and I don't think it's
25 coming soon. And, third, there must be some kind of

1 determination of the cost, and that's referred to in the
2 statute and, as I said a minute ago, to have the cost you
3 have to have a concrete proposal that you can put a dollar
4 on.

5 These conditions have not been met. They all
6 go to the plausibility of the DOE option.

7 Going beyond these omissions, NIRS and PC point
8 out that in fact the DUF₆ would be categorized as greater
9 than Class C waste and would need to be disposed of in a
10 geologic repository under current regulations.

11 LES makes the statement that the DUF₆ would not
12 fit into any current category; it therefore must be a low-
13 level waste. But their argument forgets that there are
14 criteria that low-level waste itself must be:

15 It has to be appropriate for land disposal and
16 institutional control limited to 100 years. And, as is
17 pointed out in detail in our petition, the DUF₆ or DU₃O₈,
18 after it's deconverted, will most likely fall into a
19 category greater than Class 3 waste because it's
20 characteristics will quite resemble transuranic waste.

21 Its activity will be well in excess of 100
22 nanocuries per gram. The isotopes are all alpha emitters,
23 all with very long half-lives: 200,000 years, much more
24 than that.

25 It's not going to be found to be low-level

1 waste, and under 10 CFR 61.55, such wastes are not
2 acceptable for near-surface disposal. It must go to a
3 geologic repository.

4 Where would this waste go under current
5 circumstances? We know it can't go to WIPP; WIPP just
6 takes defense waste. We know it can't go to Yucca
7 Mountain; this isn't high-level waste.

8 There is no greater-than-Class-C waste disposal
9 site operating yet, so without a disposal site it will sit
10 on site for 50 years, and that is not a plausible
11 strategy.

12 Thank you. I'll reserve the rest of my time
13 for rebuttal.

14 JUDGE BOLLWERK: All right. Any questions from
15 any of the Board members at this point?

16 JUDGE KELBER: Does your remark that the fact
17 that the claim that the waste is going to greater than
18 Class C and there's no disposal also apply -- no disposal
19 site also apply to deconversion by DOE? Should I repeat
20 that?

21 MR. LOVEJOY: I think I understand your
22 question. Is your question perhaps if this waste is
23 greater than Class C waste, is it amenable to the DOE
24 option?

25 JUDGE KELBER: No. My question is this: If

1 this waste is greater than Class C and so is the waste
2 from deconversion at Paducah --

3 MR. LOVEJOY: That's quite likely, sir.

4 JUDGE KELBER: -- is that a problem for the DOE
5 waste?

6 MR. LOVEJOY: I would have to think about that,
7 but this -- the DOE waste in general is all going to be
8 defense waste, so it might fall into a different category.

9 JUDGE KELBER: Because it's DOE's property it's
10 not that it's different in any [inaudible] sense.

11 MR. LOVEJOY: Not in any intrinsic sense, I
12 would not think. We're making some suppositions about the
13 nature of the deconversion process somewhat.

14 JUDGE ABRAMSON: Well, my question is actually
15 probably for all of you, but I'll address it to NIRS at
16 this moment.

17 The principal contention I'm hearing about
18 plausible strategy seems to me to revolve around cost.
19 Are you suggesting that with, say, the NASA budget, this
20 would not be a plausible strategy for disposal? Is this a
21 cost problem, or is it a physical problem, an actual -- I
22 understand folks are saying you don't dispute that the
23 technology is available for disposal; that it's a problem
24 of showing me when and where. Does that make it a cost
25 problem?

1 MR. LOVEJOY: It makes it a cost problem, and
2 it makes it a when-and-where problem as well.

3 JUDGE ABRAMSON: Well, perhaps we'll come back
4 to this when we start dealing with cost.

5 JUDGE BOLLWERK: Anything else?

6 (No response.)

7 JUDGE BOLLWERK: Thank you.

8 Let me then turn to Louisiana Energy Services.

9 MR. CURTISS: Thank you, Mr. Chairman, Drs.
10 Abramson and Kelber.

11 I join Mr. Lovejoy in welcoming you here to
12 Hobbs. It's a good opportunity I think for the citizens
13 of the area to see a very important process and, as you
14 pointed out, focusing on the admissibility of the issues
15 that have been proffered by the various parties in this
16 proceeding.

17 And I think LES joins the parties here in
18 saying that the designation of the plausible strategy
19 issue and the issues associated with the disposition and
20 management of the tails is in fact understood by LES to be
21 the most important surrounding this facility. So I think
22 it's appropriate that this is the first issue that we
23 address here today.

24 A couple of prefatory remarks, and I'm going to
25 take the time, if I could, in a moment to put in context

1 how we view the plausible strategy issue and hopefully
2 address some questions that have been raised here by the
3 members of the panel.

4 A couple of prefatory comments at the opening:
5 Understanding the significance of this issue, as has been
6 pointed out here, LES since last summer has been engaged
7 in discussions with the State of New Mexico in an effort
8 to understand and address concerns raised by the State
9 relative to this set of issues; indeed, as has also been
10 pointed out, have been in active discussions with various
11 commercial parties to endeavor to focus on a commercial
12 solution to the issue of disposition of tails.

13 But I would submit that the issue here today is
14 a narrow one. It is the admissibility of a contention
15 under a standard that, as I think the questions have
16 already framed, was carefully articulated by the
17 Commission and, indeed, not just in its February 6 order,
18 but back to 1991, when the Commission first adopted this
19 standard.

20 I want to do three things in my comments here
21 today, because I do think, as the chairman pointed out,
22 several of the issues have, I think, overlap in various of
23 the issues that have been raised and we'll discuss here
24 later today, so I think it's important from our
25 perspective to understand that context.

1 I want to do three things here in my comments,
2 and I'll be glad to answer questions either during the
3 presentation or at the conclusion.

4 First I want to discuss what we believe the
5 purpose and intent of the plausible strategy standard was
6 when it was first adopted by the Commission in 1991.;
7 secondly, what we think emerged from the expensive
8 litigation of this issue, where many of the same
9 challenges were raised in the context of the previous
10 license proceeding, and the conclusions of the Board at
11 that time.

12 And I hope to expand upon what we think is
13 litigable in this proceeding, as well as what we think is
14 not litigable, because we do think there are some issues,
15 some of which have been touched on here already, that are
16 in fact cognizable under the standard that's been
17 articulated by the Commission in its February 6 order,
18 which leads to my third point.

19 I do want to talk for a moment about the intent
20 of the Commission in adopting the standard, at least as we
21 view it. And I think, as I pointed out, in reviewing that
22 history, it will become evident that there are in fact
23 some issues that are litigable, but we think there are
24 some issues that have been resolved during this long
25 history.

1 The one common theme I think that runs through
2 all the contentions here is the level of certainty that is
3 alleged a plausible strategy has to satisfy.

4 And so at various point in the briefs that have
5 been filed, we see phrases such as, LES has inadequate
6 certitude; LES has failed to secure commitment; LES has no
7 licensed disposal option or lacks a substantive
8 commitment, for holding discussions does not constitute a
9 commitment.

10 Indeed, one would hardly go so far as to
11 suggest what we view to be an entirely alternative
12 standard -- waste confidence standard -- to be substituted
13 for what the Commission set forth in its order itself.

14 I do think -- and I'll be quick with this,
15 because the argument is set forth in our brief on pages 17
16 through 37, and I'll take the chairman's admonition not to
17 repeat information that's in our brief.

18 But I would like to go back briefly to point
19 number one: What's the history of the standard? This
20 standard was first founded in May of 1991 in the
21 Commission's order on the LES enrichment facility very
22 similar to this proceeding.

23 And I make that point not to argue that that
24 order applies here, but the history of this is important.
25 It is not a standard that was invented in February of

1 2004.

2 And I think the Board in that case, in
3 Licensing Board Panel decision 97-3, captured the essence
4 of what our argument is here today. "The purpose of the
5 applicant's disposal strategy is to enable the computation
6 of reasonable cost estimates for the various elements of
7 the decommissioning plan, thereby ensuring compliance with
8 the Commission's regulatory requirement that during the
9 plant's life, LES escrows sufficient funds to cover, among
10 other things, the cost of tails disposal."

11 Indeed, I think that's what Dr. Abramson's
12 pointed out: There is a significant financial assurance
13 component of this, which we'll get to in one of the
14 subsequent issues.

15 And in that context, I think the Board went on
16 to say, in a way that was almost -- is almost directly
17 applicable today. Although we do not assert that the
18 decision in LES 1 is legally binding here, we would
19 suggest that the logic in interpreting the Commission's
20 decision is quite persuasive.

21 What that Board said, contrary to intervenor's
22 assertion of the fact that there is no currently operating
23 defluorination facility -- what we call today a
24 deconversion facility -- in the USA or a firm commitment
25 by Cogema or some other entity to build such a facility,

1 does not somehow make it unlikely or unreasonable to
2 assume that one will be built here in the future for DUF₆.

3 They went on to focus on what I think are the
4 key issues for us, and that is, is there a technically
5 feasible process and is it developing in sufficient detail
6 that it would form the process of estimating the cost of
7 decommissioning the tails and the facility as well, so
8 that financial assurance may be provided.

9 And I think it was in that spirit that, in the
10 February 6 order of the Commission, which has already been
11 quoted here; I will requote it. The Commission reiterated
12 the plausible strategy standard. We would submit if they
13 wished to adopt an alternate standard, they certainly had
14 the waste confidence standard there -- it's been around
15 for a long time -- and could have adopted a standard.

16 We submit that the history of this standard,
17 that the exact same terminology was used in the February 6
18 order, informs the logic and the history of why the
19 Commission adopted that.

20 Now, let me turn to what this history and the
21 Commission's specific language in the order itself of
22 February 6 suggests insofar as what LES thinks can and
23 cannot be litigated.

24 As has been summarized here, LES has proposed
25 two plausible strategies. I would note parenthetically

1 that we are required to demonstrate that we have a
2 plausible strategy that we are prepared to defend
3 and justify the reasonableness of both of those
4 strategies.

5 Let's take the two plausible strategies,
6 beginning with the option of the Department of Energy,
7 pursuant to 3113 of the 1996 USEC Privatization Act --
8 their obligation to take the tails if certain conditions
9 are satisfied.

10 That is in fact one of the specific strategies
11 that we have proposed. We believe the statutory language
12 in 3113 is sufficient to address this issue, no further
13 legislation required.

14 And indeed, in the LES 1 proceeding, late in
15 the process -- the legislation was adopted in 1996, at the
16 tail end -- the Board at that time even noted that 3113
17 likely constituted not only what DOE would do with its
18 tails but a plausible strategy for the applicant in that
19 case.

20 And I won't repeat the language that's in the
21 order at this point, but I want to make two points about
22 what can be litigated under that standard, because it's
23 very explicit and it has a long history associated with
24 it.

25 First, as has been pointed out here, LES has to

1 demonstrate that the depleted uranium hexafluoride is in
2 fact waste under 10 CFR 61.2. I would say in that context
3 and the issue that has been raised in one of the filings,
4 it is our view that the question of whether depleted
5 uranium hexafluoride and the uranium in that DUF₆ can be
6 treated as a resource -- because it has been suggested
7 that it cannot be treated as a resource in the NMED
8 contention BC-2, I believe that is -- it's our view that
9 the resource determination and whether there is any
10 recoverable business value to the uranium in the DUF₆ that
11 is usable as a resource is really a business decision once
12 that determination -- we think that's a business
13 determination.

14 If LES decides that -- if LES does not
15 demonstrate that there is a resource use for that DUF₆,
16 then, pursuant to the order, it is deemed waste. And the
17 order is very specific in what happens at that point.

18 If LES can demonstrate that that waste
19 satisfies the definition of waste in 61.2 of 10 CFR, a
20 showing that we have set forth in the environmental
21 report, in section 4, then that's the end of the analysis
22 under the question of whether it's a plausible strategy.

23 It doesn't answer the cost question, but we'll
24 get to that momentarily, but that's the end of the
25 analysis, and we argue that that's the extent of what's

1 litigable under that issue.

2 Indeed, because that's a factual
3 determination -- it's an issue that the AG has raised in
4 the latest reply -- we believe that factual determination
5 is appropriate to litigate. We have to demonstrate that
6 the waste, if it is in fact a waste and not a resource,
7 satisfies 61.2.

8 Now, in a moment I'll get to the question of
9 whether that opens the door for litigation of the greater-
10 than-Class-C argument that has been raised by NIRS. But
11 in any event, we think that's one litigable issue.

12 Let me turn now just quickly to the point
13 relative to the NIRS argument. The NIRS argument, in our
14 view, takes the position that depleted uranium
15 hexafluoride cannot be declared a waste; in fact, it's
16 never been declared a waste -- a low-level radioactive
17 waste by the Agency and hence that ought to be litigated
18 in this issue.

19 As we read the NIRS position in this, they take
20 the position that it is not possible to declare this a
21 low-level radioactive waste. In our view, that closes the
22 door on a factual determination that the AG's contention
23 in the latest filing.

24 And, indeed, if one goes back the history of
25 this, the fact of the matter is that the allegation, the

1 argument that depleted uranium hexafluoride has never been
2 considered a low-level radioactive waste is factually
3 incorrect. Staff declared that in Section 90.019 in 1991
4 where they said in accordance with 10 CFR 61 depleted
5 uranium tails in the original process are a source
6 material and, if waste, are included with the definition
7 of low-level waste and could be disposed of in a low-level
8 waste facility.

9 That's exactly the conclusion that the Board
10 reached in LES 1, in concluding that the waste is Class A
11 low-level radioactive waste, and it's most recent in the
12 positions staff set forth in the ACW meeting a couple of
13 weeks ago.

14 So in our view, the issue associated with the
15 greater-than-Class-C part of this waste, as has been
16 proffered in the NIRS contention, is essentially a
17 challenge to the Commissioner's order that set that out.

18 Let me turn just briefly to LES's proposed
19 strategy relative to the private deconversion option;
20 moving from 3113 now to the private deconversion option.

21 The gravamen, I think, of the contentions that
22 we've heard -- that we've read and the arguments that
23 we've heard today is that we have to demonstrate the
24 facilities are operational, that they're licensed, that
25 they're in effect today.

1 We would submit that that's contrary to what
2 the Commission intends with its plausible strategy
3 standard. And in fact, as I pointed out earlier, we think
4 the key issue is whether there is sufficient confidence
5 that a technologically feasible option is available where
6 the cost can be estimated.

7 As I said, when we get to that issue, we'll
8 discuss the cost issue, because we think the issues in
9 some respect about the financial assurance for depleted
10 tails processing and disposition are cognizable in this
11 proceeding and, in some respects, are admissible.

12 But in effect, what we would argue, I think,
13 with respect to the private deconversion option is that a
14 technologically or legally infeasible option, if that's
15 what we were suggesting, would in fact open the door to
16 contentions that challenge our approach as technologically
17 or legally infeasible.

18 That's not what we proposed here; we don't
19 believe that's what the contentions have focused on. And
20 in fact, the approach that has been taken, for reasons
21 that are outlined in the brief, that I won't repeat,
22 relies on the fact that there are indeed facilities that
23 are operating today that are deconverting the waste in
24 Europe with Cogema. These are facilities that are
25 technologically able to do the process that we proposed,

1 and there are facilities that are capable of disposing of
2 low-level radioactive waste.

3 I think, in sum, on this point, the parties in
4 effect are seeking to challenge the approach taken by the
5 Commission in its February 6 order. Indeed, I think, to
6 the AG's credit, she is explicit in arguing that a
7 different standard should apply, the waste confidence
8 standard; a standard that, by the analysis as we read it
9 in the brief, the AG acknowledges only applies to reactors
10 and that was out there on the books when the Commission
11 could have had the opportunity to adopt that standard if
12 they so chose.

13 The AG is explicit in saying that, and I think
14 that is to her credit. The other parties -- I think
15 particularly NIRS -- are more veiled in their arguments,
16 but the import of their argument is the same: They are
17 challenging a level of certainty in a way that we would
18 submit is not required of any other licensee that is
19 issued a license by the Commission, the level of certainty
20 that has to accompany a plausible strategy standard.

21 And fundamentally, whether it's in the form of
22 a waste confidence approach or some alternative, we would
23 submit -- this goes to I think that, Judge Bollwerk, you
24 and Judge Abramson have raised -- we would submit that the
25 proper forum in which to contest the approach set forth in

1 the February 6 order is a motion for reconsideration filed
2 pursuant to that order and explicitly authorized under
3 that order, where a party can take to the Commission a
4 motion that seeks to reconsider any of the policy items
5 set forth in Section 4 of the order, including the
6 plausible strategy language.

7 And the Commission is explicit in saying that
8 such motions can raise issues associated with the lack of
9 any applicable statutory authority -- we have the argument
10 that additional statutory authority is needed -- or the
11 lack of any regulatory authority in support of the
12 approach that the Commission took in that order.

13 The deadline for that was June 1, and none of
14 the parties have sought to reconsider through the
15 recognized mechanism the policy guidance set forth in that
16 order.

17 And so we would submit, respectfully, that the
18 approach taken by the Commission in that order and the
19 history behind that -- a long line of Commission logic,
20 licensing board logic -- which we submit is not applicable
21 but nevertheless logically very persuasive -- that the
22 plausible strategy standard has a meaning, particularly
23 with 3113 where the Commission defined exactly what is
24 litigable, but also, we would submit, with respect to the
25 private deconversion option.

1 And with that, we submit our argument and
2 answer any questions that the Board might have.

3 JUDGE BOLLWERK: In the context of contention
4 admissibility, how do we take the Board's logic and apply
5 it here? Do we really have to get into another legal
6 argument?

7 MR. CURTISS: Chairman Bollwerk, I think this
8 argument is asked and answered in the Commission's order
9 of February 6. The history associated with that order, of
10 course, was an extensive opportunity for public comment
11 that went back to April of 2002: meetings the Commission
12 held, a Federal Register notice where they solicited
13 comment and received over 350 comments on these policy
14 questions. This is all associated with the February 6
15 order, and then, after adopting that standard in Section
16 4, specifically providing even yet again an opportunity to
17 reconsider.

18 So argument I say is based strictly on the four
19 corners of the consideration of the February 6 order and
20 the history on that order itself, including the public
21 comment. It's extensive and widespread public comment,
22 including a request by one of the parties here to comment.

23 So we only outline the history of this for the
24 purpose of saying it is consistent with the conclusions of
25 the Commission.

1 JUDGE BOLLWERK: I take it, on this question of
2 plausible strategy, the crux of your argument to some
3 degree is sort of the obverse of a famous statement from
4 the Field of Dreams, that if you build it, they will come;
5 sort of, if you come with the waste, they will build it.
6 Is that where you're -- is that where this heads?

7 MR. CURTISS: Well, I think it's a slightly
8 different argument. I think we want to distinguish what
9 we might do as a commercial matter from what's prudent to
10 do as a business.

11 And in fact, there have been discussions
12 referred to here today and publicly reported, where
13 there's extensive interest, given the fact that we're
14 proposing to build a facility. As the Board recognized in
15 the earlier proceeding, in fact, the Department's
16 [inaudible] and indeed are two facilities that are planned
17 for Ohio and Kentucky.

18 There are numerous companies that are currently
19 in discussions -- three in particular that I think have
20 been reported publicly, so the commercial argument and
21 what we might do as a business matter -- and which we've
22 described in the application in an effort to be open and
23 candid about it -- is one thing, and that's prudent to do
24 as a business matter.

25 On the plausible strategy standard, we would

1 submit that the level of detail that has to be specified
2 in the standard is not one where we have a licensed
3 facility but rather the level of detail necessary to
4 inform a judgment on the cost of decommissioning and the
5 disposition of the depleted tails. That is the crux of
6 the argument as the Commission laid it out in the initial
7 order and, we would submit, the February 6 order.

8 JUDGE ABRAMSON: Counsel, just so I'm
9 absolutely clear on this -- I understand the distinction
10 between commercial business decisions and the legal
11 requirement of a plausible strategy.

12 Is it LES's view or position that if you
13 satisfy the legal definition of plausible strategy set out
14 in the February 6 order and ask perhaps shed some light on
15 by other matters related to it, that that ends the
16 discussion, that anything you do on a commercial side is
17 purely a business decision for LES and unrelated to
18 whether or not you satisfy the legal requirement?

19 MR. CURTISS: Well, we recognize it's an
20 important issue; the parties representing the State of New
21 Mexico have expressed it.

22 And we would submit that, yes, the answer to
23 that is because of the Commission's desire, we would
24 submit, to set a clear standard on what plausible strategy
25 constitutes and their successful effort, I think, in order

1 to lay out the standard, that if we satisfy the legal
2 standard set forth in the order for plausible strategy for
3 purposes of the NRC licensing decision and this
4 adjudication, I think that's the end of the analysis; not
5 the end of the effort that LES would undertake because all
6 those commercial activities going on are very important.

7 JUDGE ABRAMSON: But for the purposes of the
8 licensing, just so I get this clear, if you meet the DOE
9 standard, that's the end of it.

10 MR. CURTISS: Yes, sir.

11 JUDGE BOLLWERK: Judge Kelber.

12 JUDGE KELBER: You refer to the primary purpose
13 of the discussions on plausibility going to the
14 determination of the cost and the necessary funding. And
15 you also referred to experience in Europe.

16 Is that similar to the assortment of plausible
17 strategies you have discussed -- plausible if they're
18 commercial or --

19 MR. CURTISS: Well, we don't use the
20 terminology, because that's, of course, uniquely in our
21 chief licensing standard, but I think we have great
22 confidence based upon the technical capabilities in this
23 sector, including facilities that are in fact operating,
24 doing this process; that we can develop in sufficient
25 detail what that facility might cost, which comes back to

1 the financial assurance issue and cost of decommissioning.

2 So these efforts are going on in parallel, Dr.
3 Kelber, but they are important to distinguish, not because
4 we're pursuing any or either of these less aggressively,
5 but because the NRC process is focused on a much narrower
6 issue.

7 JUDGE KELBER: Let me simplify it: In Europe
8 is there experience with Durenco, for example, on
9 deconversion and [inaudible]?

10 MR. CURTISS: Yes.

11 JUDGE KELBER: In other words, you claim that's
12 a model to determine cost.

13 MR. CURTISS: We think that is in fact a
14 sufficient and ample basis for estimating cost. I would
15 analogize this, Dr. Kelber, to what's gone for
16 decommissioning plans generally across the board pursuant
17 to the Commission's 1988 rule.

18 At the outset of licensing, the agency never
19 required that all of the facilities that are ultimately
20 necessary be placed in operation on legal arrangements
21 being made between reactors and low-level waste disposal
22 facilities or what have you. And I think that's analogous
23 to what we would submit here the standard should be.

24 JUDGE KELBER: Thank you.

25 JUDGE BOLLWERK: Any other questions?

1 (No response.)

2 JUDGE BOLLWERK: All right. Thank you very
3 much.

4 NRC staff.

5 MS. CLARK: First of all, I'd just like to
6 reiterate that the staff agrees that the issue of how the
7 tails will be dispositioned is a very important one
8 relative to the licensing of this facility.

9 However, there is no NRC requirement that the
10 tails be dispositioned in any particular schedule for any
11 particular time period. As long as the tails can be
12 safely stored at the site, temporarily, there is no reason
13 that they have to be dispositioned before DOE is ready to
14 take them.

15 And with regard to the DOE option, we agree
16 that the Commission order explicitly states that that
17 disposition by DOE is a plausible strategy, as long as the
18 waste meets the definition of waste in 10 CFR 61.2.

19 The Commission, when they made this
20 determination, was of course well aware of the waste
21 confidence decisions that we have heard about. The
22 Commission does not explicitly state the grounds for its
23 determination that this is a plausible strategy, but I
24 would presume that it took into account many of the issues
25 that the Commission considered in these waste confidence

1 decisions.

2 Clearly the Commission is aware that the
3 technology is available to convert this material and that
4 in fact the program in place is actually being scheduled
5 at DOE facilities for the construction of conversion
6 facilities.

7 Furthermore, by law DOE is required to take
8 material from LES as long as it meets the definition of
9 low-level waste. In view of this, we believe that the
10 Commission's determination on this is clear. It is not
11 the starting point for another determination with waste
12 confidence decisions but is in fact a final determination
13 as to whether this strategy constitutes plausible
14 strategy.

15 Furthermore, because this determination has
16 been made by the Commission, it is not an issue that can
17 be raised before this licensing board. If this decision
18 needs to be reconsidered, it should be done by the
19 Commission and upon request to the Commission.

20 As to the issue of cost, it's the staff's
21 position that LES does in fact have to demonstrate a
22 plausible strategy for dispositioning the tails. Clearly
23 the strategy that's selected and the means of doing this
24 is going to have to be considered in determining the cost
25 of the activities that will be necessary to have the tails

1 dispositioned. However, this is a matter that depends on
2 the plausible strategy.

3 One cannot say that the cost will prevent such
4 a strategy. The way the Commission's regulations work,
5 once the strategy is determined, LES determines the cost,
6 and then must provide adequate financial assurance to
7 cover those costs before they can be licensed.

8 And finally I would like to briefly address the
9 issues on the scope of replies. Although the staff has
10 briefed this quite extensively, we just would like to
11 reiterate that the Commission's regulations are very clear
12 on the scope of replies.

13 In fact, the Commission expressly addressed the
14 scope of reply and the statement considerations in
15 adopting the new Part 2 regulations and specifically said
16 that that reply should be narrowly focused on legal or
17 logical arguments presented in the applicant or licensee's
18 or the NRC's answers.

19 It's longstanding Commission practice that
20 contentions must be developed initially. This is not an
21 opportunity for the parties to cure defective contentions
22 and certainly not to raise new ones.

23 Finally, the compliance with Commission
24 regulations is in fact important and is necessary in order
25 to ensure that these proceedings are conducted in a fair

1 and timely manner.

2 Thank you.

3 JUDGE BOLLWERK: Let me take the last point
4 first. The Environment Department basically that by
5 allowing LES and the staff to file surreplies that any --
6 there's no prejudice to either of the parties in terms of
7 their ability to address issues that were raised in the
8 replies, so essentially no harm, no foul.

9 What, if anything, do you want to say about
10 that?

11 MS. CLARK: Well, the Commission's regulations
12 explicitly provide for the filing of late-filed
13 contentions, and I would say that they must comply with
14 those provisions; in other words, they should show good
15 cause for the late filing of contentions.

16 JUDGE BOLLWERK: Anything you want to say about
17 that?

18 MR. CURTISS: No. I think from our
19 perspective, while we don't disagree with the position
20 that the staff's taken, we believe that the issues that
21 were raised are either precluded by the order or, in the
22 case of the issues of classification of [inaudible], we'd
23 acknowledge it's appropriate [inaudible].

24 JUDGE BOLLWERK: Thank you.

25 Judge Abramson?

1 JUDGE ABRAMSON: Is it a correct observation,
2 then -- I address this both to the staff and to counsel
3 for LES. Is it a correct observation that the additional
4 issues, if you will, or the additional facts asserted by
5 the petitioners with respect to plausible strategy and
6 probably with respect to cost are not going to be so
7 important here because these can be addressed on the
8 merits of the contention as it was focused to begin with,
9 but may be more important for other contentions that have
10 been raised?

11 Staff?

12 MS. CLARK: I know that these cost issues and
13 other issues were raised in the context of the allegation
14 that the DOE disposition option is not feasible, and we
15 would argue that those contentions should not be admitted,
16 and those allegations should not be admissible as a basis
17 for contentions, because the Commission's already said
18 this is a plausible strategy, and we believe that that's
19 an absolute statement by the Commission, and these
20 arguments therefore should not be permitted.

21 JUDGE ABRAMSON: Independent of -- but the
22 point is that whether or not they were made late, your
23 view is that this is all precluded by the Commission order
24 and position.

25 MS. CLARK: That's true, and furthermore, even

1 if the cost is higher, keep in mind that LES is required
2 to provide sufficient funding to cover the cost,
3 regardless of what it is.

4 So in other words, we'll look at the strategy,
5 use that strategy to determine the cost. Once those costs
6 are determined, LES is going to have to provide that
7 funding, regardless of what the cost is.

8 JUDGE ABRAMSON: Counsel for LES?

9 MR. CURTISS: First, let me correct the record.
10 I was speaking of the waste classification issue; it's the
11 AG and NMED issue that was raised in the follow-on. I
12 think our position is there are certain issues,
13 irrespective of when they were raised, that go to
14 fundamental challenges to the order itself in the notion
15 of plausible strategy and are in conflict with and,
16 indeed, in one respect, suggest a completely alternative
17 standard of making this determination: waste confidence
18 standard.

19 And those issues, without taking analysis any
20 further and what the cost implications of those are, I
21 think can be resolved and should be put to bed at that
22 point as inconsistent with the order itself.

23 Having said that, to the extent that issues
24 raised with respect to the financial assurance, the cost
25 estimates, the subject of another issue we're going to get

1 to here shortly, we believe that those are issues that,
2 based upon the technological and legal capability to do
3 what we proposed -- and in one case, as the Commission
4 acknowledged, the mandate that, upon request, DOE take the
5 material, in 3113, we believe the cost estimate becomes --
6 the cost issue becomes a much narrower issue and is
7 properly focused on in that context.

8 So a large part of what's been raised here, Dr.
9 Abramson, this set of contentions on plausible strategy,
10 as I said at the outset, is an effort to impose a level of
11 certainty in various ways on these options. The
12 facility's not built, it's not licensed; it's not in
13 operation. That is really divorced from the question of
14 whether we can properly estimate the cost.

15 It seems to imply that it's important that
16 there is a standard somewhere in plausible strategy or an
17 alternate approach, waste confidence, that has the
18 Commission saying, You have to have these facilities in
19 operation, licensed, actually built -- contracts, legal,
20 that sort of thing -- before you can even get a license.

21 And we think those issues are capable of
22 disposition just on the basis that they are inconsistent
23 with the order itself.

24 JUDGE BOLLWERK: Again, just for my
25 clarification, what portions of what contentions do you

1 believe are admissible?

2 MR. CURTISS: I think that's an appropriate
3 question. We set that out in our brief, but I'd be glad
4 to reprise that here.

5 The factual question associated with whether
6 waste -- DUF₆ if LES doesn't demonstrate that there's a
7 resource for it -- if waste is properly classified under
8 61.6 as NMED has raised in its filing -- we believe that
9 issue is litigable. It's a factual issue that the order
10 itself does not answer.

11 We sought to demonstrate in our application
12 that we believe the material does in fact satisfy that
13 definition, but that's a determination for the Board which
14 you can reach and NMED has properly raised.

15 In that context I think it's important to
16 understand that the variation on that contention proffered
17 by NIRS is really a fundamentally different issue. It is
18 based upon a premise that the agency had never found this
19 material to be low-level radioactive waste.

20 For reasons we've set forth in our brief in
21 97-019, a licensing board decision, the ACW comments
22 there's extensive history of the agency having concluded
23 that. I would note, parenthetically -- call your
24 attention that the expert that NIRS is proposing to use
25 for this position today, that this material is not low-

1 level waste but greater than Class C, that very expert in
2 the LES 1 proceeding took exactly the opposite position.
3 I don't think that goes to the admissibility question but
4 took the position arguing that the Commission ought to
5 grant a waiver under Part 61, because otherwise this
6 material was Class A low-level radioactive waste, a
7 decision of the Board and the Commission [inaudible], the
8 expert in this proceeding and that proceeding have taken
9 the position exactly the opposite, so I think that
10 although that's not an admissibility determination
11 necessarily we'd take, the character of the NIRS argument
12 on this issue goes way beyond the factual determination
13 that the Board contemplates be made.

14 (Pause.)

15 JUDGE BOLLWERK: Just one other question. Does
16 staff have anything they want to say about the Class C
17 waste issue that's been raised by NIRS?

18 MS. CLARK: We believe that's a factual issue
19 to be determined at hearing.

20 JUDGE BOLLWERK: All right. Let's go ahead
21 then and do the rebuttal. Let's start with the
22 Environmental Department.

23 MS. FOX: Thank you, Mr. Chairman, members of
24 the Board. A couple of points. With respect to the
25 plausible strategy issues, it appears to us that if --

1 what Mr. Curtiss has said was required in prior decisions
2 was a technically feasible process developed in sufficient
3 detail in order for financial assurance cost estimates
4 associated there in to be developed.

5 It seems to the Environment Department that if
6 there is no viable option for disposal out there -- and we
7 don't believe -- we believe that LES has not presented any
8 such viable option, then there is no basis upon which to
9 estimate costs and financial assurance. And, therefore,
10 we don't believe a cost estimate can be established if
11 there is no viable option.

12 Second, we believe that part of the charge of
13 the Commission and the Board is the protect the health and
14 the safety of the citizens of New Mexico under 10 CFR
15 40.32(d). And we believe that, with respect to the long-
16 term storage issues, the various parties have identified
17 risks and concerns associated with long-term storage of
18 the depleted uranium.

19 And, therefore, we do believe it's appropriate
20 that there be a more definite approach to short-term --
21 shorter-term storage and disposal of the depleted uranium
22 in order to protect the citizens of New Mexico and the
23 environment. The more DU out there, the longer it's
24 there, there's more risks to the citizens and to the
25 environment.

1 And we don't think it's appropriate, for
2 example, as staff suggested, that the depleted uranium can
3 stay here in New Mexico until the Department of Energy is
4 ready to take that, be that 20, 30, 50, or 100 years.

5 We don't think that will be a responsible or
6 appropriate position for the Board or the Commission to
7 take, especially in light of the history that the
8 Department of Energy has had, with its inability to deal
9 with the large inventories of depleted uranium at its
10 facilities. We have that history to look at. That is not
11 a history that the State of New Mexico wants for people
12 here.

13 JUDGE BOLLWERK: All right.

14 MR. COPPIN: Mr. Chairman, I'd like to start
15 first with answering -- I'm sorry.

16 JUDGE BOLLWERK: I just want to check. Any
17 Board members have anything? No? All right. Go ahead.

18 MR. COPPIN: Judge Abramson asked Mr. Lovejoy
19 if the issue should come down to costs. And the answer
20 from the Attorney General's perspective is yes.

21 The -- you can't look at this with blinders on
22 if you talk about the cost of strategy because it relates
23 to the cost. And, believe me, the Attorney General is not
24 suggesting that we start over and have some new discussion
25 on plausible strategy with the Commission. We've already

1 talked about the elements of the waste confidence criteria
2 if the technology's available.

3 The Attorney General in their opening statement
4 said, Yes, it is available. Is there a program in place?
5 We've talked about Paducah, Portsmouth. When will
6 disposal become available if we're talking about 20, 50,
7 100 years of storage, and can it be stored safely?

8 These are issues that are being raised by the
9 staff and by LES and other parties which is exactly what
10 the waste confidence criteria involves. And it then moves
11 into a discussion -- the answer to these questions moves
12 you into, what are the costs. What are the costs of
13 having to turn over the waste to DOE? When can you turn
14 it over to DOE? When can it be disposed of? And how long
15 is it going to be stored? Those all relate to cost.
16 Simple answer to your question, Judge Abramson, is, yes,
17 it does relate to cost.

18 JUDGE BOLLWERK: I take it your point is in
19 order to figure the cost, you have to know approximately
20 when it would come because that affects -- inflation and
21 all those sorts of factors will be added in.

22 MR. COPPIN: Correct. Correct. And the cost
23 of storage -- long-term storage. We're not talking about
24 the environmental costs, we're talking about monitoring
25 costs of safe storage and then security, transportation --

1 things like that all have to be taken into consideration.

2 But to say that the waste confidence -- or the
3 waste confidence criteria is something new -- then they
4 all talk about the exact criteria that we raised seems to
5 me, again, form over substance.

6 MR. PATO: And if I might I add --

7 JUDGE BOLLWERK: Yes.

8 MR. PATO: Both LES and staff suggest the
9 Commission could have adopted a waste confidence standard
10 had it wished to do so. We can't possibly know whether
11 the Commission intended for plausible strategy -- whether
12 the Commission intended for plausible strategy to be
13 construed in a manner that is inconsistent with waste
14 confidence decisions.

15 LES and staff are in [inaudible] position, as
16 is this Board, in defining Commission intent -- adopting
17 plausible strategy standard.

18 Based upon her argument, the Attorney General
19 respectfully requests that this Board construe what would
20 constitute plausible strategy within the larger context of
21 the waste confidence decisions.

22 And, as Mr. Coppin has said, this does boil
23 down to a matter of cost, the cost of infinite storage --
24 or indefinite storage and its attendant costs such as
25 maintenance and security and the like that we discussed in

1 our brief.

2 And, finally, with respect to the argument Mr.
3 Curtiss made with respect to a motion for reconsideration,
4 the Attorney General does not believe that a motion for
5 reconsideration is necessary, because the Attorney General
6 asks that plausible strategy only be construed consistent
7 with prior waste confidence decisions.

8 And she additionally believes that this raises
9 the legal issue that the Commission's order does not
10 answer and it's appropriate to raise.

11 JUDGE BOLLWERK: All right. Questions?

12 (No response.)

13 JUDGE BOLLWERK: Anything further from the
14 Attorney General then?

15 MR. COPPIN: No, Mr. Chairman. Thank you.

16 JUDGE BOLLWERK: All right. NIRS, please?

17 MR. LOVEJOY: Thank you, Your Honor. Just
18 briefly, I want to point out that the Commission's order,
19 which has been what's referred to, contains the key word
20 if in the sentence we're talking about, saying, in
21 addition, If such waste meets the definition of waste in
22 10 CFR 61.2 -- and it goes on.

23 Quite clearly, this order does not foreclose
24 that issue. The definition of waste in Part 64 is as
25 follows: waste means those low-level radioactive wastes

1 containing [inaudible] nuclear byproduct materials that
2 are acceptable for disposal in a land disposal facility.
3 And then it goes on.

4 To meet LES's argument that it's perfectly
5 prepared to tender to DOE and that's the end of the
6 matter, it's not so. It first must be found that the DUF_6
7 or DU_3O_8 is both waste and is a low-level waste. Those
8 determinations have not been made.

9 Under Part 61 -- our papers explained this a
10 little more -- but under Part 61 waste that will not decay
11 to a level that's an acceptable hazard to an intruder
12 within 100 years is designated as Class C waste. Waste
13 with concentrations above these limits is generally
14 unacceptable for near-surface disposal.

15 And Part 61 also says that waste that is not
16 generally acceptable for near-surface disposal is waste
17 for which disposal methods must be different and, in
18 general, more stringent than those specified as Class C
19 waste.

20 In the absence of specific requirements in this
21 part such waste must be disposed of in a geologic
22 repository as defined in Part 64.63 of this chapter.
23 That's the course that this waste must take.

24 Now, the element of plausible strategy -- and
25 we have talked about whether it includes means or cost.

1 Really means and costs are directly connected. A previous
2 Board had said, explaining plausible strategy in
3 connection with the regulation under decommissioning
4 costs, for the regulation to have meaning the cost
5 estimate should contain reasonable estimates for an
6 adequately described decommissioning strategy. This is
7 going to apply to dispositioning through a private
8 facility or dispositioning through DOE.

9 I was looking at Section 31.13. It contains --
10 there's that word again -- well, they say in the event
11 depleted uranium were ultimately determined to be low-
12 level radioactive waste -- again, pointing out that the
13 issue is open -- the generator shall reimburse the
14 Secretary for the disposal of depleted uranium pursuant to
15 paragraph 1 in an amount equal to the Secretary of
16 Energy's cost, including a pro rata share of any capital
17 cost.

18 So, again, cost must be determined before this
19 section could be invoked. Cost must be determined before
20 this Board can find that decommissioning costs have been
21 established and security has been provided. And, for all
22 those purposes, there must be more than a dream or a hope
23 or a law to point to. There must be a concrete proposal.
24 This goes for private disposal or for DOE disposal.

25 So we have a dispute here. We've got a

1 litigable issues concerning whether this is low-level
2 waste. And we have litigable issues concerning how it
3 might be disposed of -- how it needs to be deconverted,
4 how it might be disposed of, and the costs of those
5 processes. These all must be resolved in this proceeding.
6 Thank you.

7 JUDGE BOLLWERK: Again, the point's been made I
8 guess by LES this -- while it's not being done here --
9 it's not being done right now here -- it's been done other
10 places. Doesn't that go to the plausibility?

11 MR. LOVEJOY: A demonstration of technical
12 feasibility would certainly be part of the showing of
13 plausibility.

14 But this is a business matter as well. This
15 plant may or may not operate at full capacity turning out
16 7,000 tons of DUF₆ every year. And someone who's
17 considering building a deconversion plant wants to know,
18 because if the throughput is going to be uncertain then
19 the investment is going to be a little more risky and the
20 cost of money is going to be higher and the cost of
21 deconverting is going to be higher.

22 These are all matters which need to be explored
23 in establishing cost and security costs for disposition,
24 disposal, and deconversion of the waste.

25 JUDGE ABRAMSON: Certainly we're going to come

1 back to the issue of cost.

2 MR. LOVEJOY: Keeps coming up.

3 JUDGE ABRAMSON: Yes. And that's the next
4 topic on the agenda, is the cost on how we're going to
5 estimate decommissioning.

6 Let me ask a different question of all three of
7 the petitioners. Did any of you participate at all in the
8 Commission's February 6 order and process leading up to
9 the order?

10 MR. PATO: Unfortunately, the Attorney General
11 [inaudible].

12 MS. FOX: The Environment Department did not.

13 MR. LOVEJOY: NIRS did, yes.

14 JUDGE ABRAMSON: NIRS did.

15 MR. LOVEJOY: I'm informed, yes.

16 JUDGE ABRAMSON: So you did participate in that
17 order. And did you raise the waste confidence decisions
18 in that order -- in that process?

19 MR. LOVEJOY: No. That was no, sir.

20 JUDGE KELBER: Did you raise the Class C
21 question?

22 MR. LOVEJOY: This was before my time.

23 JUDGE ABRAMSON: Do you want to get back to us?

24 MR. LOVEJOY: Yes, I think I would like to do
25 that.

1 JUDGE BOLLWERK: We're actually about to take a
2 break, so if you want to go ahead and do that, that would
3 help --

4 MR. LOVEJOY: Okay. Yes.

5 MS. CLARK: Also, Your Honor, my -- Tim Johnson
6 here, who is our project manager, says that his
7 recollection is that NIRS did raise the greater-than-
8 Class-C waste issue --

9 JUDGE BOLLWERK: Okay.

10 MS. CLARK: -- but not the waste confidence
11 decision.

12 JUDGE BOLLWERK: And, again, the process we're
13 talking about is one where there were policy issues placed
14 before the Commission and the Commission solicited
15 comments, and then answered certain questions, and then,
16 as well, issued an order that --

17 You look like want to say something.

18 MR. CURTISS: No, I don't want to have the last
19 word. I was prepared and ready to provide you the
20 reference on the issue --

21 JUDGE BOLLWERK: All right. Why don't we do
22 that right now?

23 MR. CURTISS: It's actually the reason I
24 couldn't relate it to a specific contention is because it
25 was addressed in NMED's May 10, '04, reply at the bottom

1 of page 6, beginning with the sentence, Third, for this
2 strategy to be plausible, NRC must determine that the DU
3 generated by the facility is low-level waste within the
4 meaning of 10 CFR Part 61.

5 That's the issue that we believe is admissible
6 in accordance with the terms of the order of February 6.
7 I believe -- although I'll defer to NMED here, but I
8 believe that May 10 reply could be construed as raising
9 that issue in the context of TC-1/EC-1. But I'll defer to
10 them. There was a brief discussion largely of disposal
11 issues that were raised in the context of TC-1/EC-1 as we
12 interpreted.

13 JUDGE BOLLWERK: That was page what again? I'm
14 sorry.

15 MR. CURTISS: I'm sorry, sir. Page 6 of the
16 May 10, '04, reply, the sentence beginning, "Third, for
17 the strategy to be plausible."

18 JUDGE BOLLWERK: All right. Anything you want
19 to say about that or you want to look at it and come back
20 after the break for that?

21 MS. FOX: I'll need to look at our --

22 JUDGE BOLLWERK: Okay. Very good. Any other
23 questions from any of the Board members at this point?

24 (No response.)

25 JUDGE BOLLWERK: No? All right. Then why

1 don't we go ahead and -- it's about, oh, ten till 11:00.
2 Why don't we go ahead and take a ten-minute break. And
3 we'll come back, and I need to do a little bit of re-
4 juggling here in terms of the schedule on the next group.
5 And I'll go ahead and give you what that is when we get
6 back, and we'll go from there. Thank you very much.

7 (Whereupon, a short recess was taken.)

8 JUDGE BOLLWERK: Let's go back on the record
9 then if we would. All right. We're ready to start with
10 the second group of contentions, which we have labeled
11 Waste Disposal Costs Estimates.

12 And, as was mentioned several times during the
13 previous argument, there is some overlap -- that's a
14 better word than what I used originally -- between this --
15 these arguments and these contentions and the ones we just
16 discussed in terms of plausible strategy.

17 It's also my understanding that the
18 Environmental Department would prefer to have the
19 contention that we had originally put in this group, which
20 was EC-2, EC-3 -- you would prefer to argue that one in
21 the next group. Is that correct?

22 MS. FOX: Correct.

23 JUDGE BOLLWERK: All right. So then we have
24 under this group left then the Attorney General's TC-I,
25 which was formerly their Attorney General G, and also the

1 NIRS EC-6/TC-3, which was formerly their 4.1.

2 And, in terms of argument time, given the
3 rearrangement, the times for both the Attorney General and
4 NIRS would stay the same at 15 minutes; LES would have 20
5 minutes for response; and the staff would have 15 minutes
6 for response. And we do need to know the rebuttal time
7 for the Attorney General and for NIRS.

8 MR. PATO: The Attorney General would like to
9 reserve five minutes.

10 JUDGE BOLLWERK: Five minutes? Okay.

11 MR. LOVEJOY: Five minutes.

12 JUDGE BOLLWERK: Five minutes as well. All
13 right. Very good. By the way, we did a pretty good job
14 of keeping to the time -- general time frame last time.
15 And the Board appreciates that and would encourage you to
16 keep doing what you're doing.

17 I think we are getting the nub of the
18 arguments, and that's what we're understanding. So, with
19 that, let's go ahead and start then with Attorney General
20 TC-I.

21 MR. PATO: The problems with LES's cost
22 estimates are closely --

23 JUDGE BOLLWERK: Get closer to the mike.

24 MR. PATO: Oh, I'm sorry.

25 JUDGE BOLLWERK: There you go.

1 MR. PATO: The problems with LES's cost
2 estimate are closely tied to the fact that LES has not yet
3 been able to demonstrate that a program is in place for
4 developing a treatment and disposal facility or when such
5 treatment and disposal will become available as required
6 by the Commission and the waste confidence decisions.

7 These problems also bear a strong relation to
8 impacts in the storage of the depleted uranium
9 hexafluoride in New Mexico pending disposition.

10 Particularly, in her original petition for leave to
11 intervene and request for hearing, the Attorney General
12 expressed her concern that the manner in which the
13 disposal security will be calculated is not at all clear
14 and that the basis for LES's cost estimates are suspect in
15 the actual cost of disposing the tails will exceed the
16 5.50 per KGU estimated by LES.

17 In its responsive pleading staff defends LES's
18 failure to finalize the specific financial instruments on
19 the grounds that LES has stated that it will set up a
20 funding mechanism as contemplated by the Commission's
21 regulations.

22 The Attorney General does not request that LES
23 do anything more than simply comply with the Commission's
24 regulations. And compliance in this instance simply means
25 establishing, rather than stating that it will establish,

1 a funding mechanism for disposition of depleted UF₆ tails,
2 which must take into account indefinite storage of the
3 depleted tails, given that there is no licensed disposal
4 option for the waste produced by LES and including a 25
5 percent contingency factor that takes into account the
6 numerous environmental factors which LES has yet to take
7 into account.

8 NUREG 1727 requires the licensee develop a
9 decommissioning cost estimate for the facility based on
10 documented and reasonable assumptions. Particularly,
11 NUREG 1727, Section 15.1, provides that the purpose of the
12 review of the cost estimate is to ensure the licensee or
13 responsible party has developed a cost estimate for
14 decommissioning the facility based on documented and
15 reasonable assumptions, and, most importantly, that the
16 estimated cost is sufficient to allow an independent third
17 party to assume responsibility for decommissioning the
18 facility if the licensee or responsible party is unable to
19 complete the decommissioning.

20 In addition, if the licensee or responsible
21 party intends to request license termination under
22 restricted conditions the cost estimate should be
23 sufficient to allow an independent third party to assume
24 responsibility for all necessary control and maintenance
25 activities at the site.

1 The Attorney General's expert, Allen Messenger,
2 has stated that it is reasonable to assume there will be
3 decommissioning costs not identified in the LES cost
4 estimate, including, but not limited to, ongoing storage,
5 maintenance, operational monitoring costs of its storage
6 and ancillary facilities, and preparation of non-
7 conforming cylinders for transportation.

8 A reasonable decommissioning cost assumption is
9 to require financial assurance sufficient to provide long-
10 term storage -- or indefinite storage in this instance --
11 cylinder maintenance, storage and ancillary facility
12 maintenance, and security for an indefinite period of time
13 after facility operations cease and the rest of the LES
14 facility is decommissioned.

15 While LES estimates the total depleted uranium
16 disposition cost for the NEF to be 5.50 per KGU, an
17 estimate which it states explicitly encompasses convergent
18 transportation and disposal costs, and asserts that this
19 unit cost was obtained from four sets of cost estimates
20 for the deconversion of DUF_6 to DU_3O_8 and the disposal of
21 the DU_3O_8 product and the transportation of DUF_6 and DU_3O_8 .
22 This estimate is simply contrary to the documents upon
23 which LES relies.

24 For more information with respect to this point
25 please see the Attorney General's reply in support of

1 admission of technical contention 2.

2 Staff recognizes that the fact that LES's cost
3 estimate will not be exact, as to be expected, and is the
4 reason for the use of mechanisms such as contingency
5 factors and periodic adjustments in the funding estimate,
6 both of which are part of the LES application.

7 Staff's approval of only a 10 percent
8 contingency factor in lieu of the customary 25 percent
9 contingency factor set forth by the Commission in NUREG
10 1727 in the year 2000 based upon the operations of a pilot
11 CL facility in Europe is disconcerting.

12 The Attorney General's expert, Allen Messenger,
13 even noticed that LES does not provide sufficient
14 documentation to demonstrate the URENCO experience
15 regarding pilot-scale facilities conducted in the
16 Netherlands is applicable in the United States or that the
17 10 percent contingency is adequate given the uncertainties
18 of deleted UF₆ disposition.

19 The Attorney General is not on a quest to
20 prohibit the licensing of this facility, but, rather,
21 seeks to ensure that licensing proceedings -- or that
22 licensing proceeds in a manner that is both open and
23 thorough and that the construction, operation, and
24 decommissioning are accomplished with adequate security
25 and protection for the citizens of New Mexico.

1 JUDGE BOLLWERK: All right.

2 JUDGE ABRAMSON: I'd like to ask counsel what
3 its view is of the effectiveness of the periodic
4 adjustments to accommodate uncertainties.

5 MR. PATO: If I may refer that question to my
6 expert, Allen Messenger.

7 MR. MESSENGER: That would include an inflation
8 adjustment primarily.

9 JUDGE ABRAMSON: Sorry. Is that your view that
10 that's all it would include?

11 MR. MESSENGER: It could include additional
12 cost information with regard to disposition of the
13 material.

14 JUDGE ABRAMSON: It could.

15 MR. MESSENGER: Yes, sir.

16 JUDGE ABRAMSON: And is your position that
17 periodic adjustments to accommodate new information about
18 technology or new information about disposal sites or new
19 information about facilities would not be included in
20 those periodic adjustments?

21 MR. MESSENGER: They would be included, sir.

22 JUDGE ABRAMSON: They would.

23 MR. MESSENGER: Yes, sir. And such
24 consideration could adjust the financial assurance either
25 up or down.

1 JUDGE ABRAMSON: So help me understand why it
2 is your view that those periodic adjustments would
3 inadequately accommodate the uncertainties that may exist
4 today.

5 MR. MESSENGER: I don't believe I made that
6 statement, sir.

7 JUDGE ABRAMSON: Would the AG care to comment
8 on that?

9 MR. COPPIN: The Attorney General thinks that a
10 periodic adjustment is perfectly appropriate to take into
11 account realized conditions and experience.

12 JUDGE BOLLWERK: All right. Judge Kelber?

13 JUDGE KELBER: It seemed to me earlier in your
14 statement just now that you were referring to the omission
15 of information. Could you review that for me, please --
16 clarify that? I'm trying to understand whether this is a
17 contention of omission or a factual dispute.

18 JUDGE BOLLWERK: The distinction being a
19 contention of omission is one where the argument is that
20 there's something here that isn't -- there's something
21 important that isn't here as opposed to what's here isn't
22 adequate or incorrect.

23 MR. PATO: The Attorney General would suggest
24 that this is both an argument regarding omissions in LES's
25 cost estimate and regarding -- and raising specific

1 factual contentions regarding the adequacy of the 5.50 per
2 KGU cost estimate and the 10 percent contingency fee
3 versus the 25 percent contingency fee.

4 Our expert, Allen Messenger, has stated their
5 cost -- that LES's cost estimate does not take into
6 account ongoing storage, maintenance, operational and
7 monitoring costs of its storage and ancillary facilities,
8 and preparation of non-conforming cylinders.

9 Additionally, from certain documents, the 5.50
10 per KGU also does not take into other costs as well. And
11 we tread very carefully in discussing this further at this
12 point.

13 JUDGE BOLLWERK: All right. Thank you. All
14 right. Anything further?

15 (No response.)

16 JUDGE BOLLWERK: All right then. If NIRS would
17 like to speak next then.

18 MR. LOVEJOY: Thank you, Your Honor. I might
19 as well answer one of the questions the Board raised to
20 begin. There was a comment about the periodic adjustments
21 in one of the opinions of the -- one of the previous Board
22 in the previous case that I think is pertinent here.

23 This decision was vacated by the Commission
24 when the proceeding was concluded, but I think it is, as
25 we all understand, at least educational.

1 The Board then pointed out that -- and this is
2 LBP 97-3. LES must be totally self-reliant in paying for
3 tails disposal. As we detailed in LBP 96-25, LES is a
4 newly-formed entity created to build and operate the CEC.
5 It is structured as a limited partnership, and LES has no
6 significant independent assets.

7 Similarly, none of the LES general or limited
8 partners are corporations of worth. Further, under the
9 LES partnership agreement, as well as general principles
10 of corporate and partnership law, the corporate parents
11 and other affiliates of the LES general and limited
12 partners have no liability for the obligations of the
13 partnership.

14 In these circumstances we cannot conclude that
15 the applicant's tails disposal estimate need only be a
16 rough approximation that can be adjusted in the future
17 upon periodic reviews by the applicant. Rather, for the
18 LES tails disposal estimate to be a reasonable one it must
19 include the substantial cost of neutralizing the hydrogen
20 fluoride from the conversion of DUF_6 to U_3O_8 .

21 So that is what the previous Board considered
22 about the periodic reviews. The substance of it is you
23 have to start with a good estimate going in. And you can,
24 I'm sure, adjust for unforeseen circumstances, but what
25 you can see coming up you have to provide for.

1 Now, NIRS's contention is here, of course, that
2 the application underestimates the cost and feasibility of
3 managing and disposing of the DUF₆. The bases we have put
4 in our petition are several expert opinions by Dr. William
5 Weida. He's an economist; he's served as professor and
6 chair of the department of economics at Colorado College.
7 He's been acting head of the economics department at the
8 Air Force Academy. He's taught courses in micro and macro
9 economics and presents expert opinions of the following
10 points.

11 First, in the cost estimating, he states that
12 it's incorrect to rely on median values contained in the
13 1997 Livermore report because of the high uncertainty
14 attached to the estimates. I might note on a related
15 point that the staff has, in its request for additional
16 information of April 19, advised LES that a contingency
17 factor, probably greater than 10 percent, must be applied,
18 not only to decommissioning costs, strictly defined, but
19 the cost of tails disposition as well to reflect
20 uncertainties in estimating those costs.

21 Dr. Weida also points out that the Livermore
22 report uses erroneous shipment distances for the situation
23 in New Mexico, makes assumptions that a deconversion plant
24 could be dismantled and steel be recycled, even though
25 there is some possibility that the steel may be

1 contaminated.

2 He points out that resales of byproducts of the
3 deconversion process cannot be assumed; rather, there has
4 to be a market shown to exist. That's a problem that came
5 up in that same licensing board proceeding that I just
6 quoted from in the previous licensing proceeding. And
7 it's equally relevant here.

8 There's also the question of the disposal of
9 some byproducts of deconversion if they're not resalable
10 and they may actually have to be disposed of as low-level
11 waste. That goes for calcium fluoride and magnesium
12 fluoride.

13 In addition, the cost estimates err in assuming
14 that there will be a private deconversion facility
15 available, which is a difficult thing to assume,
16 particularly in light of the fact if LES's deconversion
17 needs are going to be much smaller and less reliable than
18 the needs of DOE, which has a 57-year-old backlog to
19 present to a deconversion facility.

20 LES ought not to be using the Livermore cost
21 estimates because they relate to a much bigger facility.
22 The Livermore report itself contains sensitivity analyses
23 of reducing the throughput from a figure of 28,000 metric
24 tons to 7,000, which is about the rate that this NEF
25 facility is planned to generate.

1 The total costs of deconversion are shown in
2 Table 6.4 of the Livermore report. And reducing the
3 throughput from 28,000 to 7,000 metric tons per year
4 reduces the cost of the operation from \$266 million to
5 \$249 million -- the total cost. That's not a huge
6 reduction in economies.

7 The disposal costs shown in Table 6.11 of that
8 report -- when you cut the throughput to only 25 percent
9 of the original 28,000 go down from 790 million to 519
10 million total cost. So we're looking at a much higher per
11 unit cost for a 7,000 metric ton per year deconversion and
12 disposal process than we would for a process to serve the
13 DOE facilities.

14 And there are other departures shown from the
15 figures contained in the ER and the SAR. I noted that LES
16 did not rely upon the disposal costs contained in this
17 report. They calculated their own costs of mining. And
18 they concluded that the so-called engineered trench
19 option, a method of surface disposal, would, in effect,
20 bound the cost of disposal.

21 Well, that was not the conclusion of the
22 Livermore report. They concluded the disposal of U_3O_8 in
23 a mined cavity would be much the most expensive method of
24 disposal. And, in our view, that is likely to be the
25 required method.

1 I suppose I could continue. But there is
2 clearly several very concrete expert-supported grounds to
3 question the cost estimates relied on by LES in this case.
4 It's clearly a contested issue, and we request that the
5 contention be admitted.

6 JUDGE BOLLWERK: All right. Any questions?
7 Board questions? Judge Abramson?

8 JUDGE ABRAMSON: I have a question. I
9 understand the challenge to the specific cost estimates.
10 However, I have a question about the relevance of the
11 prior Board ruling, which, as you say, was overthrown the
12 Commission.

13 But my question is this, that the substance of
14 the portion you quoted us seems to go to whether or not
15 there would be any direct liability of the owners or the
16 partners for the decommissioning cost. Are you -- or is
17 NIRS contending that the establishment of a
18 decommissioning fund is an insufficient way and that there
19 should be some way to reach the shareholders or the owners
20 of this company?

21 MR. LOVEJOY: What we're contending -- I think
22 the -- what the Board was describing in that previous
23 opinion is simply the reality -- the business reality of
24 the situation, which I took as a very strong argument for
25 ensuring that the decommissioning funding is itself quite

1 secure and adequate.

2 JUDGE ABRAMSON: And how is -- what is NIRS's
3 view about the use of periodic adjustments to accommodate
4 changes in knowledge of the -- what's actually available
5 as a decommissioning and disposal method?

6 MR. LOVEJOY: I certainly think it's
7 appropriate to take into account new information that
8 comes up. And what is likely to come up we really can't
9 tell because we don't know it now. But one must, in
10 establishing the initial amount of security, make sure
11 that any uncertainties are accounted for.

12 JUDGE BOLLWERK: Judge Kelber?

13 JUDGE KELBER: Yes. You mentioned discussing
14 the sensitivity of unit cost to the total, a number of
15 figures from the Livermore report. Are those the median
16 values that you were criticizing earlier? What I'm
17 getting at is, if one chose something with perhaps a 95
18 percent confidence level, or something on that order, you
19 would get a greater sensitivity or not. I don't know the
20 answer.

21 MR. LOVEJOY: One might perhaps see even
22 greater variation. I must assume that these are median
23 values. There's a statement in the report that median
24 values are employed.

25 JUDGE BOLLWERK: Okay. Anything further?

1 (Pause.)

2 JUDGE BOLLWERK: All right. Let's turn then
3 to -- thank you, sir. Let's turn then to the LES and to
4 the staff.

5 MR. CURTISS: Thank you, Mr. Chairman. I think
6 I can be brief in discussing this issue and hopefully not
7 use the entirety of my 20 minutes to keep us further ahead
8 of schedule.

9 I think I'd make three or four overall points
10 here. In several respects the issues that have been
11 raised by the Attorney General and NIRS here today and in
12 their petitions and replies simply allege that, because no
13 conversion plan exists in the United States, for example,
14 or because questions are raised about burying low-level
15 radioactive waste in an abandoned mine, is uncertain.

16 Without any further explication as to the
17 issues that they've identified they then jump to the
18 conclusion that that means that a plausible strategy is
19 not feasible, and, hence, as the AG has suggested, we're
20 obligated to provide for an indefinite cost of storing --
21 strike that -- provide financial assurance for indefinite
22 storage of this material on site.

23 And with some certain exceptions, which I think
24 in the case of NIRS, we're prepared today to
25 acknowledge -- have raised factual disputes and we would

1 agree are admissible -- and I will specify those in a
2 moment.

3 I think the argument largely revolves around
4 that issue that we debated before, which is the allegation
5 or the charge that the level of certainty required, as
6 opposed to the technical or legal feasibility that we
7 would argue is the standard underpins much of what I think
8 has been advanced as the basis for these contentions.

9 I should also say for purposes of the record,
10 although I understand the NMED has decided to defer
11 discussion of this issue until we get to the storage
12 questions, there was a concern that the estimates that
13 were provided by LES did not cover the cost of
14 deconversion.

15 We hope we've addressed that adequately in our
16 answer with the references to the ER and the SAR. And if
17 there are any further questions about that we can take
18 that up in the next discussion. But I think we've
19 adequately addressed all the components -- transportation,
20 conversion, and, ultimately, disposal.

21 The second point that I would make is that the
22 issues raised by the Attorney General in her April 5
23 petition in several respects, as I indicated, go to this
24 question about the -- that Congress has failed to -- DOE
25 has failed to follow Congress' direction in the Nuclear

1 Waste Policy Act context, an issue that we think is
2 irrelevant here, as we've explained in our answer -- no
3 deconversion facility exists -- that sort of thing.

4 Again, we think those are largely issues that,
5 as we've laid out in our answer, we've responded to. And
6 I won't go into the details here in deference to not
7 repeating what we've already said.

8 I would say that there are a host of issues
9 raised in the Attorney General's May 24 reply, which, in
10 our view, go beyond the narrow scope of issues that were
11 identified by the -- discussed by the staff and LES in our
12 answers. And we've identified the bases for our concern
13 that they've raised new issues in the May 24 reply.

14 As to the contingency discussion, I'd like to
15 speak to that because we have had some further discussion
16 of that issue. I want to focus on the contingency factor
17 for the facility decommissioning and the contingency
18 factor for the tails disposition.

19 In discussion with the staff LES has committed
20 to adopt a 25 percent contingency for the facility
21 decommissioning -- and I believe that responds to the
22 issue that's been raised here. And if there's a need for
23 further clarification or confirmation of that perhaps we
24 can take that up directly with counsel. But I believe
25 that issue -- I hope that issue would be satisfactorily

1 addressed.

2 With respect to the contingency for the tails
3 disposition -- DUF₆ disposition -- I think our position is
4 that the \$5.50 per KGU estimate that's reflected -- and,
5 again, covered conversion, transportation, and disposal --
6 has, in fact, a built-in contingency of roughly 25 to 40
7 percent -- and we lay that out in our application and in
8 more detail than I can go into here.

9 But that's based upon our view that the most
10 recent cost estimates, which have come down from what was
11 estimated in the CEC context because we know about the
12 commercial challenges, and, in fact, DOE has let a
13 contract for the construction of these facilities. The
14 DOE estimate is \$3.92 per KG.

15 I would also offer for the record here,
16 although this isn't a part of our answer, that the
17 estimate that the staff -- the NRC staff has found
18 reasonable for essentially the same commercial challenge
19 here -- the tails generated by USEC is a figure of \$3.52
20 per KG in the most recent decommissioning funding plan
21 submitted by USEC.

22 So our view here is that there is contingency
23 in the range of about 25 to 40 percent built into the
24 \$5.50 estimate for the disposition and processing of the
25 depleted uranium hexafluoride.

1 If I could turn now quickly to the issues that
2 were raised by NIRS, because, as I said, I do think upon
3 reflection, and as they have clarified here, there are, in
4 fact, some factual issues that we would be prepared to
5 acknowledge are admissible. And I'll discuss those
6 specifically here.

7 The contention -- the EC-6/TC-3, which is
8 formerly NIRS 4.1, raises nine separate bases lettered A
9 through I, which the Board has indicated are the subject
10 of discussion here. I will specify here for the record
11 the issues that we think raise factual questions and,
12 hence, we would not contest their admissibility.

13 Basis B -- the Lawrence Livermore report
14 assumes travel distances of 1,000 kilometers; actual
15 travel distances required to deconvert DUF5 will be much
16 greater. In our view, the travel distance issue is
17 relatively insensitive to the overall estimate, but we
18 understand that's a factual issue. So the travel distance
19 basis B -- we would not contest its admissibility.

20 The estimate -- or the basis C -- LES's
21 estimates do not account for the fact that a significant
22 amount of the steel used in the construction of the
23 conversion plant will have to be disposed of as low-level
24 radioactive waste. Without conceding the merits of that
25 issue we believe that one is admissible.

1 Basis D -- LES's assumptions regarding resale
2 of calcium fluoride, generating revenue of \$11.02 million
3 per year are unfounded as no market for the CAF-2 is
4 demonstrated. Again, without acknowledging that NIRS is
5 correct on the merits, and, indeed, correct on our
6 assumptions about the resale of CAF, basis D we would not
7 contest as admissible.

8 And, finally, basis E of this contention --
9 calcium fluoride may be contaminated with uranium. If it
10 is it must be disposed of as low-level radioactive waste,
11 raising the cost by a certain amount. Again, we would
12 acknowledge that's a factual issue, and so we would not
13 contest the admissibility of that.

14 So B, C, D, E of that contention, for purposes
15 of this discussion, we would acknowledge are admissible.

16 Let me address the remainder of the bases
17 because we do not believe that they raise litigable
18 issues. In basis A, the reliance on the median values as
19 amplified upon in the argument in the May 10 reply, this
20 really comes back to the question of greater than Class C.
21 That's the point that's made -- that in the Lawrence
22 Livermore report it's assumed that the depleted uranium
23 hexafluoride is low-level radioactive waste.

24 I think it's NIRS position, as we've heard,
25 that it's greater than Class C. Again, we think that goes

1 back to the issue on classification that NMED has raised,
2 and we have not objected to. But the greater than Class C
3 dimension of that in basis A we would object to.

4 In basis F, magnesium fluoride generated and
5 decommissioned may be contaminated, raising the cost by
6 more than \$400 million. As we explained in our answer,
7 the Lawrence Livermore report makes it clear that
8 magnesium fluoride contamination is only the result of a
9 process where we would convert the DUF 6 to a metal.

10 Indeed, that's not what the applicant is
11 proposing. We're proposing to convert it to U_3O_8 . And so
12 the issue that's identified, while it's correctly
13 characterized here, doesn't go to the process that we are
14 proposing in the application, and, hence, we do not
15 believe it raises a material issue upon which we are
16 asking the agency to make a decision.

17 Basis G we believe is a recycling of the
18 argument -- LES's plausible strategies cannot be accepted
19 because no conversion facility exists and private
20 investors will not likely build such a facility. Again,
21 we think that's just a variation on the argument that a
22 level of certainty is required that we do not believe the
23 plausible strategy contemplates.

24 Similarly, H and I -- that a mine disposal
25 strategy is not acceptable and the engineered trench

1 method is not acceptable. Those fundamentally, as the
2 bases are articulated by NIRS, are premised on the notion
3 that this material is greater than Class C. We think the
4 proper place to litigate that is in the context of the
5 issue that NMED has raised and that we're not objecting to
6 in that context.

7 So the -- I'd be glad to clarify our position
8 if need be, Mr. Chairman, on bases A through I, as raised
9 by NIRS in this contention. B, C, D, and E we would agree
10 are admissible in this proceeding.

11 But the remainder of the issues identified by
12 NIRS, the new issues identified by the Attorney General in
13 the May 24 reply, and, for purposes of clarification, the
14 point that I made earlier that the estimates do, in fact,
15 cover the deconversion component of this, we think are not
16 admissible.

17 And, finally, with respect to the contingency
18 factor, we would hope that the clarification on the 25
19 percent contingency -- the commitment that we've made to
20 the staff and clarification on the contingency that's
21 built in to the DUF₆ estimate would address the concerns
22 that have been raised.

23 JUDGE BOLLWERK: In terms of the 25 percent
24 contingency, do you all need to talk and see if there's
25 anything that needs -- formally needs to be done in terms

1 of something being dropped or not withdrawn or -- I'm not
2 asking you to do it right now. I'm just -- there needs to
3 be discussion. Is that what I'm hearing?

4 MR. LOVEJOY: I would be happy to have a
5 discussion. This is verging closely upon reaching the
6 merits of a contention at the admissibility stage in my
7 view. But I would be happy to listen to whatever's going
8 to be said.

9 JUDGE BOLLWERK: All right. I mean, again, if
10 what they propose solves your problem -- whether it's
11 admissible or not, if it not there anymore it's not there.
12 And that's up to you and to withdraw if that's
13 appropriate, or, if not, to pursue it or however is
14 appropriate. There have been others that you have
15 withdrawn. I noticed that. So it's possible. All right.
16 Anything then further from LES?

17 JUDGE KELBER: I would appreciate it if you
18 would go over again the remarks about -- you meant about
19 basis A. I didn't quite catch what you were saying.

20 MR. CURTISS: Basis A in the NIRS context.

21 JUDGE KELBER: Yes.

22 MR. CURTISS: Yes. That basis -- it's actually
23 addressed in both the April 4 petition and in their May 10
24 reply, Dr. Kelber. And if I could just repeat what they
25 say here I think it's an accurate recitation.

1 LES's reliance on the median values in the
2 Lawrence Livermore report is inappropriate given the
3 numerous uncertainties associated with deconversion and
4 disposal.

5 JUDGE KELBER: You trace that somehow -- you
6 trace that to the greater than Class C controversy?

7 MR. CURTISS: It's -- no, sir. It's really
8 what they say in the May 10 -- and I'll address both of
9 those.

10 JUDGE KELBER: Okay. No, that's all right. I
11 just --

12 MR. CURTISS: The May 10 repeats the median
13 value issue, and then also says the Lawrence Livermore
14 report also assumes that DUF₆ is low-level radioactive
15 waste

16 JUDGE KELBER: Okay. All right.

17 MR. CURTISS: So there are really two issues
18 here. One is the median value question. In our view,
19 that basis A, in citing uncertainties associated with
20 deconversion and disposal, is just another way of saying
21 there aren't facilities operating.

22 We believe the Lawrence Livermore report, which
23 is one of the bases that we cited of three. The Lawrence
24 Livermore report provides an adequate explanation of that
25 issue. There is no allegation, other than there aren't

1 deconversion facilities, as to why use of the median value
2 is not appropriate.

3 And then the greater than Class C issue, Judge
4 Kelber, is addressed in the May 10 reply. And we think
5 that's a recycling of that issue.

6 JUDGE KELBER: It was the separation of those
7 two issues that I did not understand.

8 MR. CURTISS: I'm sorry I wasn't clear, sir.

9 JUDGE BOLLWERK: Let me just also get one other
10 clarification. Before the break we had asked I guess New
11 Mexico Environmental Department counsel if NMED was,
12 indeed, the proper contention that he was referring to in
13 a reply. Is that --

14 MS. FOX: That's correct.

15 JUDGE BOLLWERK: That's correct? Okay. All
16 right. Anything further from the Board on --

17 MR. CURTISS: I'll yield back whatever time I
18 have left.

19 JUDGE BOLLWERK: All right. Then any
20 questions? No. Then the staff, please.

21 MS. CLARK: Thank you. I just have a couple of
22 points. First, I just want to point out that the funding
23 mechanism set up by the Commission's regulations requires
24 that the funding be set aside in an independent type of
25 fund so that in the event that decommissioning cannot be

1 carried out by LES that those funds would be available to
2 whatever entity would take over, though this is how the
3 Commission addresses the concerns that were raised by the
4 Attorney General in that respect.

5 And I wanted to make one other point because I
6 think there may be some misunderstanding in staff's
7 position. The staff is not suggesting that those funding
8 mechanisms need not be in place before licensing. The
9 staff was merely saying that the funding mechanisms, even
10 if they're not in place now at this point, must be in
11 place before licensing. And it will be the staff's
12 obligation to ensure that those mechanisms are complete
13 before the license is issued.

14 JUDGE BOLLWERK: Anything further on --

15 MS. CLARK: And that's all.

16 JUDGE BOLLWERK: -- either contention? Again,
17 the staff had opposed the Attorney General's contention,
18 but had not opposed the NIRS contention.

19 MS. CLARK: That's correct.

20 JUDGE BOLLWERK: That's still your position.

21 MS. CLARK: Yes.

22 JUDGE BOLLWERK: In terms of all the bases that
23 are involved.

24 MS. CLARK: Yes.

25 JUDGE BOLLWERK: All right. Then I guess we

1 are -- if there's no questions from the Board or the
2 staff. All right then. I guess we're back to the
3 Attorney General on rebuttal.

4 Let me ask a separate question here before you
5 start. At one point there was a question about some
6 proprietary information that I think related to this
7 contention.

8 MR. PATO: Yes.

9 JUDGE BOLLWERK: And that was provided to you,
10 and there was a response due, but we haven't seen any.
11 Are you -- is there anything that --

12 MS. PATO: I actually had overnighted that
13 response last Thursday.

14 JUDGE BOLLWERK: Did you put -- did you file
15 electronically?

16 MR. PATO: No, I did not.

17 JUDGE BOLLWERK: Okay. That's why we haven't
18 seen it, because it's in Washington and we're not.

19 MR. PATO: There actually -- there were -- in
20 the protective order we were not permitted to file
21 electronically.

22 MR. CURTISS: We've --

23 JUDGE BOLLWERK: Oh, I'm sorry. There was
24 information in -- I see, in the pleading that we that we
25 put there. All right.

1 MR. PATO: Yes, sir.

2 JUDGE BOLLWERK: Is there anything -- since I
3 haven't seen the pleading I'm not sure -- can you -- is
4 there anything that we need to resolve any further
5 argument that needs to be -- that we haven't heard here?

6 MR. PATO: There certainly is actually.

7 MR. CURTISS: I think -- if need be -- and we
8 certainly would not deny the AG the opportunity to raise
9 whatever additional issues in this proprietary pleading
10 she wishes to raise. So if it's appropriate to go into
11 closed session -- I will say that in our view the -- and
12 understanding that you haven't seen the pleading, of
13 course, so you'll have to accept this as simply my
14 assertion -- that --

15 JUDGE BOLLWERK: Well, part of the problem
16 being that Washington, D.C. was shut down on Friday for
17 the Reagan funeral.

18 MR. CURTISS: Yes.

19 MR. PATO: Oh, that's true.

20 JUDGE BOLLWERK: So due to the fact that I was
21 in the office, but I couldn't get the pleadings because it
22 was down in our mail.

23 MR. CURTISS: In our view, Judge Bollwerk, the
24 information in this filing, which we received timely last
25 week and have reviewed, does not provide any substantially

1 new information beyond what's in the underlying non-
2 proprietary pleading on TC-2. But, having said that, if
3 the AG would like to expand upon that in closed session we
4 certainly would not object.

5 MR. PATO: I would suggest actually that it
6 does provide certain additional information.

7 JUDGE ABRAMSON: Let me suggest this, folks,
8 rather than delay things here. We have your pleadings.
9 We will review them and we will consider them as we make a
10 ruling on contentions. And if we need further information
11 then we'll determine how to obtain it.

12 MR. CURTISS: That's acceptable certainly.

13 MR. COPPIN: That's acceptable. And we would
14 be happy to provide the Board copies of that pleading now.
15 If you have questions we can address those while we're
16 here, too.

17 JUDGE BOLLWERK: I'm sorry. I was listening to
18 Judge Kelber. Can you repeat that?

19 MR. COPPIN: I was saying that we'll be happy
20 to provide the Board members with copies of that response
21 today. And if you have questions we can address that
22 while we're here -- if the Board has questions.

23 JUDGE BOLLWERK: All right. That's probably --
24 we can look at it. And we're probably going to be taking
25 a lunch break in a couple of minutes, so we can certainly

1 look at it over that period. And if we need to have
2 something discussed or raised we can certainly deal with
3 that.

4 MR. COPPIN: Thank you, Mr. Chairman.

5 JUDGE BOLLWERK: And then -- I meant to raise
6 this earlier and forgot. But I -- that's why we hadn't
7 seen it. So that explains a lot. All right. Your
8 rebuttal on this point -- on this contention there,
9 subject to whatever there is in the proprietary
10 information.

11 MR. PATO: Thank you. The Attorney General
12 agrees that periodic adjustments do not eliminate the need
13 for accurate cost estimates up front based on reasonable
14 assumptions as suggested by NIRS. In fact, NUREG 1727
15 specifies that the licensee is required to develop a
16 decommissioning cost estimate for the facility based on
17 documented and reasonable assumptions.

18 The Attorney General is not in a position to,
19 nor is it her responsibility to make the actual cost
20 determinations for LES, but, rather, has pointed out
21 deficiencies that will need to be rectified in a hearing
22 process in the future.

23 In response to Judge Kelber's earlier question,
24 our concerns raise issues of -- both of omission, such as
25 the lack of sufficient information to determine whether

1 the estimate includes the cost of preparing non-conforming
2 cylinders prior to shipment offsite, as well as the
3 ultimate material issues of fact regarding the ultimate
4 cost disposal estimate proffered by LES.

5 While the AG is appreciative that it's staff's
6 obligation to review the funding mechanisms, the Attorney
7 General respectfully requests the opportunity to be a part
8 of these proceedings to do the same.

9 JUDGE BOLLWERK: All right. Any questions?
10 Let me turn then to NIRS.

11 MR. LOVEJOY: Thank you. I appreciate the
12 concessions made by LES as to certain points concerning
13 the cost estimates. However, LES has not conceded the
14 admissibility of really what are the principal contentions
15 involving the overall costs of deconversion and disposal.

16 These show up in G, H, and I bases of this
17 contention and relate to the peculiar characteristics of
18 deconversion and disposal facilities which need to be
19 constructed for this enrichment plan.

20 They can't be the high throughput, high volume
21 facilities that will serve a continuous, reliable input of
22 DOE depleted uranium. These will have to serve a much
23 smaller plant susceptible to market realities. And so
24 it's going to be most costly.

25 The Livermore report shows that it's going to

1 be more costly. And these are points that need to be
2 taken into consideration in establishing the cost of
3 disposal and security for those costs. And we think that
4 they are very live issues and need to be admitted.

5 JUDGE BOLLWERK: All right. And, in terms of
6 the question about the 25 percent contingency, you all are
7 going to speak about that? Will someone submit something
8 to the Board at some point in the near future -- say, in
9 the next several days?

10 MR. CURTISS: I would propose that we consult
11 here, if we can, while we're here in Hobbs, and, based
12 upon discussion, see if the answer that we provide to the
13 staff addresses the underlying concern.

14 JUDGE BOLLWERK: Okay. All right.

15 MR. COPPIN: We'll confer.

16 JUDGE BOLLWERK: All right. I appreciate that.
17 Questions. I'm sorry.

18 JUDGE ABRAMSON: Yes, I have a question for the
19 staff. As I understood the staff's response to this
20 portion of the NIRS's contention, staff found that the
21 challenge as to cost estimates arising in the use of
22 median values, cost of capital -- these were reasonable,
23 genuine issues. Is that correct?

24 MS. CLARK: Yes.

25 JUDGE ABRAMSON: Does staff support admission

1 [inaudible]?

2 MS. CLARK: Yes.

3 JUDGE ABRAMSON: Let me ask a procedural
4 question for how cost estimates -- how the staff and the
5 applicant would arrive at the initial cost estimates.
6 You've submitted something in your application. And
7 perhaps you could -- staff could tell me just for a
8 second -- and how the process works for you to arrive at
9 cost estimates outside the hearing.

10 MS. CLARK: We essentially review what is
11 submitted in the application. So we are in the process
12 now of going through the information that we've received
13 from LES and determining whether we believe it's
14 reasonable and is a genuine estimate of the cost. But,
15 basically, we review what they submit to us.

16 JUDGE ABRAMSON: And there would be a process
17 where you would submit requests for additional
18 information?

19 MS. CLARK: Exactly.

20 JUDGE ABRAMSON: They would submit a reply?

21 MS. CLARK: Exactly.

22 JUDGE ABRAMSON: Has that process begun?

23 MS. CLARK: Yes. In fact, we have already had
24 one telephone conference in which we spoke with the
25 contractors who prepared the report just so they could

1 explain to us how all of the numbers were arrived at in
2 the cost estimate.

3 JUDGE ABRAMSON: All right. Is any of that
4 information made available to any of the petitioners?

5 MS. COPPIN: From the Attorney General, no. I
6 believe it's publicly available.

7 MS. CLARK: We -- there is a public summary of
8 that telephone conference, and it will be issued shortly.

9 MR. COPPIN: We were not part of that telephone
10 conference.

11 JUDGE ABRAMSON: Yes. I wouldn't expect
12 that --

13 MR. COPPIN: And we've not --

14 JUDGE ABRAMSON: I think that's the normal
15 process. But the question is whether or not the
16 information that's conveyed in that is made available to
17 you later so you can review it. And it sounds like it --
18 if I understand it properly, it will be made available,
19 but it's recent enough that it has not yet been -- which
20 is that? Correct?

21 MS. CLARK: Yes. We are in the process of
22 preparing a summary of the information that we got during
23 that telephone conference. And it will explain the
24 information that we received.

25 JUDGE ABRAMSON: And how long ago was that

1 telephone conference?

2 MS. CLARK: Approximately two weeks ago.

3 JUDGE ABRAMSON: And what's your normal delay
4 time between having those things and getting something
5 available to the petitioners to look at?

6 MR. LOVEJOY: I just received a summary of a
7 June 1 telephone conference on the basis of -- concerning
8 the basis for cost estimates for disposition of depleted
9 uranium.

10 JUDGE ABRAMSON: You just received it by hand
11 now?

12 MR. LOVEJOY: Just received it -- Mr. Marriotte
13 just gave it to me, and I suppose it came to his office.

14 JUDGE ABRAMSON: Can you advise me
15 approximately when you received that?

16 MR. LOVEJOY: Today.

17 MR. MARRIOTTE: We received it at NIRS on
18 Thursday.

19 JUDGE ABRAMSON: So, apparently, it is
20 available.

21 MR. CURTISS: We received a copy through the
22 same mechanism. And it looks like the conference, as was
23 noted, was the date of June 1. The date of this memo is
24 June 7 and I think it's CC'd to several people here,
25 including Mr. Marriotte. It is publicly available. And

1 so, the information here I think was provided to us
2 through that process publicly -- through the public
3 process late last week perhaps.

4 MR. COPPIN: Just to make clear I don't believe
5 the Attorney General has seen that document.

6 JUDGE ABRAMSON: Has or hasn't?

7 MR. COPPIN: Has not.

8 JUDGE ABRAMSON: Has not.

9 MR. COPPIN: But we were closed Friday, too, so
10 that may be the problem.

11 JUDGE ABRAMSON: Well, in any case, are they on
12 distribution?

13 MS. CLARK: Yes, they should have received a
14 copy. They're on the distribution list.

15 JUDGE ABRAMSON: I'm just checking on the
16 process.

17 MR. CURTISS: There are CCs on here for the
18 attorney general of Madrid, Glen Smith, Lindsay Lovejoy,
19 Michael Marriotte. Understand that this just recently
20 came out, but I received it I think last week at the same
21 time that everybody should have received it.

22 JUDGE BOLLWERK: All right. Any other
23 questions from the Board then on these two contentions?
24 Or anything from any of the parties due to what we just
25 heard? All right.

1 If we could, then, get a copy of the Attorney
2 General's Thursday filing on TC-ii, I'd appreciate it.
3 And we'll take a look at that over lunch and decide if we
4 need to have any further discussions or clarification
5 about that document.

6 It's about ten till 12:00. Why don't we go
7 ahead and -- again, we have to leave the facility and
8 drive away and get something for lunch. Let's take about
9 an hour-and-a-half for lunch. Let's say 1:30 we'll
10 reconvene. So we'll see everyone at 1:30.

11 At that point we'll decide what we're going to
12 do about the proprietary document we're going to be
13 seeing. And also then we'll move into -- after that we'll
14 move into group 3 contentions, which are NMED EC-2 and EC-
15 3 and the Attorney General's EC-ii. At this point then --
16 do you have a point?

17 MR. PATO: Actually, is there any way we might
18 be able to get that to you after lunch since we won't have
19 three copies of that?

20 JUDGE BOLLWERK: Even if you only have one copy
21 that would work.

22 MR. PATO: Okay. Fantastic.

23 JUDGE BOLLWERK: It would be important for us
24 to see it at lunch so we can move on from there if that is
25 possible.

1 MR. PATO: Okay.

2 JUDGE BOLLWERK: All right. Thank you very
3 much. We stand adjourned.

4 (Whereupon, at 11:50 a.m., the hearing was
5 recessed, to reconvene at 1:30 p.m., this same day,
6 Tuesday, June 15, 2004.)

A F T E R N O O N S E S S I O N

1:30 p.m.

JUDGE BOLLWERK: All right. Let's go back on the record, please. We're here for the afternoon session on Tuesday for the arguments on contentions in the Louisiana Energy Services proceeding.

Again, I would remind everyone that if you have a cell phone with you, we'd appreciate it if you would turn it off or put it on vibrate. And any conversations you might need to have on them need to be held outside of the hearing room.

All right. Let's take up first, briefly -- excuse me -- the question of the filing made LES Thursday by the Attorney General regarding proprietary information that they had received by LES.

I guess from the Board's perspective the pleading is clear. I certainly have a problem if you want to present some argument on it. I prefer, however, not to have to close the room and close the record.

So the question would be, my assumption is -- and I'll to LES for this one -- I take it that the numbers that are in here are proprietary. Is that correct?

MR. CURTISS: Yes, sir.

JUDGE BOLLWERK: If there's a way that you can --

1 MR. CURTISS: The numbers and parties. Excuse
2 me.

3 JUDGE BOLLWERK: And the parties. All right.
4 If there's some way you can present your argument so that
5 you -- you may reference the pleading and tell us what
6 you're talking about where without talking about, A, the
7 parties, or, B, the numbers, that would be the most --

8 MALE VOICE: If you feel you need to.

9 JUDGE BOLLWERK: If you feel you need to. I
10 mean, I think, again the pleading is clear. But I don't
11 want to --

12 MR. COPPIN: Thank you, Mr. Chairman. From the
13 Attorney General's perspective we would just as soon stand
14 on that pleading --

15 JUDGE BOLLWERK: Okay.

16 MR. COPPIN: -- and answer any questions that
17 may come up.

18 JUDGE BOLLWERK: Okay. All right. Well,
19 again, I think the Board -- we read the pleading. It
20 seems clear what your arguments are. Again, I don't want
21 to preclude you from arguing. But, having said that,
22 closing the record creates all kinds of other
23 complications in terms of just the court reporter
24 producing two transcripts, so --

25 MR. COPPIN: We agree.

1 JUDGE BOLLWERK: Okay. .

2 MR. COPPIN: Thank you, Mr. Chairman.

3 JUDGE BOLLWERK: All right. Thank you. All
4 right. Then I guess we can move on -- I should mention
5 that -- any of the parties have anything procedural at
6 this point?

7 All right. Then let's move on.

8 MR. FOX: Mr. Chair?

9 JUDGE BOLLWERK: Yes.

10 MS. FOX: I have one I think relatively small
11 housekeeping matter.

12 JUDGE BOLLWERK: Okay.

13 MS. FOX: The Secretary of the Environment
14 Department, Ron Curry, had a prepared statement -- it's a
15 one-page statement that I would just like to be able to
16 put into the record. And I've discussed this with LES
17 counsel and NRC staff and they have no objection. I did
18 not have an opportunity to show it to the Attorney General
19 or NIRS. I wouldn't anticipate an objection.

20 MR. COPPIN: Did Secretary Curry mention us?
21 If not, we have no objection. We have no objection.

22 JUDGE BOLLWERK: All right. If you want, if
23 you can give me a copy of it I will take it back and have
24 it -- put in the docket of the proceeding if there's no
25 objection to that. I take it the staff has seen this as

1 well? Your name wasn't mentioned earlier, but you've seen
2 it as well?

3 MS. CLARK: Yes, I have.

4 JUDGE BOLLWERK: Okay.

5 MS. FOX: Would you like me to give it to the
6 court reporter or to you directly?

7 JUDGE BOLLWERK: Why don't you give it to me?
8 I'll just have it put -- have it put into the document
9 unless you want --

10 MS. FOX: Now or --

11 JUDGE BOLLWERK: I'm sorry?

12 MS. FOX: Now or --

13 JUDGE BOLLWERK: Now is fine. That would be
14 good. Might as get it now. While we're talking about it
15 we might as well take care of it. All right. As I say,
16 we will have it incorporated into the record of the
17 proceeding.

18 MS. FOX: Thank you.

19 JUDGE BOLLWERK: All right. I guess we're at a
20 point now to start with the contentions in group 3. And
21 these have been changed slightly. We're going to be
22 dealing with one Environmental Department contention, and
23 then one Attorney General Contention -- that EC-ii.

24 And the times, again, would be the same as they
25 were for the LES group of contentions -- 15 minutes for

1 both the Attorney General and the Environmental Department
2 on their contentions, and then LES 20 minutes, and the
3 staff 10 minutes. That's what we did LES time.

4 All right. I guess, Environmental Department,
5 if you're ready.

6 MS. FOX: Thank you, Mr. Chair. The New
7 Mexico -- I would like to reserve five minutes for
8 rebuttal.

9 JUDGE BOLLWERK: All right.

10 MS. FOX: New Mexico Environment Department
11 contends that LES has not demonstrated in its license
12 application that its proposed storage on site of the
13 depleted uranium hexafluoride over the 30-year life of the
14 facility will not be inimical to the health and safety of
15 the public.

16 In support of this contention the Environment
17 Department offers the opinions of Mr. Robert Alvarez, to
18 whom I've referred before, who is a policy analyst and was
19 previously a senior policy adviser to the Secretary of the
20 Department of Energy, and Mr. George Amastas, a health
21 physicist. Both of those gentlemen's resumes are attached
22 to our reply.

23 The Environment Department cited a number of
24 bases to support this contention, including the following.
25 The Department of Energy Defense Nuclear Facilities Safety

1 Board's 1995 report concluded that the DOE program for
2 storage of DUF₆ was not adequate for long-term storage.
3 The report identified various different corrosive
4 mechanisms that pose risks for the canisters.

5 The Environment Department also cited a finding
6 from the National Research Council that, above 125 degrees
7 Fahrenheit, a temperature that can be exceed in a storage
8 yard under direct sunlight, the material -- that is, the
9 DUF₆ -- converts directly from a solid to a gas.

10 LES -- we also cite that LES did not
11 sufficiently evaluate the public health consequences of
12 potential accidents on critical segments of the
13 population, specifically the embryo fetus and persons
14 under 18 years of age.

15 And, also, we contended that the LES emergency
16 plan was not adequate. And, in that regard, we detailed
17 the inadequacies in our reply.

18 In surreply the staff, as I have already
19 stated, argued mostly on procedural grounds that the reply
20 should not be allowed. And I won't go into detail again
21 about that argument -- regarding that argument.

22 But, suffice it to say, staff had argued in its
23 answer that we needed to be more specific in support of
24 our contentions, and the Environment Department asked for
25 more time to do so, and then staff complained when we gave

1 more specifics.

2 And we do believe that each of the specific
3 bases in support of this general contention is logically
4 connected to and in support of the general contention.
5 And, again, we do not believe there's any prejudice to LES
6 or staff because they were able to respond to our
7 additional factual and legal bases through their surreply,
8 to which we did not object.

9 Staff also argued that NMED's contentions,
10 including our citation to the DOE report, the National
11 Resource Council's finding, and to evidence of recent
12 leaks do not address LES's proposal for managing its
13 canisters.

14 This is not accurate. The Environment
15 Department's contentions with respect to LES's failure to
16 address the critical segments of the population and the
17 inadequate emergency plan go directly to LES's
18 application.

19 The Environment Department's contention with
20 respect to past handling of these types of canisters and
21 current releases demonstrates the general risks that are
22 present when such material is being stored long term.

23 With respect to LES's surreply, LES states that
24 it does not oppose admission of the Environment Department
25 storage-related contentions with one exception. LES

1 challenges the introduction of the Environment
2 Department's contention that LES has not identified either
3 the short term or the annual average HF limit or HF
4 recommendation for the critical segments of the
5 population.

6 LES argues that this matter is explicitly
7 addressed in NRC regulations at 10 CFR 70.61, quote,
8 Including specific regulatory limits for HF exposure, end
9 quote, and, therefore, quote, NMED's objection
10 impermissively challenges the NRC rules. NMED in its
11 contention does no such thing.

12 LES contends that 10 CFR 70.61(b)(4) and (c)(4)
13 address acute chemical exposure to workers and members of
14 the public, and that their application did just that.

15 However, the Environment Department's
16 contention goes to critical segments of the population;
17 that is, the female worker carrying the embryo fetus and
18 persons under 18 years of age, which are not addressed in
19 LES's application.

20 10 CFR 70.61(b)(4)(ii) addresses acute chemical
21 exposure to "an individual" that could lead to
22 "irreversible or serious long-lasting health effects to
23 any individuals."

24 Individual is not defined in 10 CFR 70, but is
25 defined in 10 CFR 20.1003 as any human being, which would

1 include a female worker carrying the embryo fetus or a
2 person under the age of 18.

3 Moreover, the NRC has set forth specific
4 guidelines for protection of the embryo fetus carried by
5 the female worker. The embryo fetus is defined in 10 CFR
6 20.1003 as the developing human organism from conception
7 until the time of birth.

8 NRC regulations further recognize the unique
9 sensitivity of the embryo fetus to ionizing radiation.
10 Under 10 CFR 20.1208 radiation dose to the embryo fetus is
11 limited to one-tenths the maximum annual dose of
12 occupationally exposed -- of an occupationally-exposed
13 adult individual.

14 The dose to an embryo fetus by regulation can
15 be more than -- no more than 500 millirem. The maximum
16 dose to an occupationally-exposed worker can be no more
17 than 5,000 millirem.

18 Therefore, in its contention the Environment
19 Department does not make an impermissible challenge to 10
20 CFR 70.61, but seeks to ensure that LES complies with the
21 regulations and acts consistently with other NRC
22 regulations.

23 This concludes my argument, and I stand for any
24 questions from the Board.

25 JUDGE BOLLWERK: All right.

1 (Pause.)

2 JUDGE BOLLWERK: I don't have any at this
3 point. Let's then turn to the Attorney General. What
4 about allocation of time?

5 MR. PATO: I'd like to reserve five minutes for
6 rebuttal, please.

7 JUDGE BOLLWERK: Okay.

8 MR. PATO: With respect to the health, safety,
9 and environmental impacts of indefinite waste storage, the
10 concerns addressed by the Commission and the waste
11 confidence decisions are yet, again, applicable.

12 Having failed to demonstrate that a program is
13 in place for disposing of the depleted uranium
14 hexafluoride, or even when such a program will become
15 available, indefinite waste storage in New Mexico must,
16 unfortunately, be considered.

17 The Attorney General, in her second
18 environmental contention, recognizes that storage of large
19 amounts of depleted uranium tails in steel cylinders which
20 remain in outdoor storage on concrete pads for a few years
21 poses distinct environmental risks to New Mexico.

22 NRC staff, in response, suggested there is no
23 need for New Mexico's Attorney General to participate in
24 this proceeding with respect to the issue of storage
25 because, as a necessary part of its review, the staff will

1 determine whether the provisions put forth in LES's
2 application are adequate to assure public health, safety,
3 and the environment are adequately protected before
4 issuing the requested license.

5 While the Attorney General is grateful that the
6 effects of indefinite storage will be examined as a
7 necessary part of staff's review, the Attorney General
8 would like to remind this Board that this examination is
9 part and parcel of her statutory charge.

10 Additionally, were staff's promise of a
11 sufficient review sufficient to dismiss a contention, no
12 contention of any party could ever be admitted.

13 Of particular concern to the Attorney General
14 is that the LES application provides no information to
15 document or demonstrate that it is reasonable to assume a
16 licensed offsite facility will be available to receive its
17 accumulated depleted UF₆ inventory.

18 The two facilities that could convert LES's
19 accumulated depleted UF₆ inventory at the end of the
20 plant's 30-year operating life are posed to be
21 decommissioned, and, therefore, could not receive the
22 accumulated depleted UF₆ from the proposed Eunice, New
23 Mexico, facility.

24 The 15,727 cylinders of depleted UF₆ to be
25 accumulated at the proposed facility are comparable to the

1 16,000 cylinders currently accumulated at the Portsmouth
2 facility.

3 Moreover, the draft EIS for Portsmouth
4 estimates two years will be required to construct the
5 Portsmouth conversion plan and 18 years to process the
6 16,000 cylinders.

7 For LES, then, this means that Portsmouth would
8 not even be able to consider LES's depleted uranium
9 hexafluoride for at least 20 years, if, indeed, Portsmouth
10 will ever accept LES's waste.

11 The Attorney General's expert, Allen Messenger,
12 recognizes that, since there is no conversion plant
13 currently proposed to be available to convert LES's
14 accumulated depleted UF_6 inventory, and since length of
15 time required to obtain authorization to construct and
16 then to convert the accumulated depleted UF_6 , could
17 reasonably be assumed to be over 20 years, it is also
18 reasonable to assume that the LES facility will continue
19 to store this material for an unknown period of time after
20 the rest of the facility is decommissioned for
21 unrestricted release.

22 Moreover, Allen Messenger states that a
23 reasonable decommissioning cost assumption is to require
24 financial assurance sufficient to provide for indefinite
25 storage, cylinder maintenance, storage and ancillary

1 facility maintenance, and security for an indefinite
2 period of time after facility operations cease and the
3 rest of the LES facility is decommissioned.

4 The Attorney General does not consider these
5 flaws to be fatal to LES's application. Rather, the
6 Attorney General advocates that LES put forth a sufficient
7 surety that will cover indefinite maintenance of the
8 uranium byproduct cylinders, security for the storage pad,
9 indefinite storage, operational and monitoring costs for
10 storage and ancillary facilities, and preparation of non-
11 conforming cylinders for transportation, which would
12 ensure that the indefinite storage of depleted uranium
13 hexafluoride on concrete pads is done in the safest manner
14 possible for all New Mexicans and would ensure that an
15 independent third party would be able to assume
16 responsibility for decommissioning the facility should LES
17 be unable to complete the decommissioning.

18 Additionally, indefinite storage does not mean
19 indefinite cost. The Attorney General believes that her
20 participation with respect to the issues surrounding
21 indefinite storage will be instrumental in boosting the
22 public confident that New Mexico will not be left with
23 legacy of waste.

24 As a final matter, LES supports the
25 admissibility of NMED's contention that storage of DUF₆

1 for the life of the facility is not acceptable to the
2 State of New Mexico and is contrary to representations
3 made by LES -- that LES's proposed storage plant is not
4 sufficiently detailed, that storage of highly dangerous
5 DUF₆ for 30 years may pose a threat to the protection of
6 health and property, and LES has not demonstrated that
7 issuance of a license will not be inimical to the health
8 and safety of the public, and that, in the event of a
9 default by LES, there would be -- there would not be
10 adequate financial assurance stating its reasons for its
11 support, its recognition of the unique and important role
12 that the State of New Mexico plays as a representative of
13 its citizens, and that LES understands NMED's concerns,
14 particularly as they relate to ensuring that issues that
15 touch on public health and safety of New Mexico citizens,
16 as well as the environment of New Mexico, are addressed in
17 an open and thorough manner.

18 The Attorney General respectfully directs this
19 Board to Section 852 of the New Mexico Statutes,
20 Annotated, which makes plain that the Attorney General has
21 a unique and important role in ensuring that issues that
22 touch on the public's health and safety of the New Mexico
23 citizens, as well as the environment of New Mexico, are
24 addressed in an open and thorough manner.

25 For these reasons, the Attorney General

1 respectfully requests that she be admitted as a party to
2 matters regarding the health, safety, and environmental
3 impacts of indefinite waste storage at the LES facility.
4 Thank you.

5 JUDGE BOLLWERK: Questions:

6 JUDGE ABRAMSON: Yes. Counsel, it sounds to me
7 like, once again, you're focusing on costs. Is that
8 correct?

9 MR. PATO: Certainly costs --

10 JUDGE ABRAMSON: That your contention boils
11 down to there's an environmental risk unless we are
12 confident that enough money is put in to make sure that
13 these things are adequately stored because we're not
14 confident that they can tell us when they'll be removed.
15 Does that --

16 MR. PATO: That's correct, Judge. Cost does
17 play an important role in this.

18 JUDGE BOLLWERK: All right. Let me then turn
19 to Louisiana Energy Services.

20 MR. CURTISS: Thank you, Mr. Chairman. I think
21 we can, again, be brief here. I'll take the NMED argument
22 and then the AG argument in turn.

23 As we set forth in our answer to the NMED
24 petition of March 23, with one exception we believe the
25 issues that have been identified relative to storage are

1 appropriately raised.

2 We understand the concern that NMED, on the
3 Governor's behalf, has raised about the storage-related
4 issues. And, on that basis, although we reserve the right
5 to contest, and will contest, the merits of those issues
6 when we get to that phase, the storage-related issues that
7 they've raised here in this contention, in our judgment,
8 should be admitted to this proceeding.

9 The one exception relates to the -- what we
10 view to be a challenge to the regulations in 70.61 in
11 which NMED takes the position that the regulations do not
12 require -- the regulations provide that HF -- or radiation
13 exposures for offsite pregnant women or individuals under
14 18 have to be analyzed.

15 In 70.61 it explicitly provides that that
16 analysis has to be done for the workers. And, of course,
17 if the workers were to include individuals under 18 or
18 pregnant women, 70.61(b), in particular, focuses on the
19 worker questions.

20 So we stand by the position and need not expand
21 here any further unless you have questions that we set
22 forth in our answer -- that that part of the NMED
23 contention in the March 23 petition constitutes a
24 challenge to 70.61.

25 And, to the extent that it argues for an

1 analysis of offsite consequences of individuals under 18
2 or pregnant women, that's not contemplated in our view
3 under the regulations.

4 The additional issues that were raised in the
5 May 10 petition by NMED, in some respects, are merely
6 expansions upon the points relative to storage. But we do
7 believe that, in an important respect, the emergency
8 planning issue that was identified in that additional
9 reply, unfortunately, is a brand new issue that was
10 brought to the attention of the parties in that reply in a
11 manner that goes beyond this Board's guidance that the
12 reply should narrowly focus on issues that are raised by
13 the staff or the applicant in their answers.

14 And so, unfortunately, because that is a brand
15 new issue, we've taken the position that it's not
16 appropriate for that to be admitted in that context of a
17 reply.

18 The only -- the final comment I guess I would
19 make, following up on the discussion this morning -- and
20 I'm a little bit unclear about this. There was a
21 discussion that the financial assurance issue that was
22 originally raised in issue number 2 in the form of NMED
23 TC-2 and EC-3 would be deferred for discussion in this
24 context.

25 And I'm not prepared to respond to that at this

1 point because the argument hasn't been made. And I'll
2 defer to the counsel for NMED as to whether they wish to
3 pursue that issue here.

4 But, in sum, with respect to the NMED issues,
5 we think the storage-related issues, save for the
6 challenge to 70.61, are, in fact, appropriate to admit.
7 And, while we will disagree with them on the merits and
8 believe that the approach set forth in our application
9 provides adequate protection to public health and safety
10 and fully complies with the regulations, we, nevertheless,
11 support the admission of those contentions.

12 Turning to the issues raised by the Attorney
13 General, I think I can summarize LES's position really in
14 two comments.

15 In the initial petition offered by the Attorney
16 General of April 5 the issue was phrased as follows. The
17 storage of large amounts of depleted uranium tails in
18 steel cylinders, which would remain in outdoor storage on
19 concrete pads for up to 30 years, would pose a distinct
20 environmental risk to New Mexico, quote, unquote.

21 As we set forth in our answer, we think that
22 issue, as framed, is insufficiently specific. It lacks
23 reference to any section of the application where the
24 Attorney General is contesting the approach that we are
25 taking to the storage of tails. And, unfortunately,

1 because it is so generally pled without any of the
2 specific details, that an issue such as request requires,
3 in order to be litigable, we oppose that particular
4 contention as framed in the April 5 petition, and we do so
5 here today.

6 Subsequently, in the May 24 reply that was
7 submitted by the Attorney General, there were a whole
8 series of issues raised, some of which, again, were raised
9 for the first time. And, on that basis as well, we think
10 those issues go beyond the scope of the Board's directive
11 to focus narrowly on issues raised by the staff or the
12 applicant in their answers.

13 In particular, they raised for the first time
14 the fact that the application fails to identify that the
15 project location is within the range of state-listed
16 threatened species, including the sand dune lizard -- the
17 first time that issue has been raised. And we think
18 that's inappropriate to raise in the context of a reply.

19 Similarly, the concern identified relative to
20 relocation of the carbon dioxide transmission pipeline and
21 the effect of that construction on small mammals,
22 amphibians, and reptiles, and the potential for injury to
23 large mammals -- again, a brand new issue raised in the
24 May 24 reply. Those two issues having to do with impact
25 on wildlife we believe are inappropriately raised at this

1 late stage of the process.

2 The Attorney General goes on to raise the issue
3 relative to the assumption that we'll have offsite
4 facilities available. Again, I think that's a variation
5 on the issue that we discussed this morning in the context
6 of issue 1. And so I wouldn't propose to go into that in
7 any further detail.

8 And then, finally, in a slightly different way,
9 but similar to an issue that was raised previously, the
10 position apparently is taken that, because of the
11 indefinite nature -- the asserted indefinite nature of the
12 disposal facilities and the processing facilities, that
13 LAS is obligated to provide for indefinite storage, which
14 this morning we understood to mean indefinite costs.

15 It wasn't clear today whether they were
16 suggesting that indefinite storage would result in
17 indefinite costs being imposed. But, again, that's
18 fundamentally an issue raised in the context of issue
19 number 1 this morning and the cost issue number 2. And I
20 think we can deal with that in that context.

21 So, in sum, with respect to the AG issues that
22 were raised in the initial petition of April 5, the
23 contention as originally framed was too generally pled
24 without any specific reference to the application or
25 reference to experts that were commenting on the

1 deficiency in the application.

2 And the subsequent arguments that were advanced
3 in the May 24 reply were either raised for the first time
4 or are essentially a variation on issues that were raised
5 in issue number 1 and 2 this morning and should be
6 deferred for a decision in that context. That concludes
7 my comments.

8 JUDGE BOLLWERK: I just have one question.
9 This -- relative to the question on threatened species, my
10 understanding is this is a threatened species under New
11 Mexico's designation rather than a federal designation.
12 Is that correct?

13 MR. CURTISS: That's correct.

14 JUDGE BOLLWERK: Does that make any difference
15 in terms of the scope of NEPA, the National Environmental
16 Policy Act?

17 MR. CURTISS: I'm not certain, but I can get
18 back to you on that.

19 JUDGE BOLLWERK: I'd defer to the staff on
20 that, of course, since the NEPA document is the staff's
21 purview. I think you're right. I may have directed the
22 question to the wrong person, but you have an
23 environmental report, but you don't have anything to say
24 about that.

25 MR. CURTISS: This is correct. I think our

1 fundamental position here is that the issue was raised for
2 the first time in a reply -- brand new issue that we
3 didn't seek or have the opportunity to comment on. So
4 this is the extent of our comment on that issue.

5 JUDGE BOLLWERK: All right.

6 MR. CURTISS: Thank you.

7 JUDGE BOLLWERK: Well, let's let the staff make
8 their actual presentation.

9 MS. CLARK: Are you --

10 JUDGE BOLLWERK: Yes, go ahead.

11 MS. CLARK: With regard to the state listed
12 species, yes, we do consider those --

13 JUDGE BOLLWERK: All right.

14 MS. CLARK: -- in our EIS.

15 JUDGE BOLLWERK: Okay. They do. They do
16 consider that. It's part of the NEPA study. And what --
17 I guess your argument then.

18 MS. CLARK: Yes. Thank you. By and large, I'd
19 like to rest on the pleadings that we've already filed.
20 However, I would like to address the NMED argument
21 regarding the health consequences of potential accidents.

22 First of all, of course, we've already argued
23 that, as a new issue with -- as it has not been properly
24 raised and should not be considered on that basis.
25 However, we have additional reasons for believing that

1 this issue should not be admitted.

2 NMED is claiming that the -- that what needs to
3 be considered are the toxic effects of uranium and HF.
4 And they discuss limits that OSHA has had and talk about
5 calculating similar limits under the Commission's
6 regulations in Part 20.

7 However, Part 20 refers only to radiation
8 exposure. While it does consider calculations to critical
9 segments of the population, it does not apply to chemical
10 exposures.

11 Part 70, however, does take into account
12 chemical exposures. And, specifically, 70.61 requires
13 that when there could be an acute chemical exposure to an
14 individual of licensed material the licensee is required
15 to reduce the risk if the risk consequence is either high
16 or moderate. And this should be done through engineer
17 controls, administrative controls, or both.

18 In other words, under Part 70 we are not
19 requiring that they set occupational or public limits on
20 exposure. Instead, what the Commission is requiring is
21 that the licensee implement controls to reduce the
22 credibility of the accidents.

23 And, in fact, LES, in their application, has
24 proposed a number of controls in order to ensure that the
25 cylinders will not be breached and these accidents will

1 not occur. And because NMED has not taken specific issue
2 with those particular measures, we believe the contention
3 is not admissible.

4 JUDGE ABRAMSON: Can you give us a cite to the
5 section, please?

6 MS. CLARK: Well, 70.61 --

7 JUDGE ABRAMSON: That's Part 70?

8 MS. CLARK: Right.

9 JUDGE ABRAMSON: 70.61.

10 MS. CLARK: 70.61. And then there is -- I
11 believe NMED said that it's (b) (4) and (c) (4).

12 JUDGE ABRAMSON: I'm interested in the cite to
13 the application section where --

14 MS. CLARK: Oh, I'm sorry. This is the
15 environmental report 4.13.3.1.1 and 4.13.3.1.2.

16 JUDGE BOLLWERK: Is it likely that the -- oh,
17 were you finished with your argument? I'm sorry.

18 MS. CLARK: Yes, I have.

19 JUDGE BOLLWERK: Is it likely that the question
20 of the sand lizard will be addressed in the final
21 environmental impact statement?

22 MS. CLARK: I'm sorry. Is it likely --

23 JUDGE BOLLWERK: That the question of the
24 endangered species status of the lizard will be addressed
25 in the final environmental impact statement?

1 MS. CLARK: Yes. They are planning to look at
2 that.

3 JUDGE BOLLWERK: So it will be addressed in
4 some way or --

5 MS. CLARK: Yes.

6 JUDGE BOLLWERK: And I take it when you
7 published the draft -- the statement -- we have an
8 opportunity to comment on whatever you put in there?

9 MS. CLARK: Yes.

10 JUDGE BOLLWERK: Any other questions of the
11 Board members? Let me go back, before you begin your
12 rebuttal and just -- I had the same that counsel for LES
13 had. And this may have been my misunderstanding or my --
14 I'm not making things clear.

15 There was a contention [inaudible], and that
16 was -- I thought what we were moving, but maybe I was
17 wrong. And I don't think you have addressed it at this
18 point.

19 MS. FOX: No, and perhaps I misunderstood you,
20 Mr. Chair. At this point in time we are not pursuing that
21 contention.

22 JUDGE BOLLWERK: All right. So you withdraw it
23 essentially, if I'm understanding?

24 MS. FOX: Yes.

25 JUDGE BOLLWERK: Okay. Does that clarify it?

1 MALE VOICE: That clarifies it.

2 JUDGE BOLLWERK: Clarifies it for me anyway. I
3 appreciate it. Thank you.

4 MS. FOX: I apologize for the --

5 JUDGE BOLLWERK: No, no problem. I just wanted
6 to make sure he was correct -- that I hadn't heard an
7 argument. I wanted to make sure that we were giving you
8 the opportunity. Anything on either of these contentions
9 then from anyone?

10 (Pause.)

11 JUDGE BOLLWERK: All right. Moving then to
12 your rebuttal. I'm sorry.

13 MS. FOX: Thank you, Mr. Chair. With respect
14 to the regulatory framework under 10 CFR 70.61, just to
15 reiterate that we believe that that regulation, because it
16 refers to individuals, allows for consideration of the
17 effects on the embryo fetus and the person under 18 years
18 of age.

19 With respect to LES's contention that our
20 analysis of the inadequacies of their emergency plan is a
21 new contention that shouldn't be allowed to be set forth
22 in a reply, we believe that the emergency plan -- that the
23 fact that it's inadequate does go to the contention that
24 there is not -- that the long-term storage has not been
25 adequately addressed by LES in terms of health and safety

1 issues.

2 So we believe that the inadequacies that we
3 detailed in the emergency plan support that specific
4 contention, Logically connected to that contention, and
5 that both LES and staff had full opportunity to address
6 the merits of the -- of our argument in their sur replies.

7 JUDGE BOLLWERK: All right. Anything else?

8 MS. FOX: No.

9 JUDGE BOLLWERK: Let me just ask this question.
10 In terms of the emergency plan, particularly, I see the
11 connection in your drawing. The problem I'm having is I
12 look, for instance, to a petition like the one the NIRS
13 filed, which had a significant amount of information
14 attached to it in the initial filing, and then their reply
15 as much briefer.

16 And yours has sort of gone the other way. I'm
17 wondering how this Board, in terms of dealing with other
18 situations that arise, particularly under the new rules,
19 were made pretty clear what a reply is. How do we deal
20 with those? What kind of precedent are we setting for
21 sort of taking sort of a broad view of what a reply is?

22 MS. FOX: I think the State of New Mexico is in
23 a unique position here. And I think we've acknowledge
24 that in the petition we may not have met each and every
25 one of the bases that was set forth.

1 This is not an area that we generally litigate
2 in. And, of course, the Board's rules, which are new, are
3 much more stringent than certainly any intervention rules
4 of which I'm aware.

5 And I think the extent to which there's been
6 any non-conformance with the rules or prejudice to the
7 other parties, that has been cured through the process
8 whereby we asked for an extension, we gave our reasons,
9 and a surreply was allowed.

10 And that's really, you know, all I can say at
11 this point. I apologize that the petition wasn't more
12 specific. We acknowledge that it should have been. But,
13 that being said, we have done our best at this point in
14 time to try to cure that and make sure that there's no
15 prejudice to the other parties.

16 JUDGE BOLLWERK: All right. Any questions from
17 the other Board members?

18 (Pause.)

19 JUDGE BOLLWERK: No? Attorney General then.

20 MR. PATO: The Attorney General has no --

21 JUDGE BOLLWERK: All right. That then I guess
22 closes out our consideration -- or our discussions on
23 number -- category number 3. We now have category number
24 4, which we label basically miscellaneous financial
25 qualifications or financial assurance issues.

1 There are a number of contentions that we
2 grouped under this group. For the Environment Department
3 there was miscellaneous contention 1, which was formerly
4 NMED D. For the Attorney General there was a technical
5 contention small I, which was formerly the Attorney
6 General F. There was Environmental Contention iv, which
7 was formerly Attorney General E. And there was
8 miscellaneous contention small II, which was formerly
9 Attorney General H. And then for NIRS, environmental
10 contention 5, technical contention 2, which was formerly
11 its contention 3.1.

12 Let me find out first about rebuttal time.

13 MS. FOX: These are the costs --

14 JUDGE BOLLWERK: Yes, the -- have you argued
15 this already you feel like? That's maybe part of the
16 question.

17 JUDGE ABRAMSON: Yes. Let me -- yes. Perhaps
18 I can pick up on what Judge Bollwerk is saying here. And
19 that is that most of these contentions relate, it seems to
20 me, to financial matters, much of which we have discussed.
21 So perhaps it's possible to reduce what needs to be said
22 in this section.

23 JUDGE BOLLWERK: This maybe an area where
24 things overlap, frankly, between 2 and 4.

25 MS. FOX: We have nothing to add more than what

1 we've already stated.

2 JUDGE BOLLWERK: All right.

3 MS. FOX: Thank you.

4 JUDGE BOLLWERK: Let's turn to the Attorney
5 General. Anything on either -- on any of these
6 contentions you wish say?

7 MR. COPPIN: Just to recap, Mr. Chairman. The
8 Attorney General from day one has raised issues of cost in
9 these proceedings. And, basically, around the concept
10 that the plausible strategy does not show us where this
11 waste is going to go in the immediate future. And that's
12 why we refer to it as indefinite.

13 And one thing we do know is there will be waste
14 produced and it will be stored here in New Mexico
15 indefinitely. There is nothing out there that will --
16 that we know will take this waste either through Plan A or
17 Plan B, the private decommissioning and placement in a
18 mine or turn it over to DOE.

19 And so cost drives the whole issue raised by
20 the Attorney General. And we believe that this is an
21 issue that was raised from the very beginning by the
22 Attorney General. And we think that the staff -- as we
23 said in our brief, the staff and LES are highly
24 restrictive in their interpretation of the regulations in
25 how they deal with contentions.

1 A contention should be adequate to give notice
2 as to what is to be litigated and assure there's a genuine
3 issue sufficient to proceed further with discovery and
4 hearing. We think plenty of information has been provided
5 showing that there are problem with cost estimates that
6 are being proposed.

7 We heard today that one of the issues we raised
8 in our reply about the 25 percent contingency versus a 10
9 percent contingency may be addressed. But we've never
10 said 25 percent is adequate. We just used that as
11 evidence that the 10 percent may not be adequate. It may
12 be that 15 percent; it may be that 30 percent is adequate.

13 These are issues that need to be addressed and
14 resolved through a fact-finding process.

15 JUDGE BOLLWERK: All right.

16 MR. COPPIN: We agree with NMED that technical
17 perfection in the drafting of contentions has never been
18 required -- just putting people on notice as to what the
19 issues are. And we think the real main issue here is what
20 is going to be an adequate surety to protect the State of
21 New Mexico, to make sure that the environmental
22 requirements are met through an adequate surety so that a
23 third party can take over the storage in a decommission of
24 this waste. Thank you.

25 JUDGE BOLLWERK: Any questions?

1 (Pause.)

2 JUDGE BOLLWERK: Okay. All right. From NIRS
3 then.

4 MR. LOVEJOY: Thank you, Your Honor. We
5 separately set forth in contention 3.1, which is now in
6 this category, our contention as to cost estimates and
7 cost of decommissioning in the funding plan for
8 decommissioning in the kind of -- in the narrow sense of
9 dismantlement of the facility.

10 The opinions expressed are those of Dr. William
11 Weida, whom I've referred to previously. And, in
12 substance, what he's raising are problems using the model
13 of short-term projects in Europe as appropriate measures
14 of decommissioning costs for a 30-year-old -- 30-year
15 plant in the United States.

16 His explanation is that the lifetime -- the
17 duration of a plant's operation essentially governs the
18 effort required in decommissioning. And as plant life
19 increases both the magnitude of contamination and the
20 uncertainties with respect to predicting such
21 contamination increase.

22 So he's criticizing the model used the LES, as
23 indicated in its SER. And he would propose to use models
24 such as those in -- derived from decommissioning of DOE
25 weapons facilities or commercial nuclear plants. And it's

1 notable that his own experience has shown from his resume
2 includes several studies of weapons production.

3 And the other principal thrust of Dr. Weida's
4 opinion focuses on the contingency cost allowance of 10
5 percent and the cost of capital of 6 percent as being just
6 too low. LES, in its application, supported the capital
7 cost and contingency figures with what it refers to as
8 ten years of URENCO experience.

9 Certainly, Dr. Weida's experience is longer
10 than ten years and quite as broad as URENCO's. And he's
11 bringing that to bear in expressing his view on these
12 contingency cost allowances and the cost of capital.

13 I have heard this morning that LES has agreed
14 to introduce a contingency cost factor of 25 percent for
15 its decommissioning costs. Like Mr. Coppin, I'm grateful
16 for the information, but I'm not still very sure where the
17 25 came from. And it does look like a very debatable
18 issue here.

19 So, quite frankly, I think that this is a
20 situation where LES has basically conceded that the
21 allowance contained in the application was inadequate and
22 is seeking to arrive at a compromise in discussions with
23 staff. I think it's still an open factual issue that
24 ought to be resolved on the merits rather than by a
25 compromise. And so it's still very much a live issue.

1 Dr. Weida's opinion makes references, I should
2 note, to the Livermore report, which, in certain passages,
3 requires a 30 percent contingency and, in other passages,
4 for particular equipment, calls for a 30 to 50 percent
5 contingency allowance where the process is much --
6 contains a lot of uncertainty.

7 JUDGE BOLLWERK: All right.

8 MR. LOVEJOY: Thank you.

9 JUDGE BOLLWERK: Questions?

10 (Pause.)

11 JUDGE BOLLWERK: I take it that was a result of
12 your discussion perhaps -- or not?

13 MR. LOVEJOY: Not yet.

14 JUDGE BOLLWERK: Not yet. You're still
15 thinking about it.

16 MR. LOVEJOY: We're still thinking.

17 JUDGE BOLLWERK: Okay. All right. Let me turn
18 then to LES and see what you have to say.

19 MR. CURTISS: We haven't discussed it yet. I
20 think we both had lunch over the lunch hour and we'll
21 discuss it --

22 JUDGE BOLLWERK: Okay. That's a good thing to
23 do at lunch.

24 MR. CURTISS: -- hopefully shortly so we come
25 back renewed to make these points.

1 I do want to just briefly comment on the NMED
2 contention, although it was not discussed in detail,
3 because there are a couple of key points that we want to
4 make.

5 The contention essentially argues that the
6 economic viability, which we interpret in this category
7 means the financial qualifications associated with the
8 plant, cannot be judged without an assessment of the
9 market need first and a business plan.

10 Very simply, I think our position is that, in
11 the February 6 order the Commission has articulated
12 precisely what needs to be demonstrated to demonstrate
13 financial qualifications. And a business plan and a
14 market analysis are important considerations, but they're
15 important business considerations, not licensing
16 considerations.

17 I'd also say, to the extent that what's
18 really -- what appears to be the concern here in NMED's
19 comment, that if the plant is not economically viable the
20 state will inherit the facility and its waste should LES
21 default on decommissioning the facility I think flows from
22 a mistaken impression that the decommissioning funding for
23 both the facility and the tails is drawn from the revenue
24 stream from the facility, when, in fact, the regulations
25 in Part 40 and Part 70 require, through one of a variety

1 of different mechanism; likely a surety bond in our case,
2 that that funding be set aside so that the premature
3 shutdown of the facility or any other adverse consequence
4 doesn't threaten the availability of the set aside
5 decommissioning funding.

6 With that, let me quickly move then to the
7 NMAG, the Attorney General's contentions. And I'd like to
8 discuss E, F, and H -- TC-4, EC-1, and MC-2, really, in
9 the same context.

10 Because they also seem to flow from the same
11 premise -- I should back up and say they express the same
12 concern with respect to the ability to ensure the
13 decommissioning funding is available for both the facility
14 and the tails.

15 But I think they flow from the same premise
16 that, in one way or another, that, because the facility
17 might shut down early or its owners who are foreign owners
18 might abandon the facility, that in some way that's going
19 to jeopardize the ability to decommission and the
20 facility.

21 And, again, for the reasons that we set out in
22 our answer to this -- and I'll defer to that discussion --
23 I'll simply summarize here that, to the extent that
24 this -- based upon the premise that decommission funding
25 flows from revenues, that's not the case. And the

1 regulations themselves specify in Parts 40 and 70 exactly
2 what needs to be done to address this kind of issue.

3 I think I'd also then turn just briefly to the
4 additional points that are raised in the May 24 reply by
5 the Attorney General. And here I think the argument has
6 shifted. Now it appears to be the case that the argument
7 here understands that the financial assurance, for
8 purposes of decommission, is, in fact, set aside
9 separately and a number of questions are raised about
10 financial assurance, including the ability to address
11 financial assurance through a license condition, the
12 adequacy of the contingency margin, and a number of
13 similar questions.

14 Let me take those just in turn -- and I'll be
15 brief here as well. As to the ability to address
16 financial assurance requirements through the mechanism of
17 a license condition, I'd simply refer the Board to CLI 97-
18 15, which sets forth the basis for doing exactly that.
19 It's acceptable in the Commission's view to make sure that
20 the conditions are identified -- in other words, what has
21 to be done with regard to financial assurances addressed,
22 and then impose that through a license condition. And, to
23 the extent that the Attorney General raises a question
24 about the ability to do that, I'd refer the Board to CLI
25 97-15.

1 With regard to the adequacy of the contingency
2 factor, we've touched on that in a couple of different
3 contexts today. Let me summarize where I think we are and
4 where we're likely to go with this.

5 First, as we indicated this morning, LES has
6 agreed to the staff's request that we adopt a 25 percent
7 contingency factor for facility decommissioning. The
8 source of that requirement is in NUREG 1727. So, in the
9 guidance established by the Agency, the 25 percent figure
10 derives from 1727. And it's in that context -- I'm sorry,
11 1757, you know -- and the more current version of 27. And
12 that requirement for the guidance for the 25 percent
13 contingency is set forth in 1757.

14 I think we do look forward to the opportunity
15 to discuss this further and see if that raises the --
16 addresses the concern that NIRS has raised, and we'll have
17 that opportunity, hopefully, in the near future.

18 With respect to the contingency for the tails
19 portion of the decommissioning, again, I'll simply
20 summarize what we said this morning. That the \$5.50
21 estimate per KEG of uranium includes, we think, a
22 contingency in the range of about 20 to 40 percent based
23 upon the \$3.92 reference in the contract for DOE's
24 construction of the two facilities in Kentucky and Ohio,
25 the most current estimate we have, together with the fact

1 that, for another commercial enricher, USEC, the staff has
2 agreed, in its review of their decommissioning funding
3 plan, to an estimate of \$3.52.

4 So we would submit that the contingency built
5 into the estimate as it was prepared, and given the
6 reports that that took into account, should be
7 substantially more than would be provided otherwise.

8 The -- I think a couple of additional points
9 here that I guess I would touch on just briefly. We --
10 there's a reference here to the use of the proprietary
11 data -- we talked about that earlier. There's nothing
12 further I think that we need to say about that.

13 A further discussion here of the potential for
14 the waste to be contaminated at a higher level, as we
15 interpret what's raised in bases B, which is where this is
16 addressed, I think we believe that that's, in another
17 respect, simply a variation on the grade of a Class C
18 argument.

19 I think we've explained in our answer where the
20 100 and \$150 figures were used for different aspects of
21 decommissioning, including the separation building modules
22 and the waste -- and the \$150 figure for the other
23 buildings.

24 And I think that essentially covers everything
25 that we had not discussed earlier. If you have any

1 questions I'd be glad to answer them.

2 JUDGE BOLLWERK: Just a couple.

3 JUDGE KELBER: Can you address briefly the
4 issue of short-term right now [inaudible] costs as they
5 bear on longer term production unit?

6 MR. CURTISS: Yes. I think our point there is
7 twofold. And I may also ask Rod Krich, who's been in
8 direct contact and is the licensing manager -- he might
9 like to speak to this as well.

10 I think our point, first, is that, with respect
11 to the allegation -- or the contention that the short-term
12 nature of the project -- or the pilot nature of the
13 project has a bearing on the decommissioning cost and the
14 size of the facility and the length of its operation bear
15 on the ultimate decommission, we certainly don't disagree
16 with that.

17 And in our answer that's, in fact, I think
18 correct, that the size of the decommissioning task and the
19 length of the operation -- size of the facility I should
20 say, Judge Kelber, bear on the ultimate cost to
21 decommission.

22 I think from our perspective the pilot
23 decommission for a facility that operated ten years and
24 then was in a decommissioning mode for about ten years is,
25 in fact, a relevant consideration. And, in the absence of

1 an argument as to how, other than the general observation,
2 that would impact our decommissioning cost estimate, I
3 think we view that as an issue that's not sufficiently
4 pled in terms of its specific details.

5 But perhaps I might ask -- Rod, do you have
6 anything further to add on that?

7 MR. KRICH: Just to add that the facility that
8 we used as a model -- the facility in Almelo, Netherlands,
9 which was operated by URENCO, is a pilot production -- was
10 a pilot production facility. It operated for about 20
11 years, and it was decommissioned over a period of ten
12 years.

13 So there was a tremendous amount of data
14 information and cost information that we certainly availed
15 ourselves of. And we looked at it and considered it to be
16 very pertinent to our situation. It was a production
17 facility.

18 JUDGE BOLLWERK: Anything further? Judge
19 Abramson?

20 JUDGE ABRAMSON: Yes. I have a question really
21 addressed to all three petitioners. And I want to see if
22 I understand this writing. I see a common theme that
23 really focuses both what we've said in group 2 and group 3
24 and, to a degree, group 1. And that's this. And I'd like
25 you to tell me whether this is accurate or whether I'm

1 missing something fundamental.

2 It seems to me the common theme is, because
3 there's an absence of facilities -- current existing
4 facilities to process the waste, and because there's an
5 absence of current locations to store this waste, that the
6 concern that's being expressed is, we can't tie down when
7 this is going to be dealt with and we can't tie down where
8 or how it's going to be dealt with. And, therefore, there
9 are concerns about being able to estimate -- accurately
10 estimate the cost of doing so, and that you would all like
11 to see those costs addressed as realistically -- or as
12 reasonably as possible in compliance with the regulations
13 in this process. Am I accurate? Am I missing something?
14 Does that really boil all these down? Let's start with
15 the AG.

16 MR. COPPIN: From the AG's perspective, that's
17 correct. We want a role in developing the cost estimates
18 and the amount of surety that's going to be provided,
19 because we think that's vital to the long-term interests
20 of the State of New Mexico.

21 JUDGE ABRAMSON: NMED?

22 MS. FOX: Judge Abramson, that is correct. And
23 the Environment Department also is concerned about the
24 implications for health and safety on indefinite storage.

25 JUDGE ABRAMSON: I understand that, and that

1 was not one of the ones I --

2 MS. FOX: Okay.

3 JUDGE ABRAMSON: I expressly left that one out.
4 That's group 3. And how about NIRS?

5 MR. LOVEJOY: Well -- I hope this is
6 responsive. Yes, we are very concerned when we hear that
7 the plausible strategy is demonstrated by pointing to
8 existing facilities which are capable of performing the
9 operations necessary. And we are left in great
10 uncertainty as to whether anyone will find it economically
11 beneficial to build such a facility in the United States
12 soon or ever.

13 And we are in great uncertainty also as to the
14 nature of the disposal facility that will be selected and
15 the regulations that will apply to that, and the timing of
16 its development.

17 Probably none of these facilities will call for
18 new technology, but they will call for substantial
19 investments. And there's a big question mark -- a lot of
20 uncertainty about whether this enrichment facility is
21 going to be good business and whether anybody's going to
22 want to build ancillary facilities to serve it.

23 JUDGE ABRAMSON: I'm afraid that you have gone
24 a little off track. My questions was that whether or not
25 it's accurate to say that your concern is -- what will

1 the -- when will facilities be available and what will it
2 cost LES to make -- to take access of those facilities,
3 either for processing or for disposal.

4 And I understand your questioning their
5 economic viability, and I think that's something they
6 have -- that LES has responded to. So let me come back
7 and ask you to answer the question I asked.

8 MR. LOVEJOY: Well, I think the answer is very
9 briefly, yes, we are concerned about those subjects.

10 JUDGE ABRAMSON: And does that accurately
11 summarize all of the concerns with respect to groups 1, 2,
12 and 3, or is there something more? I understand that the
13 something more you're saying is you're concerned about
14 economic viability of the LES facility.

15 MR. LOVEJOY: Well, we are also concerned
16 particularly about the classification of the waste and the
17 nature of the disposal facility.

18 JUDGE ABRAMSON: That's -- okay. I understand
19 that that's a question for what's plausible --

20 MR. LOVEJOY: Yes.

21 JUDGE ABRAMSON: -- strategy. Thank you.

22 JUDGE BOLLWERK: I think we were -- we haven't
23 heard from -- let me see if LES wants to say anything else
24 about what we just heard.

25 MR. CURTISS: No. I think, as we acknowledged

1 at the outset, we understand the concerns that have been
2 expressed relative to the issue of the disposition --
3 management and disposition of the depleted uranium
4 hexafluoride and the attendant decommission of facility.

5 I think, in looking in the discussion that
6 we've had now in issues 1 through 4, Judge Abramson, I
7 think the following would summarize our position.

8 The Commission has articulated the level of
9 certainty that a licensee and applicant has to demonstrate
10 at this phase of the progress, number one.

11 Number two, the purpose of that is to inform
12 the estimation of the costs, which I think goes to the
13 core of one of the questions that you've raised.

14 It is our view, number three, that there is
15 sufficient technical knowledge about the process of
16 deconversion and, indeed, facilities that are doing that.
17 It's not a technically unsolvable problem. They're
18 operating, there's cost information that, in turn, has
19 been factored into our cost estimates.

20 So there is sufficient information to inform
21 that judgment about the initial cost estimates, together
22 with the margin that we believe is built in, when we
23 compare cost estimates of parties that are actually doing
24 this -- or, in the case of USEC, where an estimate has
25 been prepared and accepted.

1 And, coupled with number four, the fact that,
2 as you pointed out this morning, the update requirement,
3 which I believe is every three years that decommission
4 cost estimates have to be updated, will provide a process
5 for updating that estimate.

6 And, number five, finally, with the requirement
7 that the funding for those costs, updated on that periodic
8 basis as the technology develops as we get closer to the
9 ultimate decommissioning of the facility and the tails,
10 that, number five, throughout the process for tails,
11 projected on a year ahead basis, we are required by the
12 Commission's regulations to set aside in some form that
13 does not hinge upon availability of operating revenues --
14 continued operation of facility -- set aside in a letter
15 of credit -- in our case, likely, a surety bond -- to
16 ensure that that fund is available and immune from the
17 kinds of operational problems that are alleged to occur
18 and that we'll address when we get into the next issue on
19 the need for the facility and the justification
20 economically.

21 So that summarizes I think our position, sir.

22 JUDGE ABRAMSON: Let me just follow up your
23 comment with a question. That NMAG has been I think quite
24 clear in expressing their concern that, because we don't
25 know when facilities will be available to take the DUF₆ or

1 where the decommissioned components would go, that there
2 is a degree of uncertainty in estimating initial
3 decommissioning costs -- so whatever is going to be set --
4 initially established as the fund level for the first
5 three-year window. Does your application address those
6 uncertainties?

7 MR. CURTISS: It does, sir. And I'll just
8 summarize and then refer you to the application. There
9 has been a tremendous amount of experience and analysis of
10 the issue with the reports that have been done primarily
11 by the Department of Energy leading up to the letting of
12 the contract for uranium disposition services to construct
13 two of these facilities.

14 And we would submit that, in order for the
15 federal government to say, we're going to enter into a
16 contract to construct deconversion facilities, the
17 estimates do, in fact, have to be quite well developed and
18 quite specific.

19 And, as we discussed earlier, the estimate of
20 \$3.92, which is our best estimate based upon what we know
21 of the UDS contract, is much lower than -- or, to put it
22 differently, our \$5.50 per KG figure incorporates a good
23 degree of conservatism.

24 So I think, from our standpoint, that, together
25 with the USEC estimation -- the staff's review of that --

1 there's a good deal of very current information and a lot
2 of operational experience in terms of low-level waste
3 disposal facilities, which is where we believe this can
4 go, perhaps an abandoned mine, which the Board analyzed in
5 LES 1, found the valued characteristics for such a mine.
6 In our view, there's a real abundance of information that
7 allows us, with great precision, to estimate those costs.

8 The final point that I would make is, to the
9 extent that the arguments that have been raised here
10 implicitly suggest -- and, indeed, I would say explicitly
11 in some cases -- suggest a level of certainty before we
12 get the application, or a demand that the facilities be in
13 operation, that they be licensed and so forth.

14 And, in the absence of that, you have to
15 demonstrate that you have an indefinite ability to fund
16 indefinite storage. That's, in my view, not reflective of
17 what the status quo is today as we know it, and,
18 certainly, the developments that will occur in the next 30
19 years of operation.

20 Finally -- I do have maybe one codicil to my
21 final point -- as I emphasized this morning, there are
22 extensive discussions underway with commercial parties,
23 who expressed a keen interest in the deconversion aspect
24 of this, the disposal, what have you.

25 As I emphasized further, that's an important

1 task that the company is undertaking as a matter of due
2 diligence in its business responsibility, not the
3 licensing standard. We shouldn't overlook the fact that
4 those discussions are going on.

5 And, to be sure, we don't have a commitment,
6 nor do we need it in the licensing context, but we are
7 aggressively pursuing these issues, and, indeed, have
8 discussed with the Governor and the representatives of the
9 state since the summer of last year what our plans are
10 with respect to that business side of the pursuit of
11 disposal of tails and the decommission of facility.

12 JUDGE BOLLWERK: All right. Let me turn then
13 to the staff.

14 MS. CLARK: I have nothing further to add on
15 this issue.

16 JUDGE BOLLWERK: All right. Then rebuttal by
17 any of the petitioners. Let's go ahead and start with the
18 Environmental Department.

19 MS. FOX: None.

20 JUDGE BOLLWERK: The Attorney General?

21 MR. COPPIN: Mr. Chairman, thank you. I just
22 want to make it clear the Attorney General has never made
23 any demand that any facility commit to taking the waste up
24 front. Our position has always been that has to be part
25 of the calculation of the surety provided to the people of

1 New Mexico.

2 There needs to be an element in the cost
3 estimates for indefinite storage of the waste as it is
4 accumulated. There shouldn't be an assumption it's going
5 somewhere in 30 years when there is no place to put it in
6 30 years.

7 And we want to put those numbers to the test.
8 We have provided information that challenges some of the
9 numbers that have been produced, and we've heard today
10 that the numbers are changing. So we want to be part of
11 that process. We want to put those numbers to the test,
12 and we want to be assured that adequate surety is provided
13 to the people of New Mexico.

14 JUDGE BOLLWERK: Okay. But if I heard, LES
15 counsel said that their position, at least as a licensing
16 matter, they don't have to provide for indefinite storage.
17 Is that correct?

18 MR. CURTISS: That's correct.

19 JUDGE BOLLWERK: All right. NIRS?

20 MR. LOVEJOY: Nothing more. Thank you.

21 JUDGE BOLLWERK: All right. Any other
22 questions, Board members?

23 (Pause.)

24 JUDGE BOLLWERK: All right. It's about 25
25 after 2:00. Why don't we go ahead and take a break

1 here -- ten minutes. And we'll come back and start with
2 group number 5 on need for cost benefit analysis.

3 (Whereupon, a short recess was taken.)

4 JUDGE BOLLWERK: We're about to start with
5 group 5, which is NEPA cost benefit analysis. Before we
6 do that, just as a heads up, on group 6, which was
7 radiation detection, there was no opposition to the
8 admission of that particular contention. And we'd
9 indicated I guess in one order that we didn't anticipate
10 the parties would have any argument on it. Is that,
11 indeed, the case? Anyone that wants to say anything about
12 that contention?

13 Having said that, the heads up I'd like to give
14 you, as a Board, we'll have a couple of procedural
15 questions about the contention, just so, you know, it
16 doesn't come as a total surprise. There was a question
17 raised about the adoption of the contention and the
18 implications of that, and we want to discuss that. So we
19 will have some questions about. We're not anticipating
20 that the parties are going to give any argument on it.

21 Okay. With respect to number 5, the NEPA cost
22 benefit analysis -- this is the Attorney General's
23 contention -- Environmental Contention B, which was
24 formerly Contention I. And also there's a NIRS
25 contention, which we've designated EC-7/TC-4, was formerly

1 NIRS 5.1. So I'll turn to the Attorney General and see
2 how much time you want to allocate for rebuttal.

3 MR. COPPIN: Mr. Chairman, none, because we
4 will drop any contention under NEPA --

5 JUDGE BOLLWERK: All right.

6 MR. COPPIN: -- from the Attorney General.

7 JUDGE BOLLWERK: So you will have withdrawn
8 this contention.

9 MR. COPPIN: On the condition we get proper
10 surety.

11 MALE VOICE: You will take up the issue under a
12 surety. Is that what you meant, sir?

13 MR. COPPIN: No, we withdraw any contention on
14 this topic.

15 JUDGE BOLLWERK: All right. That contention
16 then is withdrawn. All right. Then, in terms of NIRS, I
17 guess it's your turn.

18 MR. LOVEJOY: Shall I take ten minutes and five
19 for rebuttal?

20 JUDGE BOLLWERK: That's -- if that's all right
21 with you that's certainly all right with me.

22 MR. LOVEJOY: Thank you. The contention here
23 is that the application does not adequately describe or
24 weigh the environmental, social, and economic impacts on
25 costs of operating the facility.

1 And, from a legal standpoint, NEPA clearly
2 requires a weighing of the environmental costs against the
3 economic, technical, or other public benefits of a
4 proposal. And the examination is required to include all
5 benefits sought by national policy, not merely economic
6 benefits.

7 And these are matters supported by the decision
8 which is -- it's reported at 47 NRC 77. I know it's one
9 of those decisions referred to in the hearing order as a
10 precedent that governs this proceeding.

11 This is not, as that may indicate, the first
12 time that a Board has evaluated the NEPA analysis of a
13 proposed enrichment facility. In the proceeding about the
14 Louisiana facility there was a close study of the likely
15 impact of such a facility, particularly on the price paid
16 for enrichment, and on other market impacts of the
17 facility. And it's established that these matters are
18 material and are appropriately addressed through expert
19 evidence.

20 We have brought forward our contention with
21 bases generated by the analysis of the economist David
22 Osterberg. And it's his conclusion that the needs study
23 contained in the ER is inadequate.

24 And, in a word, what's missing is economic
25 analysis. There seems to be an assumption that, if you

1 tote up the projected enrichment needs of reactors
2 throughout the country or throughout the world, and then
3 balanced them with various combinations of sources of
4 enrichment, you can come up with alternatives for
5 supplying the need and then just sort of pick one
6 voluntarily.

7 But that's not how it works in the real world.
8 The market is what determines who sells what to whom. And
9 the market is going to be governed by prices and costs of
10 various producers.

11 And this is the information that we haven't
12 gotten in the application. There is no attempt to
13 construct a market, and there seems to be an assumption
14 that, if LES builds its facility, it will get 3 million
15 SWU per year business no matter what.

16 That amounts to be -- to an assumption that
17 there's a shortage and that they would be able to serve
18 this shortage. And that, of course, would demonstrate
19 some -- that would be some kind of a demonstration of
20 need. But there's something missing. There's no showing
21 that they're going to be able to participate economically
22 at the prices that prevail now and will prevail for SWUs.

23 As a result, there's a lot that isn't shown by
24 the cost benefit analysis -- or the need analysis.
25 There's no indication that the enrichment needs of U.S.

1 utilities can't be met from sources other than LES plant.

2 In the previous proceeding there were great
3 efforts undertaken to demonstrate what share of the U.S.
4 enrichment market the proposed new facility would obtain.
5 And I think the estimate arrived at was 15 to 17 percent.
6 There's no economic study leading to any such conclusion
7 in the present application.

8 LES objects in its answer that it doesn't have
9 to show the economic viability of the proposed plant. And
10 the business case, so to speak, is not in issue. But,
11 clearly, for NEPA purposes, this is an instance where one
12 of the principal impacts is economic, and the economic
13 effect of the plant must be studied.

14 At the other side of the coin there's no
15 showing of how the use of foreign enrichment services has
16 an adverse impact, economically or otherwise, on U.S.
17 utilities. There were repeated references to the need for
18 another domestic enrichment source, but there's nothing
19 specific to quantify the alleged benefits that that would
20 deliver.

21 In the previous case, and, again, in contrast,
22 there was a lot of discussion of the benefits of foreign
23 competition on the enrichment market. We don't have that.

24 In sum, there's no showing that this new plant
25 will benefit anyone. If it's not going to be able to

1 generate SWUs cheaper, or at least as cheap as current
2 participants in the market, it's just going to be priced
3 out of the market before it begins, and it won't -- there
4 won't be any significant impact.

5 And we're not asking for a -- well, I'm not
6 sure exactly what a business plan would be, but there does
7 need to be an analysis of the economic impact of this
8 plant based on the reality of the factors which will
9 either prevent or enable it to participate.

10 The final basis from Dr. Osterberg is that
11 there is no analysis in the ER of the impact of the
12 proposed plant on the national non-proliferation
13 objectives of the 1993 U.S.-Russian agreement on the
14 purchase of enriched uranium produced from down-blended
15 highly enriched uranium.

16 There's no question that this agreement -- this
17 program is an important national objective. The DOE has
18 spoken or continuing it and in possibly increasing the
19 flow of highly enriched uranium into the program.
20 Certainly, the addition of a new source of supply will
21 hamper the operation of this national program. The extent
22 of that -- the impact of that are not discussed.

23 And I'll reserve the remainder of my time for
24 rebuttal.

25 JUDGE BOLLWERK: All right. Questions?

1 JUDGE ABRAMSON: Counsel, can you cite us
2 relevant portions of NEPA that require the detailed
3 economic study of the effects of this plant or what market
4 share it would obtain?

5 MR. LOVEJOY: I don't think NEPA speaks
6 specifically of market share. This was the conclusion
7 that was generated out of the previous proceeding where
8 the specific impacts of the proposed plant were
9 economic -- were studied. And the Commission held that it
10 was appropriate for the Board to inquire into economic
11 benefits; i.e. price effects that were said to flow from
12 the plant. That's a quote.

13 JUDGE ABRAMSON: But your contention is under
14 NEPA or your contention is --

15 MR. LOVEJOY: It's NEPA.

16 JUDGE ABRAMSON: And what portions of NEPA
17 support your contention?

18 MR. LOVEJOY: The -- I'm afraid I can't from my
19 head give you the section numbers. But there is support
20 in -- let me read you 10 CFR 51.71(d), referring to the
21 content of the EIS -- directs that the EIS should include
22 consideration of the economic, technical, and other
23 benefits and costs of the proposed action and alternatives
24 and indicate what other interests and considerations of
25 federal policy, including factors not related to

1 environmental quality, if applicable, are relevant to the
2 consideration of the environmental effects of the proposed
3 action.

4 JUDGE ABRAMSON: 51. --

5 MR. LOVEJOY: 51.71(d).

6 JUDGE BOLLWERK: Anything further?

7 (Pause.)

8 JUDGE BOLLWERK: All right. Let me then turn
9 to LES and see what you've got to say about this
10 contention.

11 MR. CURTISS: Thank you, Mr. Chairman. The --
12 there's several points that I think we want to make here.
13 And I'll try to be as responsive to the summary that Mr.
14 Lovejoy's offered here, because I think he's precisely in
15 a very focused way summarized the key issues that they've
16 raised in their initial petition of April 6. And so I'm
17 going to just simply summarize what I think our key points
18 are.

19 First, let me address the LES 1 argument.
20 That, because the case in that context was advanced by
21 LES, that that facility would have a price effect bringing
22 prices down. That was appropriate for the Board to
23 consider because that's the way the application -- the
24 proposal was postured by the applicant.

25 Having said that, even the Commission said that

1 the sole consideration under NEPA is not price effects.
2 But I think the important point here is that was unique to
3 the way LES 1 focused the need argument in that case.

4 That's not the argument that we are making in
5 the context of the NEF facility in New Mexico. And we
6 would submit, not only is that not the argument, but it's
7 not required under NEPA for reasons that I'll get into in
8 a minute, and, particularly, given the Commission's
9 decision in CLI 01-04, hydro resources, that addresses
10 this issue squarely and unequivocally.

11 But let me talk just briefly about the purpose
12 of focus of this facility. It is LES's view, as we've set
13 forth in our application, that this facility, having
14 analyzed as we're required to do under 15.20 the overall
15 global market for enrichment, the purpose to be served by
16 this facility is to provide a reliable, competitive,
17 domestic source of enrichment. That's the overall purpose
18 of this.

19 And we would submit, in the context of the
20 analysis of the overall global market, that there is a
21 need for this facility in that context, and it's a need
22 that is not contravened in any particular specifics in
23 what counsel for NIRS has offered today or what's in their
24 initial petition.

25 The analysis is set forth in detail with a

1 variety of different scenarios. And, aside from simply
2 saying that we don't have a business analysis, there is no
3 allegation of any deficiency in that analysis.

4 So let me turn just briefly to hydro, because I
5 think it is dispositive on the question of the scope of
6 NEPA relative to these so-called business decisions, or,
7 as counselor for NIRS says, the economic aspect of this
8 facility.

9 Again, CLI 01-04 -- I'm just going to recite
10 here briefly some of the key findings. The NRC is not in
11 the business of regulating the marketing strategies of
12 licensees. Accordingly, the Commission leaves to an
13 applicant the intricate, ongoing business decisions that
14 relate to cost and profit.

15 Secondly, even though the costs and the price
16 of a particular product or service may be subject to
17 frequent and significant fluctuations, it remains
18 nonetheless within an applicant's business discretion to
19 determine whether market conditions warrant commencing
20 operations. In other words, the initiative to build and
21 operate a nuclear facility belongs to the private
22 applicant, not the NRC.

23 Further, the Commission's role centers on
24 evaluating whether an applicant can conduct operations
25 safely in accordance with applicable safety and

1 environmental regulations.

2 And, finally, the Commission is not in the
3 business of crafting broad energy policy involving other
4 agencies and non-licensee entities.

5 That decision two years ago -- two-and-a-half
6 years ago, in our view, and for reasons that we expand
7 upon in our answer to the April 6 petition of NIRS, sets
8 out directly on point where we think the line should be
9 drawn between the appropriate scope of NEPA and the
10 business considerations that properly reside with the
11 applicant.

12 Secondly, let me just focus on the market
13 analysis -- the business strategy in a slightly different
14 context. And the concern that's been raised that, in the
15 current market with the current SWU prices, how can you
16 possibly envision that you're going to capture contracts.
17 Again, we'd stand on the principle of hydro decided by the
18 Commission.

19 But I also direct the Board's attention to the
20 February 6 Federal Register notice, which, in the
21 financial qualification's context, addresses specifically
22 what the applicant has to do relative to contracts in
23 order for the Commission, as a prerequisite, to find that
24 the applicant has the requisite financial qualifications.
25 And the relevant language is on page 5878.

1 The specific license condition approved in that
2 proceeding, referring to the Commission's decision in LES
3 1, which addressed a minimum equity contribution of 30
4 percent from the parents and affiliates of LES Partners
5 prior to construction of associated capacity -- and here I
6 emphasize -- and having in place long-term enrichment
7 contracts, defined as five years in the LES 1
8 proceeding -- long-term enrichment contracts with prices
9 sufficient to cover both construction and operating costs.

10 So I think we make two points. Number one,
11 NEPA does not require this analysis under the hydro logic
12 articulated by the Commission. And, number two, the
13 financial qualifications criterion, as it was specifically
14 addressed in the Commission's order of February 6, tells
15 us precisely what we have to do relative to enrichment
16 contracts.

17 And the fact of the matter is, if the postulate
18 that NIRS advances here that we won't be able to get
19 contracts because we've made a dumb business decision --
20 if that comes to pass, the fact of the matter is, that,
21 under this criterion, we cannot go forward. We have a
22 prerequisite demonstration that we have to make that we
23 satisfy the contract requirement provision of the February
24 6 order.

25 Let me turn to a couple of additional points

1 here -- and I'm going to be brief and I'm going to seed
2 back what additional time I have, because this is all laid
3 out in some detail I think in our answer itself.

4 The arguments made here -- and this is going to
5 I think -- the right term slop over -- or there will be
6 some overlap between this and the arguments that are made
7 in issue number 7 on foreign ownership and non-
8 proliferation. But I do want to touch upon the point that
9 we failed to analyze the impact on non-proliferation and
10 the national security impact.

11 First, I would submit that, as the applicant
12 has set forth in the application, we've looked at various
13 scenarios, including the existing HEU agreement. We've
14 looked at the possibility of accelerated down-blending.

15 But, importantly, the question was raised --
16 and it's addressed in the application itself -- when the
17 Department of Energy, at the outset of this licensing
18 process, was asked the question, and commented in their
19 letter to the NRC, relative to whether to there was any
20 adverse national security impact, the Department of
21 Energy, which itself is the agency charged with the
22 responsibility for implementation of this very important
23 HEU agreement -- and we acknowledge the importance of it
24 from a non-proliferation standpoint.

25 The Department of Energy -- Bill Magwood, head

1 of the Office of Nuclear Energy, set forth in the comments
2 to the NRC his view that there would not be any adverse
3 national security impact from a facility of this nature.
4 Now, I don't want to overlap with the discussion that
5 we'll have when we get to issue 7.

6 But, suffice it to say, at this context -- at
7 this point in the process the non-proliferation issue, to
8 the extent that the argument is that's a NEPA issue,
9 fundamentally we would submit that the Commission has
10 always taken the position that non-proliferation is a
11 policy issue -- and, certainly, it's a front-page policy
12 issue these day -- is not a NEPA issue cognizable under a
13 need analysis.

14 So, if I could summarize what I think our key
15 points here are, number one, the articulation of the
16 purpose of this facility by LES to be constructed here in
17 New Mexico is set forth in the application. It has
18 nothing to do with price effects. That was a decision
19 that was made with respect to an earlier facility. The
20 argument is much different in this context.

21 Number two, we would submit that the hydro
22 analysis -- hydro resources analysis of the Commission
23 addresses squarely the question of where the business
24 decisions reside. And we would submit they reside
25 exclusively with the applicant and what the NEPA analysis

1 has to include.

2 And, third, I think we would make the point
3 that the financial qualifications criterion is specific in
4 defining what we have to do relative to enrichment
5 contracts. We actually think that the LES believes -- and
6 I think for good and valid reasons -- that the right
7 decision to was made, given their view of the marketplace
8 and the enrichment market, and so forth. The right
9 decision was made to go forward with this facility.

10 But, fundamentally, that's a business decision.
11 The Commission has defined the issue of contracts as
12 important in the financial qualifications context, and the
13 criteria are set out in the order itself. We will satisfy
14 those criteria or we won't get a license. It's as simple
15 as that.

16 And then, finally, we'll address in more detail
17 at that point when we get to issue number 7 the alleged
18 non-proliferation impacts -- the adverse impacts. But,
19 suffice it to say, the non-proliferation policy is an
20 issue that the Commission has never considered to be
21 cognizable in the context that's been suggested here under
22 NEPA.

23 So I'll seed back any remaining time and answer
24 any questions.

25 JUDGE BOLLWERK: All right. Questions by any

1 members?

2 JUDGE KELBER: No.

3 JUDGE BOLLWERK: Judge Abramson?

4 JUDGE ABRAMSON: No.

5 JUDGE BOLLWERK: All right. At this point
6 let's move on to the staff then --

7 MS. CLARK: Regarding --

8 JUDGE BOLLWERK: -- which you indicated I guess
9 originally about the bases of C, D, E, and G.

10 MS. CLARK: Correct. The staff continues to
11 support the admission of this contention as supported by
12 bases A, B, and F, but continues to oppose the admission
13 of bases D, E, and G.

14 Interpreting bases A, B, and F in a light most
15 favorable to the petitioners, the staff read bases A, B,
16 and F as challenging the applicant's discussion of the
17 domestic need of this facility, including domestic
18 enrichment capacity and cost associated with enrichment
19 production.

20 While these bases, perhaps, didn't achieve
21 technical perfection, they are specifically detailed and
22 are supported by expert opinion. Thus, without conceding
23 the merits of this contention, the staff submits that this
24 contention supported by these bases a genuine material
25 dispute adequate to warrant further inquiry.

1 However, staff submits that bases D, E, and G,
2 to the extent that they do not overlap with bases A, B,
3 and F, do not establish a genuine material dispute.
4 Instead of directing attention to omissions or
5 deficiencies in the application, bases D, E, and G
6 essentially seek to challenge conclusions reached in the
7 application with which the petitioner disagree.

8 The petitioner, however, has failed to dispute
9 any of the underlying projections and analyses used in
10 reaching these conclusions. And, without doing that, the
11 parties would be in a very difficult position to
12 litigation such vague concerns.

13 It is for precisely this reason that the
14 Commission required such specificity when formulating
15 contentions. Thus the staff must continue to oppose their
16 admission.

17 When we were interpreting bases A, B, and F, as
18 I said, we saw that as the petitioner alleging that the ER
19 did not adequately contain discussions of the domestic
20 enrichment capacity, the costs associated with enrichment
21 production, all within a framework of the need -- the
22 domestic need for the facility.

23 The staff agrees with LES that specific market
24 details are not required by NEPA. And the staff did not
25 interpret A, B, and F to include that specific

1 requirement. And that's all.

2 JUDGE KELBER: I don't --

3 JUDGE BOLLWERK: Go ahead.

4 JUDGE KELBER: I don't quite get the -- why the
5 last sentence isn't contradicting what you said before.

6 MS. CLARK: The last sentence --

7 JUDGE KELBER: About no need for a market
8 analysis.

9 MS. CLARK: Right.

10 JUDGE KELBER: Yet, we need to have a
11 discussion of the need for the capacity.

12 MS. CLARK: Well, this is precisely why the
13 staff saw that some of these bases did deserve discussion
14 in a more thorough context such as a hearing. Because
15 when you start to get into specifics of exactly what you
16 need to include in the cost benefit analysis it does get
17 much more technical and much more legal than what the
18 staff believes is required for admissibility of a
19 contention.

20 Regarding -- the staff did not interpret that
21 bases that were in this -- that were supporting this
22 contention to be as refined as what now NIRS is asserting
23 they were all intended to mean. And that's simply the
24 staff's -- what I was trying to explain.

25 JUDGE KELBER: Does the staff follow the

1 Commission's ruling in hydro resources regarding the hand-
2 off approach that the Commission would take toward
3 business decisions of an applicant?

4 MS. CLARK: Yes.

5 JUDGE KELBER: And if the staff takes that view
6 then perhaps you can help me understand what's the focus
7 of an economic analysis that would be needed under NEPA.

8 MS. CLARK: Do you mean what the staff's EIS
9 analysis would include, economically speaking?

10 JUDGE KELBER: Yes. Yes, what would you focus
11 on, given that you're not challenging the business
12 decision?

13 MS. CLARK: If you give me one second.

14 (Pause.)

15 MS. CLARK: The staff looks at the cost of the
16 facility, the cost of disposal process in that nature.
17 But the staff does not analyze the market surrounding
18 that.

19 JUDGE KELBER: And the purpose of your looking
20 at the cost of the facility and the cost of disposal and
21 the cost of decommissioning, et cetera, is to aid in
22 establishing decommissioning -- in the decommissioning
23 funding? Or is it focused on NEPA?

24 MS. CLARK: It's focused on NEPA -- the
25 economic impact are focused on the cost benefit analysis

1 for NEPA purposes.

2 JUDGE KELBER: What's the benefit side of what
3 the staff is going to address?

4 MS. CLARK: I'm sorry?

5 JUDGE KELBER: In addition to addressing the
6 costs, what are the benefit sides that you're going to
7 address?

8 MS. CLARK: Economic benefits to the community
9 in terms of jobs provided -- things of that nature.

10 JUDGE BOLLWERK: Well, if I understood the
11 answer that you gave -- you can clarify if I'm wrong --
12 you believe, or you misunderstood, or you didn't quite
13 understand what NIRS was arguing. And now you're saying
14 you support it only to the degree that they want to talk
15 about benefits to the community, but not in terms of the
16 other benefits that they're concerned about the overall
17 need or benefit from producing the SWUs?

18 MS. CLARK: That's correct. When the staff
19 interpreted the bases we just did so differently than what
20 I'm now hearing.

21 JUDGE BOLLWERK: All right. Oh, I think we've
22 used that -- SWU? We've used that quite a few times. All
23 right. All right. Any other questions for the staff
24 then?

25 Well, I take it -- this will clear it. You

1 would support the admission of this contention in terms of
2 benefits, at least only to the degree that they want a
3 discussion of the benefits to the community?

4 MS. CLARK: That's correct.

5 JUDGE BOLLWERK: All right. Let me just turn
6 to NIRS and see if that's what -- well, are you even
7 looking for that or are you more interested in the global?

8 MR. LOVEJOY: Let me try to be terse and maybe
9 hopefully clear. If this project has any benefits -- and
10 Mr. Curtiss has said the benefit sought is to provide a
11 reliable domestic source of enrichment services. If this
12 project has any benefits that, I suppose, would be one of
13 them. There would be also secondary benefits in terms of
14 employment, economic impacts, et cetera.

15 But the principal benefit sought to be provided
16 is a supplier of enrichment services. From our
17 standpoint, they're not going to supply any enrichment
18 services if their costs are higher than the price. So an
19 analysis of the benefits to be provided necessarily
20 implies a study of whether they're going to be an
21 effective market participant.

22 You can't just say there is going to be demand,
23 so we will provide a benefit, because they're not going to
24 buy if the price is too high. It's just necessarily part
25 of the analysis.

1 To say that, oh, the last time we were trying
2 to obtain a \$2 price reduction, or something like that,
3 but now we've changed our mind -- no, that's not the game
4 anymore -- we're just trying to provide a source of
5 domestic enrichment supply. That's not much of a change
6 because, whether that so-called benefit is actually
7 furnished still depends on the economics.

8 Now, it's been said -- if I may continue --

9 JUDGE BOLLWERK: Yes, please. I was trying to
10 transition it in -- now, it's time for your rebuttal and
11 whatever else you --

12 MR. LOVEJOY: Thank you. It's been said that
13 whether they're going to make money or not is their own
14 affair. Well, possibly, if you're just talking about a
15 small uranium production operation, you know, that may be
16 so, although, still, I think you can't tell whether
17 benefits are provided unless you take a look at whether
18 it's going to be an effective participant.

19 But it just isn't true that this plant, and
20 whether this plant is built, is just a small private
21 business matter. This will be an important part of the
22 nuclear industry in the United States if it's built.
23 It's -- it implicates national policy in numerous
24 respects.

25 And, as the regulation which I read a few

1 minutes ago says, a federal agency is required to analyze
2 the impact of a project on other national policies if it's
3 going to have such an impact. And that's the case in this
4 instance. This is not just a private matter.

5 JUDGE BOLLWERK: Do you -- would you like to
6 say anything specific about the arguments made by LES
7 counsel in terms of distinguishing the first LES case and
8 also the -- I think you have said something about HRI, but
9 I'll just offer you that opportunity as well.

10 MR. LOVEJOY: Well -- oh, I should add in
11 response to another argument that was made, that the
12 letter by Mr. Magwood -- I have here -- it's three pages.
13 This is not an environmental impact statement. And it
14 says, among other things, that it is not the Department's
15 intent to opine on the Nuclear Regulatory Commission's
16 responsibilities underneath it. This expresses no opinion
17 on NEPA analysis.

18 As I said concerning LES 1, I don't think this
19 case is any different. I think the analysis undertaken in
20 that case is required in this case, simply because the
21 principal benefit claimed for this plant, that it's going
22 to supply domestic enrichment needs, can't be analyzed
23 with our eyes closed to the economics of it.

24 And, as for the HRI case, again, that instance
25 has no resemblance to a proposal for a facility with a

1 national and, indeed, international implications that this
2 one has.

3 JUDGE BOLLWERK: Judge Abramson?

4 JUDGE ABRAMSON: Counselor, your arguments
5 sound to me a little bit like those of a perspective
6 investor in the sense that your interest in whether this
7 facility is going to make money.

8 If, as the Federal Register and notice from the
9 Commission requires, the LES company must have in hand
10 five-year contracts to provide a certain amount of
11 enrichment services prior to their commencing
12 construction, does not that indicate to you there will be
13 some demonstrated market?

14 MR. LOVEJOY: I believe the notice called for
15 something like half the capacity, as demonstrated by five-
16 year contracts. It's some evidence on the subject. This
17 is intended to be a 30-year plant. Five-year contracts
18 bear on the subject; they don't amount to an economic
19 analysis of the benefits intended to be provided by this
20 plant.

21 JUDGE ABRAMSON: They demonstrate that there is
22 some market for the services. Is that correct?

23 MR. LOVEJOY: If -- well, a contract is the
24 result of a marketing operation.

25 JUDGE ABRAMSON: My second question for you is,

1 if the decommissioning fund is established in such a way
2 that it covers at any time during the operation of this
3 facility enough funding to deal with all the
4 decommissioning and all the disposal, and that funding
5 must come from the investors in the facility, not from
6 some governmental agency, does not that put the entire
7 risk of the facility in the hands of those investors?

8 MR. LOVEJOY: The entire risk of --

9 JUDGE ABRAMSON: The entire economic risk. And
10 if that risk includes environmental remediation -- that's
11 also part of this fund.

12 MR. LOVEJOY: The -- I would disagree that the
13 decommissioning funding protects against all environmental
14 risks. The decommissioning funding provides for the
15 dismantlement and cleanup of the site. And I think we're
16 planning to have it cover the disposal of the tails. But
17 there are other environmental risks -- QUAST, if you will,
18 that are to be analyzed under NEPA that are not covered by
19 that.

20 JUDGE BOLLWERK: Counselor?

21 MR. CURTISS: I hesitate to try to reclaim some
22 of my time that I yielded back, but I think it --

23 JUDGE BOLLWERK: I just have one rule in this
24 instance, which is this gentleman over here --

25 MR. CURTISS: Absolutely.

1 JUDGE BOLLWERK: -- gets the last word.

2 MR. CURTISS: Absolutely. And I won't prolong
3 the discussion. But it's a very important discussion, and
4 I think the questions and the discussion between counsel
5 for NIRS and LES is focusing on really the key issues. So
6 I hope it's illuminating for the Board. And so I hope not
7 to shed less light on it.

8 But I think fundamentally our position comes
9 down to the standards that have been established by the
10 Commission for addressing this very issue. In the one
11 context, hydro resources, the Commission has spoken as to
12 the extent of which the Commission is inclined to get into
13 the business decisions.

14 Counsel for NIRS has made the case -- if I have
15 this correctly -- that NEPA requires the agency to look at
16 an economic analysis. Can LES participate economically at
17 the prevailing SWU price? And we would submit that in a
18 NEPA context that issue is squarely addressed by HRI in
19 the Commission's decision. And we amplify upon that in
20 our answer.

21 In the financial qualification's context, which
22 is not a NEPA issue, but a very important one, that's the
23 context in which the Commission in its February 6 order
24 has articulated precisely what has to be done -- the
25 contracts that have to be entered into, which presuppose,

1 Judge Abramson, as I think you have asked, that there is
2 an ability to compete in the market, not because there
3 will be a declining price, but because domestic utilities
4 are interested in having a competitive source of supply,
5 given the uncertainty in the worldwide market. And that's
6 set forth in the application.

7 But in the context of this issue it's not a
8 factual issue; it's not a merits dispute. These two
9 fundamental principles, HRI on the one hand and the
10 February 6 order on financial qualifications, establish
11 what we view to be the lynchpin for this Board to resolve
12 this issue by concluding that these contentions, which
13 fundamentally go to the business case -- the economic
14 analysis -- whether we can compete in the SWU market --
15 are inadmissible for that reason.

16 JUDGE BOLLWERK: All right.

17 MR. LOVEJOY: Well, while we're talking about
18 what's the latest precedent, the HRI case -- I think was
19 in '01 -- the Commission's order earlier this year
20 expressly refers to that decision involving economic
21 analysis of the previous proposal -- cites it.

22 It refers to it as resolving a number of issues
23 concerning uranium enrichment licensing and says that it
24 may be relied upon as precedent. And that's, I think, the
25 direction to all of us governing the scope of NEPA

1 analysis because that's the principal subject of that
2 decision.

3 JUDGE ABRAMSON: I'm sorry. What is that
4 relying to? HRI?

5 MR. LOVEJOY: That is referring --

6 JUDGE ABRAMSON: It's referring to HRI?

7 MR. LOVEJOY: That is referring to the decision
8 in re Louisiana Energy Services, April 3, 1998, CLI 98-3,
9 reported at 47 NRC 77. That's expressly referred to as
10 governing precedent.

11 JUDGE ABRAMSON: With that specificity? It
12 says resolving a number of issues. Is that correct?

13 MR. LOVEJOY: Yes.

14 JUDGE BOLLWERK: So -- just maybe trying to
15 understand. You're saying that reference overrules
16 whatever precedent HRI might have here?

17 MR. LOVEJOY: I think it could have that
18 effect. I think what's going on here is that the
19 Commission is pointing out a decision which was directly
20 applicable to this kind of a proceeding and this kind of
21 facility.

22 JUDGE BOLLWERK: All right. Any other
23 questions?

24 (Pause.)

25 JUDGE BOLLWERK: All right. At this point I

1 guess we're ready to move on then to number -- area number
2 6, radiation protection. There was one contention --
3 Environmental Department -- what we've labeled TC-3/EC-4,
4 which was formerly Environmental Department E.

5 There's no opposition to the admission of this
6 contention. There was, however, a point raised in a
7 footnote. And I think Mr. Kelber may -- do you have a
8 question about this one as well? All right.

9 Two separate points. Point raised in a
10 footnote about the fact that this contention was adopted
11 by the Attorney General, and the impact that adoption
12 might have if the Attorney General, for whatever -- well,
13 it was found not to have any admissible contentions other
14 than this potential contention, which they have adopted.

15 The staff making the point that at that point
16 the Attorney General will basically be relegated to
17 seeking interested governmental entity participation. And
18 I guess my question is, at least one of the benefits of
19 adoption, if there is -- is the fact that, if a contention
20 is dropped by a party -- in this case, we'll say the
21 Environmental Department -- one that adopts that
22 contention can, say, basically into the shoes of that
23 party potentially without having to meet the late filing
24 standards.

25 If they are out as a party, as you've argued,

1 how do they obtain that benefit? The argument I
2 understood the staff to make was they could not be an
3 intervener by adopting someone else's contention if you
4 had no contentions of your own. Is that correct?

5 MS. CLARK: Yes.

6 JUDGE BOLLWERK: And I guess the question then
7 is how do they receive that benefit if they -- as you
8 asserted is correct -- what you assert is correct?

9 MS. CLARK: Well, looking at Section 2.309, it
10 specifically requires that a petitioner who desires to be
11 a party must establish standing and propose at least one
12 admissible contention.

13 And our position is that that places
14 affirmative duty upon a participant to proffer an
15 admissible contention. And if they do not do so, they
16 should not be granted party status.

17 And, as you pointed out, they could participate
18 as an interested state. And, as long as that contention
19 is admitted into the proceeding, they may participate.

20 In the event that the party proffering that
21 contention withdrew it, I would take the position that
22 they would not be able to pursue that issue unless they
23 sought admission as late-filing.

24 JUDGE BOLLWERK: All right. I take it,
25 basically, your argument is based on the word propose. So

1 you're arguing is not adopted essentially.

2 MS. CLARK: Yes.

3 JUDGE BOLLWERK: All right. Let me see if
4 anyone else sitting here wants to make any arguments with
5 respect -- anything that LES wants to say on that point?

6 MR. CURTISS: No. We'll defer to others to
7 discuss this issue.

8 JUDGE BOLLWERK: All right. Would the Attorney
9 General like to say anything about this subject?

10 MR. COPPIN: Thank you, Mr. Chairman. First of
11 all, staff provides no authority for their position that
12 you can't adopt someone else's contention without more
13 contentions that you're being accepted to.

14 The NMED and the Attorney General were both
15 specifically invited to adopt contentions offered by the
16 other -- in this Commission's order of April 15, 2004.
17 And that's what we were responding to.

18 And the Board also invited NMED and the
19 Attorney General in the order of May 24, 2004, to adopt
20 contentions for Mr. Lovejoy's clients.

21 So this is the invitation of the Board to adopt
22 contentions. There is specifically -- the rule does
23 provide for adoption of contentions, and it doesn't say
24 that you must have other admissible contentions. I think
25 the Chairman has pointed out exactly that reason -- is

1 that if NMED should drop its contention the Attorney
2 General can carry it forward.

3 We've seen that here today -- several parties
4 dropping contentions. And it -- and as the case goes
5 forward I would assume, as the issues gets narrowed, that
6 other contentions may drop by the wayside.

7 We think it's an important contention for the
8 State of New Mexico. The Attorney General wants to make
9 sure under her constitutional and statutory authority that
10 that contention is carried through.

11 I've worked with the Attorney General now for a
12 little over 20 years. I think Tannis has been around
13 almost as long. Our departments get along with very, and
14 we will coordinate and cooperate with each other to the
15 extent possible.

16 But you have to recognize that we do serve two
17 separate constitutional officers, and we may at some point
18 not see eye-to-eye on things. But, generally, we will
19 pledge to this Board that we will work together on these
20 contentions and not cause any duplication or confusion.

21 JUDGE BOLLWERK: All right. Thank you. All
22 right.

23 Judge Kelber, I believe you had a question
24 relating to this contention.

25 JUDGE KELBER: I'm somewhat puzzled. When I

1 read the petition most of the attention is paid to the
2 chemical hazards. Reference is made to some earlier
3 releases in Europe, I believe it is, all occurring in '98
4 and '99, which were really actually very low. And I don't
5 think there's any releases cited in the United States.

6 I want to know what is the basis for concern
7 outside of the regulatory concern for protection of
8 workers, in which the regulations are -- which regulations
9 are very strict.

10 MS. FOX: Would you like me to respond?

11 JUDGE BOLLWERK: Please.

12 MS. FOX: What we've stated in our petition is
13 that the application doesn't comply with 10 CFR 20.1101
14 and the requirements set forth therein. And in our
15 petition we identify those requirements, such as the
16 application is deficit in providing the technical bases
17 for monitoring and assessing affluent discharge an in
18 estimating occupational and public radiation doses.

19 The radiation dose quantities are provided but
20 are not supported by calculation protocols, formula, or
21 variables -- for example, occupancy factors, seasonal
22 variation, diffusion coefficients.

23 And so this is a regulatory matter. What we're
24 saying is the application is deficient in that regard.
25 And what I hear LES saying is it -- in some regard,

1 that -- you know, they nor staff are objecting to this
2 contention. And, therefore, we are hopeful that LES will
3 shore up their application in this regard.

4 JUDGE ABRAMSON: Do you view this as a
5 contention of omission?

6 JUDGE KELBER: I guess that's what it must be.

7 JUDGE ABRAMSON: You're not challenging --

8 MS. FOX: I don't know if it's an omission --

9 JUDGE ABRAMSON: You're not challenging a
10 specific content. You're saying there's something omitted
11 from the application.

12 JUDGE BOLLWERK: Something missing.

13 MS. FOX: Or inadequate, yes.

14 JUDGE ABRAMSON: Well, inadequate leaves me a
15 little puzzled. It's either there or it -- there's either
16 something there that's wrong or there's something not
17 there that should be there. Which is it?

18 MS. FOX: We're saying that it's deficient in a
19 number of regards identified in the petition -- in our
20 petition.

21 JUDGE ABRAMSON: I take that as a contention of
22 omission.

23 JUDGE BOLLWERK: I guess.

24 JUDGE KELBER: With respect to what though?

25 See, my problem is I don't know what's being omitted. Can

1 you be more specific about some items you think are
2 omitted that should be included?

3 MS. FOX: No, I can't be more specific than
4 we've already been in our petition.

5 JUDGE ABRAMSON: When you say in your petition
6 that it's deficient in providing the technical bases for
7 monitoring and assessing affluent discharge, which I think
8 if pretty close to a quote from your petition -- when you
9 say it's deficient in providing us, do you mean they're
10 not providing it at all or that what's provided isn't
11 accurate?

12 MS. FOX: I have not reviewed the application
13 in that regard in some time, understanding from your order
14 that the argument was not going to be required on this.
15 And so I can -- if you would like I'd be happy to go
16 back --

17 JUDGE ABRAMSON: No, I'm not asking you to
18 argue the merits. I'm simply asking what you're
19 contending. Is it absent or is it wrong?

20 MS. FOX: What I'm --

21 JUDGE BOLLWERK: Why don't we go ahead and
22 defer this and let you come back -- take a look at it.

23 MS. FOX: I would need to look at the
24 application.

25 JUDGE BOLLWERK: All right. Does anybody on

1 the Board want to hear further on this then?

2 JUDGE KELBER: Well, let me quote from the
3 petition. LES has not sufficiently evaluated the public
4 health consequences of potential accidents to the -- to
5 critical segments of the population. This was a -- this
6 discussion was referred to earlier I believe. And there's
7 a discussion of the chemistry of uranium hexafluoride.

8 And that's about the only place I can -- I
9 think you will have to get back to us on what specifically
10 you are -- some specific examples of omissions.

11 MS. FOX: Judge Kelber, the -- our contention
12 with respect to the radiation control program is in our
13 initial petition. And what you are reading from is in our
14 reply and goes to the health and safety concerns with
15 respect to long-term storage.

16 We did not address the radiation protection
17 program deficiencies in our reply because both staff and
18 LES conceded that that was an admissible contention.

19 JUDGE BOLLWERK: The original contention did
20 cite some portions of the safety evaluation report, so I
21 guess we'll just have to go back and look at those in this
22 context. Anything else?

23 (Pause.)

24 JUDGE BOLLWERK: All right. Let's go ahead and
25 move on to category 7. This one we've titled Foreign

1 Ownership/National Security/Nuclear Proliferation.

2 There's two contentions under this particular category.

3 Attorney General Environmental Contention,
4 which was formerly Attorney General A and also NIRS
5 Environmental Contention-8/Technical Contention-5, which
6 was formerly NIRS 5.2.

7 Let's go ahead and start with the Attorney
8 General, and how much time do you want to save for
9 rebuttal?

10 MR. COPPIN: Five minutes, Mr. Chairman.

11 JUDGE BOLLWERK: All right.

12 MR. COPPIN: I think there's another category
13 that falls in the Attorney General's main concern about
14 this process. I think she raised the issue of foreign
15 ownership as a potential concern about lack of commitment
16 to the population of New Mexico -- that they wouldn't have
17 a commitment -- long-term commitment.

18 And I think that when you return to the issue
19 of the surety -- the monetary guarantees -- that the -- a
20 sufficient amount of funds would be available to a third
21 party, such as the State of New Mexico, to decommission
22 the plant, to take care of waste, to store. Then the
23 concerns about foreign ownership go away. Any ownership
24 would be appropriate with adequate surety.

25 The point we tried to make was we wanted to be

1 sure that the people of New Mexico are taken care in a
2 long term, and adequate surety would do that. And the
3 Attorney General wants to participate in that process of
4 determining adequate surety. That's simply the reason why
5 that was raised.

6 JUDGE BOLLWERK: All right. So, essentially,
7 this goes back to the surety point -- your concern about
8 surety. And in this context it's heightened I guess by
9 the fact there's a foreign owner to --

10 MR. COPPIN: Yes.

11 JUDGE BOLLWERK: -- summarize?

12 MR. COPPIN: Yes, Mr. Chairman.

13 JUDGE BOLLWERK: All right. Any questions by
14 the Board members?

15 (No response.)

16 JUDGE BOLLWERK: All right. Let's turn to NIRS
17 then and their contention.

18 MR. LOVEJOY: Thank you, Your Honor.
19 Contention we make here is that the operation of the
20 proposed LES facility would post an unnecessary and
21 unwarranted challenge to national security and to global
22 nuclear non-proliferation efforts.

23 The passage from the regulations I read a
24 couple of minutes ago applies here, and it directs that an
25 EIS include consideration of the economical, technical,

1 and other benefits and costs of the proposed action and
2 alternatives and indicated what other interests and
3 considerations of federal policy, including factors not
4 related to environmental quality, if applicable, are
5 relevant to the consideration of the environmental effects
6 of the proposed action. That's 10 CFR 51.71(d).

7 Let me read first from a recent text -- and I
8 quote. There's a consensus among nations that
9 proliferation cannot be tolerated. Yet, this consensus
10 means little unless it is translated into action.

11 Every civilized nation has a stake in
12 preventing the spread of weapons of mass destruction.
13 These materials and technologies and the people who
14 traffic in them cross many borders.

15 To stop this trade the nations of this world
16 must be strong and determined. We must work together; we
17 must act effectively -- unquote.

18 And that statement is by President Bush,
19 speaking in February of this year. And the point, if it
20 wasn't already clear, is that non-proliferation of nuclear
21 weapons' technology is very much a national objective.

22 Now, looking specifically at another federal
23 agency's consideration of these factors. In 1996 DOE
24 issued an EIS and a record of decision on the subject of
25 disposition of surplus highly enriched uranium -- and the

1 ROD came out in August of 1996.

2 In the EIS DOE recited -- and I'll summarize
3 briefly -- the pluses and minuses of various proposals
4 from the standpoint of non-proliferation objectives. And,
5 quote, it concluded that the preferred alternative would
6 best serve the purpose and need for the HEU disposition
7 program for several reasons.

8 And DOE considers all of the action
9 alternatives to be roughly equivalent in terms of the
10 fundamental non-proliferation objective of the program.
11 Both 4 percent LEU in the form of commercial spent nuclear
12 fuel and .09 percent LEU oxide for disposal as low-level
13 waste and any allocation between them fully serve the non-
14 proliferation objective, as both processing of the spent
15 fuel and re-enrichment of the .9 percent LEU to make new
16 weapons new material would be technologically difficult
17 and expensive.

18 What we're suggesting -- what we're requesting
19 here is analysis of the same variety with the same factors
20 considered -- considering the impact of the planned
21 enrichment facility. What is the effect on our nation's
22 non-proliferation commitment? After all, NEPA requires a
23 weighing of the environmental costs against the economic,
24 technical, or other public benefits of a proposal.

25 And, now, there are various bases cited based

1 on analysis by Dr. Makhijahni. For example, the ER should
2 consider costs and benefits of using down-blended Russian
3 uranium and output from a USEC centrifuge plant to meet
4 enrichment needs in lieu of the NEF plant. This would be
5 an elaboration of the no-action alternative.

6 The no-action alternative should also include
7 the choice of increasing the rate of down-blending to meet
8 enrichment needs if there are additional needs.

9 The consideration should be given to the
10 possibility of declaring an additional up to 600 metric
11 tons of U.S. highly-enriched uranium as surplus and
12 available for down-blending. LES claims that this is
13 speculative. But on May 7 DOE Secretary Abraham announced
14 a further study of this possibility, at least with respect
15 to another 100 metric tons.

16 There are other proliferation-related impacts
17 that follow from constructing the LES plant. And a valid
18 cost benefit analysis would include these consequences.
19 Such as possibly foregoing the opportunity to add
20 additional U.S. or Russian HEU to the sources of supply.

21 Next, the proliferation impact of
22 simultaneously constructing both the LES and the USEC
23 centrifuge plants. Also, the impact upon non-
24 proliferation goals of the U.S., ostensible non-
25 proliferation leader, adding a centrifuge plant to its

1 inventory.

2 Also, the effect in general of promoting of
3 centrifuge technology in light of the ease with which it
4 can practiced in secret, as compared with the large
5 gaseous diffusion plants.

6 The discussion in the ER of the no-action
7 alternative and of cost and benefit is, quote, virtually
8 silent on the benefits of not building the NEF. And --
9 unquote -- the Commission has held that such an
10 environmental study is incomplete. And I'm quoting from
11 that same decision that the Commission referred to as
12 applicable precedent at 47 NRC 98.

13 Now, there's another way in which the LES plant
14 enhances proliferation risks. We have all seen history
15 emerge, a lot recently, and then some actually earlier --
16 the history of URENCO's failure to maintain security with
17 respect to sensitive technology.

18 Issues of management capabilities, specifically
19 issues of management's ability to protect restricted data,
20 are clearly relevant here. There are precedents in the
21 Commission's decisions where management character has been
22 introduced into licensing proceedings. And they're cited
23 in our briefs, and I'm sure they're familiar to the Board.

24 The facts of this instance, so far as is known,
25 include the following. And I have some of these documents

1 here, and I would like, if I may, to hand them out.

2 First of all, there's a report just issued in
3 May of this year by Bower, et al., concerning --

4 JUDGE BOLLWERK: Are these cited -- I want to
5 just make sure. Are these cited in your brief?

6 MR. LOVEJOY: Yes.

7 JUDGE BOLLWERK: Okay.

8 MR. LOVEJOY: Concerning the activities of
9 Abdul Quadeer Khan, the father of Pakistan's nuclear
10 weapons program, who, of course, began his career, or had
11 in his early career, worked in a design office in the
12 Netherlands where he had access to highly-secret URENCO
13 data about ultracentrifuge enrichment plants.

14 He used this information to speed the
15 development of Pakistan's nuclear weapons. And he
16 subsequently made this technology available apparently to
17 North Korean, Libya, and Iran. This is discussed
18 specifically at pages 9 through 20 of this report.

19 In addition, sometime between 1985 and 1990
20 blueprints with the specifications of modern
21 ultracentrifuge facilities were taken or stolen by one-
22 time employees of MAN, which was a principal shareholder
23 of Uranit, a participant in URENCO.

24 Experts in ultracentrifuge design and
25 construction, Bruno Stemmler and Karl Heins Shott, are

1 said to have used expired entry permits to enter Uranit to
2 copy the blueprints. And then they sold them to Iraq.
3 That's discussed on pages 26 and 27 of this report.

4 Stemmler and another MAN expert, Walter Busse,
5 went to Iraq to assist in the development of centrifuge
6 enrichment capacity. After the first Gulf War the
7 International Atomic Energy Agency found advanced carbon
8 fiber reinforced centrifuges in Iraq.

9 In 1984 the German firm of Leybold Heraeus
10 responded to an invitation for bids by Uranit for delivery
11 of cascade tubing, autoclaves, UF₆ containers, and
12 desublimators. And they turned around and asked Uranit
13 for the blueprints to assist in their bidding.
14 Subsequently, an official of Leybold ordered autoclaves,
15 containers, desublimators from a Swiss firm. And most of
16 this equipment was manufactured and shipped to Pakistan.

17 There's more such history. I have other
18 articles describing this. I need not go into the details
19 because I can, if I may, put them in the record of the
20 proceeding for the Board's reference.

21 JUDGE BOLLWERK: Where are you going with this,
22 Counselor?

23 MR. LOVEJOY: These matters go to the
24 management character of the organization that is seeking
25 to open this enrichment facility and to its ability to

1 protect restricted data, which is certainly one of the
2 requirements that this Board -- the Commission are going
3 to have to include in any permit issued for this facility.

4 And, certainly, this also goes to the national
5 security determinations that this Board -- this Commission
6 need to make in connection with this licensing. And I'll
7 reserve my time for rebuttal. Thank you.

8 JUDGE ABRAMSON: Counsel, with the -- with
9 regard to the discussion before you got into the national
10 security side of it where you're talking about
11 alternatives and the absence of alternatives from the --

12 MR. LOVEJOY: Yes.

13 JUDGE ABRAMSON: -- ER and the EIS, in your
14 view, are those -- are you speaking of those failures of
15 the EIS -- or the -- sorry, of the ER in the context of a
16 failure to comply with a NEPA needs analysis? Or is there
17 something else on -- that you're telling us?

18 MR. LOVEJOY: Well, the needs analysis -- the
19 cost benefit analysis is one element. I think this is a
20 deficiency in discussion of the no-action alternative.

21 JUDGE ABRAMSON: What would be the effect of
22 including other -- studies of other alternatives? For
23 example, if the other alternatives analysis demonstrated
24 that something was less costly would that mandate that
25 this Board or the Commission -- or our Commission reject

1 the application because some other method was found less
2 costly?

3 MR. LOVEJOY: NEPA does not impose that
4 mandate.

5 JUDGE ABRAMSON: I see.

6 MR. LOVEJOY: NEPA imposes the requirement of
7 analysis, study, and explanation.

8 JUDGE BOLLWERK: All right. Any other Board
9 questions at this point?

10 (Pause.)

11 JUDGE BOLLWERK: All right. Then let me turn
12 then to LES.

13 MR. CURTISS: Thank you, Mr. Chairman. I'll
14 summarize what we've set forth again in our answer. This
15 is an issue that, insofar as the nexus to NEPA and the
16 need evaluation, which is the ostensible focus of this
17 contention, we have a difficult time understanding.

18 But we'll nevertheless address the issues that
19 have been raised because they are serious challenges, but
20 submit at the outset that these issues have nothing to do,
21 A, with the NEPA process, and, B, with the NRC regulatory
22 process itself in making a decision on this application.

23 I'll begin by making the observation that,
24 aside from these very general allegations about the
25 credibility of the management of a partner in URENCO,

1 there's been absolutely no effort to link those charges to
2 anything that we've submitted in the application.

3 So there is no discussion of the procedures
4 that we have proposed for classification of information.
5 There's no discussion of the applicant's fundamental
6 nuclear material control program or any other aspect in
7 which the contention alleges a deficiency in our
8 application. That's point number one.

9 Point number two, as the staff made clear in
10 its scoping summary report on page 19, which we know NIRS
11 is familiar with because it's cited in other contexts for
12 propositions that support its position, but conveniently
13 ignored here. The staff points out in this April 2004
14 scoping summary report that major categories of these
15 issues not analyzed in detail in the EIS include, among
16 others, non-proliferation concerns and credibility.

17 I want to expand on both of those because those
18 issues have been addressed recently in a 2001 decision in
19 the DCS Box proceeding where the licensing board rejected
20 a proposed contention raising foreign non-proliferation
21 policy issues, wherein the Board stated -- and this is in
22 LB01-35 -- quote, Any issues pertaining to the federal
23 government's non-proliferation policy clearly go beyond
24 the scope of the DCS construction authorization request,
25 environmental report, or quality assurance plan.

1 In short, non-proliferation issues are not
2 cognizable under any aspect of the application here, not
3 because they're not important -- and I'll get to that in a
4 minute -- but because they're simply not within the scope
5 of NEPA. No nexus has been alleged with respect to
6 anything that the applicant has proposed in any respect
7 dealing with safeguards information, classification,
8 fundamental nuclear control programs, or anything else in
9 the application.

10 Third, as has been made clear in a recent
11 Commission decision, CLI 01-24, it is also well
12 established that, quote, For management character to be an
13 appropriate issue for adjudication in a licensing
14 proceeding, quote, there must be some direct and obvious
15 relationship between the character issue and the licensing
16 action in dispute.

17 Yet, we have a document that's laid on our desk
18 here that purports to describe issues that the interveners
19 allege -- that NIRS allege in some undefined way with
20 scurrilous allegation, very frankly, as to the character
21 of a partner in this partnership -- a report that goes
22 back some 30 -- 20 years, that is laid before us with no
23 effort to connect it to the application itself.

24 The -- I'll just continue here, and I think
25 I'll cover all the major points and, likely, yield back

1 some time for further discussion. The conduct of the
2 centrifuge operations is done in secret. Well, in fact,
3 it's appropriate, as we've laid out in the various
4 documents, some of which includes security plans and
5 fundamental nuclear material control programs, that the
6 confidentiality of this information be maintained. It's
7 required to be done pursuant to international treaties
8 that have been entered into here with respect to this
9 facility.

10 And it was unclear to me whether that was an
11 effort in a pejorative way to characterize the fact that
12 we are going to maintain the operation of this facility in
13 accordance with all applicable NRC requirements or
14 application that's been submitted with all applicable
15 safeguards and security requirements and material and
16 information control provisions to the NRC. It's being
17 reviewed. And if there's any allegation as to any
18 deficiency we have not heard it yet.

19 And I think the final point that I would make
20 is that, with respect to the policy issues having to do
21 with the possibility of down-blending more HEU or the
22 prospect of relying on the existing down-blend program,
23 again, to the extent that those issues are offered as
24 ostensibly related to NEPA, we would submit that the
25 analysis in our application, which looked at several

1 different scenarios in the environmental report,
2 specifically looked at the impact on the projection of
3 enrichment demand of a variety of different scenarios,
4 including the current HEU down-blend program and the
5 possibility of accelerating that.

6 Now, I'll connect that to another important
7 need point -- and that is that the facility that we are
8 proposing to build is going to serve an important national
9 need to ensure that domestic utilities aren't unduly
10 relying on foreign supplies, wherever they might come
11 from.

12 There's nothing here that, in our view, is
13 inconsistent with the policy concerns that have been
14 raised here. And I would submit -- although I'm going to
15 address them in a minute -- the policy debate that's
16 offered here as somehow relevant to the NRC licensing
17 process is exactly that. It's a policy debate -- that
18 this Board ought to entertain an argument that the
19 Stockholm Initiative ought to be adopted as policy, or
20 accelerated down-blend ought to be adopted as policy.

21 Let me address specifically what the Department
22 of Energy had to say about the impact of this specific
23 facility on national security. And the question came from
24 someone who I think is unrivaled in his advancement of the
25 HEU agreement and the non-proliferation objectives

1 inherent therein -- from Senator Pete Domenici -- who
2 asked in March of 2003 of Mr. Magwood, the had of the DOE
3 Office of Nuclear Energy -- Do you have any concern that
4 the efforts of URENCO to build a new facility in the
5 United States would in any way pose a national security
6 concern at all.

7 Mr. Magwood -- No, none at all. Mr.
8 Domenici -- Do you believe that the development of new
9 enrichment capacity if sufficiently important to the
10 United States, as far as our energy security, that the
11 development of this facility by URENCO should be
12 encouraged and facilitated by the Department of Energy?
13 Mr. Magwood -- Absolutely. We are doing everything we can
14 do to help at this stage.

15 Now, this is the same department that is
16 responsible within the federal system for the
17 implementation of the HEU agreement. And this is the same
18 senator who was instrumental in advancing that and who is
19 instrumental in proposing that it be continued and
20 accelerated.

21 And the charge based upon information that goes
22 back years that is not connected in any way to the NEPA
23 issue, in the context of the very issue that was squarely
24 raised and squarely addressed -- you can probably detect
25 from my tone here -- we categorically reject. Not only on

1 its merits, although this is not a merits consideration,
2 but because it is fundamentally irrelevant to the
3 licensing proceeding here to debate the non-proliferation
4 objectives or management integrity issues where there's
5 very little effort to connect those management integrity
6 issues in some form of nexus to the application here and
7 the material that's before the Board.

8 So, with that, I have stated this issue as
9 clearly as I can in view of the charges that have been
10 made. And I'll yield back my time and answer any
11 questions that the Board might have. Thank you.

12 JUDGE BOLLWERK: Judge Kelber?

13 JUDGE KELBER: I'll pass for now.

14 JUDGE BOLLWERK: All right. Anything from the
15 staff?

16 MS. CLARK: Well, the staff agrees here that --
17 and continues to agree to contend that this contention on
18 non-proliferation should not be admitted. The majority of
19 the instances -- as LES just indicated, the issues raised
20 by NIRS were discussed in the applicant's ER, and NIRS is
21 challenging the conclusions reached by the applicant
22 without detailing specific provisions of the underlying
23 analysis which they allege to be in error.

24 In other instances NIRS is simply stating their
25 opposition to the LES proposal and disagreement with broad

1 energy policy, which the staff contends are outside the
2 scope of this proceeding.

3 I don't want to get into too much
4 discussion -- we've already here, but, just, finally,
5 regarding the alleged management concerns at URENCO -- as
6 the staff indicated in our filing URENCO is not the
7 subject of this application. URENCO has never been
8 subject to NRC regulations -- is not now.

9 NRC regulations require management plans to be
10 in place, and LES has submitted in its application these
11 management plans. And NIRS is not detailing anything
12 specific about these management plans that would raise the
13 type of concerns to which they're attempting to address.

14 And thus the NRC continues to oppose admission
15 of this contention.

16 JUDGE BOLLWERK: Okay. Judge Kelber.

17 JUDGE KELBER: Both LES and staff, Department
18 of Energy has issued, I'm aware, a number of environmental
19 impact statements, both in respect to the mixed oxide
20 fabrication, as well as to down-blending and the rest.

21 Does this -- are they essentially part of our
22 record -- are they assumed to be part of the record here?
23 Does the staff, in preparing its EIS, refer to those
24 reports?

25 MS. CLARK: No, we do not.

1 JUDGE KELBER: I see. LES, do you refer to the
2 DOE environmental impact statements?

3 MR. CURTISS: We have not, Judge Kelber, in our
4 application referred to the analyses that you've asked
5 about in the context of the DCS Box proceeding. We're
6 certainly --

7 JUDGE KELBER: There are other EIS's --

8 MR. CURTISS: Yes, sir. We're certainly --

9 JUDGE KELBER: -- such as on down-blending.

10 MR. CURTISS: -- aware of them. I would say
11 that the Commission, in its order, addresses one specific
12 Department of Energy PEIS relative to the impacts
13 associated with the -- environmental impacts associated
14 with the construction and operation of deconversion
15 facilities. And the staff is authorized I believe to take
16 into account information in that source.

17 I think our view would be that, to the extent
18 that there are EISSs of any nature -- PEIS specific or what
19 have you -- which contain relevant information that can be
20 drawn upon, consistent with what the Commission
21 articulated on one specific one, we would certainly have
22 no objection. In fact, we think there might be an
23 advantage of drawing upon information or issues are
24 analyzed by the federal government in some capacity and
25 incorporating that in the NRC's EIS.

1 It's certainly a staff decision to make -- and
2 I don't mean to encroach upon whatever discretion they
3 might have in this regard. But the analysis of these
4 issues in those EIS's could be incorporated. We would
5 not, I think, take the position that a separate EIS, where
6 a matter is addressed relevant to this issue is
7 independently litigable in the NRC proceeding -- and
8 that's the reason I would suggest incorporating that
9 information.

10 But there's a lot of valuable information
11 there, as you've indicated, that the staff is certainly,
12 in our view, entitled to incorporate.

13 MS. CLARK: Could I just offer a clarifying
14 statement there? I think the staff response was
15 specifically in response to the Mock's Department of
16 Energy EIS -- PEIS. The staff will be relying upon the
17 specific document just referenced there, as well as DOE's
18 environmental analyses regarding Paducah and Portsmouth.

19 JUDGE BOLLWERK: All right. I think Judge
20 Abramson has a question that maybe he would like the staff
21 to refresh his recollection about the foreign ownership
22 requirements.

23 JUDGE ABRAMSON: Yes. As I recall, there used
24 to be some requirement for maximum foreign ownership of
25 facilities. Is that still in effect, and how does it play

1 in this situation? For the staff or for LES?

2 MR. CURTISS: We can speak to that, and I'll
3 certainly defer to the staff. The issue is addressed in
4 the order as well in a section entitled Foreign Ownership
5 in Section 4.

6 And in that order the Commission has made it
7 clear that the application is governed by Sections 53, 63,
8 and 57. Those -- that statutory provision, 57 in
9 particular, requires, as the order states, that the
10 Commission reach a determination that the issuance of the
11 license would not be inimical to the common defense and
12 security.

13 It is, by contrast to the provision that you
14 may be thinking about, Judge Abramson, in 103 and 104,
15 relative to production and utilization facilities, of
16 which this is not, there is a foreign ownership limitation
17 there that has the effect of placing a cap on majority
18 foreign ownership.

19 But in that decision, and, subsequent to an
20 enactment by Congress in this regard in the 1990s, the
21 requirement under the order and the underlying statutory
22 provision in Section 57 is simply to conclude that the
23 issuance of the license would not be inimical to the
24 common defense and security.

25 In that context it's certainly possible that

1 foreign ownership might far exceed 50 percent, so long as
2 it's not inimical to common defense and security.

3 JUDGE ABRAMSON: That is matter for whom?

4 MR. CURTISS: That's a determination that the
5 Nuclear Regulatory Commission will make.

6 JUDGE BOLLWERK: All right. Anything anyone
7 else wants to add in that regard?

8 MS. CLARK: No. That was correct.

9 JUDGE BOLLWERK: All right. Any other
10 questions?

11 (Pause.)

12 All right. Let me turn then to NIRS.

13 MR. LOVEJOY: Thank you, Your Honor. The
14 statement has been both by staff and by LES counsel that
15 the environmental report discusses the possible use of
16 down-blending highly enrichment uranium from various
17 sources.

18 There are references to that in ER 1.1 as
19 possible sources of supply. There is no discussion of the
20 non-proliferation impacts of various levels of down-
21 blending. There's no discussion from the non-
22 proliferation viewpoint.

23 I think when we talk about possible
24 alternatives to constructing this facility and obtaining
25 enrichment services elsewhere, we are talking about the

1 sufficiency of the no-action alternative discussion. That
2 appears in the ER at 2.1.1, 2.4, and 8.4.

3 And, going back to the decision at 47 NRC 77, I
4 think the Commission has directed this Board and other
5 boards to provide a fuller discussion of the no-action
6 alternative than is contained in the ER at present. I
7 think what they say here can be said of the ER in this
8 instance.

9 It says, The no-action discussion at issue in
10 this case does not measure up to these standards. Lacking
11 balance and analysis, it merely lists various benefits of
12 the project without delineating the principal reasons why
13 the no-action option was eliminated from consideration.

14 Meticulously identifies virtually all of the
15 CEC's expected benefits, from positive local environmental
16 effects to the creation of jobs and generation of new tax
17 revenues to various national policy goals. It offers no
18 comparative reasoning whatever.

19 By merely reciting all of the benefits expected
20 from the CEC the no-action section does not indicate how
21 the agency evaluated the relative significance of these
22 individually cited benefits. In short, the reader cannot
23 readily discern how the agency weighed the various
24 benefits and costs of not building the facility.

25 JUDGE ABRAMSON: Counselor, excuse me. Let me

1 interrupt for a second. You're reading from a Board
2 decision or you're reading --

3 MR. LOVEJOY: From a Commission decision that
4 was expressly referred to in the hearing order as
5 governing precedent.

6 JUDGE KELBER: Which decision is that again?
7 You cited it earlier, but I've forgotten it.

8 MR. LOVEJOY: 47 NRC 77.

9 JUDGE ABRAMSON: And was that the one that
10 said -- is that the one you referred to earlier as --

11 MR. LOVEJOY: It is.

12 JUDGE ABRAMSON: -- providing general guidance,
13 but not -- without providing specifics that you said may
14 provide guidance? Help me understand what it was -- what
15 was the original reference in this order -- in the order
16 for this case? What was the reference to that?

17 MR. LOVEJOY: The reference to this decision in
18 the -- was in --

19 JUDGE ABRAMSON: Just read me the reference,
20 please.

21 MR. LOVEJOY: The Commission said, With respect
22 to these regulations the Commission notes that this is the
23 second proceeding involving the licensing of an enrichment
24 facility. The Commission issued a number of decisions in
25 an earlier proceeding regarding a proposed cite in Homer,

1 Louisiana. These final decisions -- and then they give
2 the citations, including this one -- resolve a number of
3 issues concerning uranium enrichment licensing and may be
4 relied upon as precedent.

5 The objection has been made that NIRS has not
6 identified specific sections of the application which are
7 deficient with respect to the issues of management
8 character that we brought forward.

9 I think a similar objection was raised in the
10 Georgia Power Company case that we cite in our briefs.
11 And the Commission in their decision in August of '93, 38
12 NRC 25, said that it was not necessary to cite to a
13 particular regulation in regard to the management
14 character issues. And this was, in effect, an instance of
15 an omission being brought to the Board's attention. And
16 in that case they said, It will be sufficient for the
17 intervenor to explain why the application is deficient.

18 The question of management character is
19 obviously a very serious matter. I am sorry to hear the
20 facts referred to as scurrilous allegations. I think all
21 of us know is that there's real substance to what we've
22 brought forward. And it is a matter of great gravity that
23 the technology of centrifuge enrichment should not be
24 contained within those who exercise -- the facilities of
25 those who exercise that technology.

1 Pakistan does have weapons technology. Other
2 countries have it to different levels. People have gone
3 to Iraq and sold them the plans. And this is clear
4 evidence of an inability to contain the technology within
5 the plants identical -- or very similar to that which is
6 proposed to be here. It's a very serious matter. I
7 really have heard nothing about how security measures have
8 been changed and strengthened in light of these
9 revelations.

10 These are clearly not the only press items,
11 reports, and studies of this sad history. There are
12 hundreds. There's truth to this. It's a serious matter.

13 If -- and it's the same company, obviously.
14 It's going to be the 70 percent partner clearly in control
15 of this proposed facility. This is not an issue that can
16 be forgotten. This is a very serious question.

17 JUDGE BOLLWERK: All right. Any questions from
18 any of the Board members?

19 JUDGE ABRAMSON: Well, at the risk of
20 prolonging this proceeding -- and I would like to make
21 sure you get the last word on this. But I think counsel
22 for LES wanted to respond to this question of the
23 precedent that was established in the prior NRC Commission
24 ruling. Is that correct?

25 MR. CURTISS: In fact, what the Commission said

1 in its order virtually goes without saying. That is to
2 say is I'm sure this Board recognizes, and, as the
3 adjudicatory process contemplates, any decision of the
4 Commission, several of which we have cited here for the
5 proposition that issues that have been raised aren't
6 cognizable in a proceeding like this -- hydro resources,
7 for example -- the Commission's decision have stare
8 decisis effect by virtue of the decision itself.

9 So the language in the order virtually goes
10 without saying. We certainly don't disagree with it, A.
11 B, there is nothing in the LES 1 proceeding and the
12 decisions that were reached by the Commission in that
13 decision -- in that proceeding -- excuse me -- that is at
14 all inconsistent with the argument that we have made here
15 today.

16 The fact of the matter is that the non-
17 proliferation concerns, which are the ratio [inaudible] on
18 the claim that's being made here, are squarely addressed,
19 most recently in the DCS Box case, where the non-
20 proliferation allegations were raised, and a Board, to be
21 sure -- not a Commission, but a Board -- appropriately
22 addressed those in the context of some of the very same
23 allegations that we are hearing repeated by just a
24 different intervener here in this proceeding.

25 I would say, secondly, that -- again, this is

1 ostensibly a NEPA issue and a need evaluation. And the
2 need evaluation that we've set forth in our application I
3 won't go through in detail because it would prolong this
4 proceeding longer than we all have. But it lays out in a
5 very quantitative way the no-action alternative and the
6 benefits.

7 There is no allegation here on any of these
8 charges, other than a 40,000 foot effort to erect a
9 smokescreen over what's going on here, that there's any
10 deficiency in the application, that the material that's
11 been provided to the NRC in public and discussed, save for
12 the security plans and specific things that cannot be
13 publicly disclosed -- no allegation that there is any
14 deficiency there.

15 There is no allegation that this relates to a
16 need issue, or at least none that I see. And so for that
17 reason, I believe, the conclusions that we've reached
18 relative to the Commission the -- to this contention, the
19 argument that we're raising here is not at all consistent
20 with the precedents that were established in LES 1.

21 JUDGE ABRAMSON: Are the security plans
22 available to counsel for NIRS to look at? Have been given
23 the opportunity to see those?

24 MR. CURTISS: Security plans were submitted in
25 a confidential way. And, so far as I know, no request has

1 been made.

2 JUDGE ABRAMSON: Mr. Lovejoy?

3 MR. LOVEJOY: These would, as I understand it,
4 require a security clearance to review.

5 MR. CURTISS: In fact, I think the Commission's
6 order explicitly addresses that in saying that, if any
7 party wishes to have access to classified information,
8 including the security plan, they had an obligation at the
9 outset of this proceeding, which effectively began in
10 February, to secure -- to seek to secure the necessary
11 security clearances immediately.

12 I don't know independently whether that has
13 been done, but, to the extent that an issue is now sought
14 to be raised relative to a security plan that requires a
15 classified clearance -- a clearance of some sort, we would
16 submit that it's pretty late in the day at this key stage
17 of the process to be injecting that issue into the
18 proceeding.

19 JUDGE BOLLWERK: Mr. Lovejoy, I'm going to
20 leave you with the last word here.

21 MR. LOVEJOY: In the previous decisions where
22 management character has been brought in issue it has not
23 been with respect to -- well, it's -- I think it's rarely
24 been with respect to compliance with specific provisions,
25 say, of a security plan.

1 It has been in the matter of demonstrating a
2 management disinclination or inability to apply and
3 enforce regulations of the Commission, provisions of a
4 license, or, indeed, of a security plan.

5 It's not a criticism of the terms of the
6 security plan or a license. Rather, it's a criticism of
7 the management ability's inclination, culture, and
8 commitment. So it's really not a matter of reviewing
9 security plans and seeing whether they're adequate. It's
10 a matter of examining management itself.

11 I hear, again, that this is a NEPA need
12 analysis, but it's really not. The study of the
13 alternatives from the non-proliferation standpoint go to
14 the sufficiency of the no-action alternative discussion.
15 And that's addressed directly by the previous Commission
16 decision that I cited. Other than that, I'm going to
17 rest.

18 JUDGE BOLLWERK: All right. Thank you. Any
19 other questions from the Board?

20 (Pause.)

21 JUDGE BOLLWERK: No? All right. It's about 20
22 after 4:00 at this point. Let's take a break and we'll
23 come back then and make some decision about where we're
24 going to proceed from here. Ten minutes, yes.

25 (Whereupon, a short recess was taken.)

1 JUDGE BOLLWERK: If everybody's here, why don't
2 we go back on the record? In terms of scheduling, we're
3 at a point -- I guess I need to talk with the parties and
4 see how both they and we want to proceed.

5 We have four contentions left -- four different
6 groups. Each of them are NIRS contentions and each one,
7 given what we've been doing here in the past over the past
8 several hours, probably would take approximately a half an
9 hour.

10 We have this room until seven o'clock. And, if
11 the parties would like to, we can proceed and finish up
12 this evening. The court reporter is available as well.

13 Having said that, I don't want anyone to feel
14 pressured. I want everyone to get the opportunity to make
15 whatever arguments they want to make. If we're going to
16 quit this would probably be the time to do it in order to
17 make tomorrow worthwhile, because then we're talking about
18 a two-hour session tomorrow from, say, nine to eleven.

19 So, having said that, let me throw the floor
20 open to discussion and see what the feelings are around
21 the tables, as it were. Let me first turn to NIRS, since
22 they're your contentions.

23 MR. LOVEJOY: Okay. Well, we're willing to go
24 forward if you'd like.

25 JUDGE BOLLWERK: You're willing to go forward?

1 All right. Again, I want you to understand, if you want
2 to stop right now we can come back tomorrow. But I don't
3 want to let you -- okay. Anybody else have a problem with
4 finishing up?

5 MR. CURTISS: We're prepared to plow on, Mr.
6 Chairman.

7 JUDGE BOLLWERK: Okay. All right. Then why
8 don't we attempt to do that? I'm --

9 JUDGE ABRAMSON: You want to ask the staff?

10 JUDGE BOLLWERK: I saw someone nod their head
11 over there.

12 MS. CLARK: We nodded.

13 JUDGE BOLLWERK: I'm taking silence as assent.
14 The -- we will go ahead and finish the contentions. We
15 probably need to have a 10 or 15-minute discussion at the
16 end about procedure going forward potentially. So we'll
17 do that as well. And, hopefully -- it's now, like I said,
18 about 4:30, we can get done by approximately 6:30 or
19 thereabouts. But, again, you need to have the time you
20 need to argue these contentions. So why don't we go ahead
21 and move forward.

22 We have number 8, Impact of Related
23 Deconversion/Disposal Facilities. It's NIRS EC-4 and
24 formerly the 2.2. All right.

25 MR. LOVEJOY: Yes, thank you. Thank you, Your

1 Honor. Clearly, it is material whether there's NEPA
2 coverage for the impact of facilities that will generate
3 part of the cumulative impact of this project.

4 If there's going to be an enrichment plan there
5 must be a strategy to manage storage and disposition of
6 depleted UF_6 . This would include, in all probability,
7 deconversion of DUF_6 to DU_3O_8 and disposal of the DU_3O_8 ,
8 probably in deep sub-surface disposal.

9 The existing environmental report does not
10 address the impact of a deconversion plant. And it does
11 refer to an analysis of various generic disposal methods
12 in a DOE programmatic EIS. But those alternatives don't
13 include deep sub-surface disposal.

14 The staff, in response to this contention, does
15 not oppose it, as I understand it, with respect to the
16 conversion plan, but does not agree with it as it regards
17 disposal impacts.

18 They said in their scoping summary report that
19 the entire interrelated cycle of enrichment production
20 must be addressed in the EIS and, thus, by logic, in the
21 ER. Staff's statement was, quote, Depleted uranium
22 disposition. The draft EIS will address concerns about
23 the depleted uranium hexafluoride material, or tails,
24 resulting from the enrichment operation over the lifetime
25 of the proposed plant's operation.

1 These concerns include the safe and secure
2 storage and ultimate removal of this material from New
3 Mexico, the potential conversion of UF_6 to U_3O_8 , and
4 ultimate disposition. That report was issued -- unquote.
5 That report was issued in April.

6 The bases that we cite -- A, petitioners would
7 have the ER present the impacts of a deconversion plant
8 construction and operation. LES states in their answer
9 that, quote, the ER does not specifically discuss
10 deconversion related impacts, unquote. And that's at page
11 39. It seems pretty clear that the deconversion plant
12 impact must be included as part of the overall
13 environmental analysis of this project.

14 Basis B -- petitioners assert that the ER
15 should include the disposal impacts, specifically the use
16 of a geologic repository for disposal of DU_3O_8 . It's --
17 certainly this disposal is part of the cycle of production
18 and enrichment uranium.

19 We believe -- and we've explained previously --
20 that the depleted uranium is required to be disposed of in
21 a deep geologic repository. And in such a situation the
22 impacts of such disposal would need to be examined in the
23 EIS for this plant because it is clearly part of the
24 cumulative impact.

25 These contentions are essentially about matters

1 omitted from the ER, and, as such, what the rules call for
2 is a specification of the omitted matter. And we believe
3 we've done that. And I'll reserve my time. Thank you.

4 JUDGE BOLLWERK: All right.

5 JUDGE KELBER: One question. If, in our
6 wisdom, we decide that depleted uranium oxide is not
7 greater than Class C, then is a -- is there a requirement
8 for discussion of disposal?

9 MR. LOVEJOY: There is.

10 JUDGE KELBER: On what basis?

11 MR. LOVEJOY: There would be --

12 JUDGE KELBER: On what basis?

13 MR. LOVEJOY: Well, there would be a
14 requirement for NEPA coverage for the disposal option that
15 the Board or the Commission determines is called for.

16 JUDGE ABRAMSON: I think Dr. Kelber's
17 question -- correct me if I'm wrong, Charlie -- was if the
18 Board should determine the waste that you're suggesting
19 would need a deep geologic repository is not such that it
20 requires that, then what?

21 MR. LOVEJOY: Well, then there would presumably
22 be some other disposal method in mind, and there would
23 need to be NEPA coverage for that option.

24 JUDGE ABRAMSON: I understand.

25 JUDGE BOLLWERK: Any other Board questions?

1 (Pause.)

2 JUDGE BOLLWERK: I take it your point here is
3 really this is an integral part of this project
4 essentially. The impacts have to be analyzed. Is that --

5 MR. LOVEJOY: Essentially. It is part of the
6 cumulative impacts of this proposal.

7 JUDGE BOLLWERK: All right. Let me turn then
8 to LES.

9 MR. CURTISS: Yes, sir. We can be brief here
10 as well. We set forth our position in our answer. I
11 think I'd make a -- let me address the impacts in reverse
12 order -- the argument that the impact of repository has to
13 be evaluated in this EIS. I know this Board is well aware
14 that the environmental impacts of that facility are going
15 to be the subject of an extensive separate consideration.

16 But I think fundamentally the question, Dr.
17 Kelber, that you've raised, which is, if the determination
18 of the classification of this waste, pursuant to the
19 Commission's order, whether it's low-level waste under
20 61.2, as the staff and the Board and others have
21 consistently said over the years -- if the determination
22 is made that it is waste that is capable of being disposed
23 of in an abandoned mine, as one option, or -- and, in
24 fact, just an option that we proposed in our
25 application -- or licensed low-level radioactive waste

1 disposal facilities, of which there are several in Utah
2 and elsewhere.

3 That if this waste is not, in fact, the type of
4 waste that must be disposed of in a repository, then
5 there's no need in our view to analyze the impact of
6 building a repository. In any even, that issue is being
7 analyzed separately and in some detail.

8 Let me shift my attention to I think the more
9 important argument, and that's the impact of a conversion
10 facility -- the environmental impact. And I'll make four
11 points here.

12 Number one, the discussion here skillfully
13 avoids the question that we talked about earlier, which
14 is, does a conversion facility have to actually have to be
15 in operation somewhere in order to get a license. I take
16 it that the argument in this context is that the
17 environmental impact of building a conversion facility,
18 albeit it not in maybe a specific location is what we're
19 looking at, it certainly I think ratifies and is
20 consistent with our view that you don't have to have a
21 specific facility in operation that a bounding analysis of
22 the environmental impact is, in fact, an appropriate way
23 to look at this.

24 And, indeed, that's what the staff did in LES
25 1, where they identified the characteristics of the

1 facilities, including the deconversion facility,
2 identified a set of parameters, as well as parameters
3 associated with an abandoned mine -- set those forth in
4 the EIS for LES 1. And I assume that that will be done
5 here as well, where they will identify the bounding
6 environmental characteristics.

7 I would further say that the Commission order,
8 as we've talked about earlier, contemplates that the staff
9 can rely on information, which is extensive by the way, in
10 DOE's programmatic environmental impact statement. That's
11 available for analysis, and I think there's ample
12 environmental information in that document that can be
13 drawn upon here.

14 And then I would also say, subsequent to the
15 order itself being published, as I think this Board may
16 know, but, if not, I'll mention this point, DOE has also
17 now published two I believe draft EIS's -- the staff is
18 nodding that that's the case -- draft EIS's on the two
19 sites that they're proposing to build a deconversion
20 facility at in Kentucky and Ohio.

21 So there is just an abundance of environment
22 information here on the impact of deconversion facilities
23 that I think is appropriate to include in the EIS. They
24 did it in LES 1. Those characteristics were actually
25 litigated in that context. I think the staff is intending

1 to do this here, and we defer to them for the discussion
2 of any further plans in that regard. I'll yield back my
3 time.

4 JUDGE BOLLWERK: All right.

5 JUDGE ABRAMSON: Let me follow up --

6 MR. CURTISS: Yes, sir.

7 JUDGE ABRAMSON: -- counselor. There's an
8 allegation of an omission in the ER.

9 MR. CURTISS: Yes, sir.

10 JUDGE ABRAMSON: And, as I understand the
11 process -- or the normal procedure, if there's an
12 allegation of an omission that applicant has the right to
13 cure that by simply putting the missing material in. Is
14 that something that LES intends to do?

15 MR. CURTISS: I think I would defer to the
16 staff in terms of what their needs are and the
17 environmental impact statement. And if this is an area
18 that needs to be addressed -- frankly, we think the very
19 same bounding analysis and the characteristics that
20 envelope the analysis in the LES EIS for the deconversion
21 facility and the mine are exactly the characteristics that
22 could be evaluated today. So it would just be a matter of
23 importing that into the EIS.

24 But if the staff needs additional information
25 from the applicant I think we'd be prepared to entertain

1 whatever request we get and respond accordingly, Mr. --
2 Dr. --

3 JUDGE ABRAMSON: I'm sorry. You lost me. The
4 allegation is there's something missing from the ER, which
5 is your document. Correct?

6 MR. CURTISS: Yes.

7 JUDGE ABRAMSON: Is there something -- is there
8 information you could put in your ER which would be such
9 bounding analysis --

10 MR. CURTISS: Yes.

11 JUDGE ABRAMSON: -- which would answer this?

12 MR. CURTISS: Yes. I think the answer is yes.
13 And we'll take that question in the spirit in which it's
14 intention --

15 JUDGE ABRAMSON: Just a question.

16 MR. CURTISS: -- to explore the -- explore
17 whatever needs the staff has in its EIS before it goes out
18 with its draft for comment. And if we cure that issue,
19 and it is an issue of omission, we presume this issue
20 would be resolved.

21 JUDGE BOLLWERK: Anything further? I think
22 it's the staff's turn, but let me ask -- you all had not
23 opposed the admission of this contention. Obviously, you
24 let that -- seems to suggest that you were not -- that
25 they had made a case that there was something missing from

1 the environmental report. Is that correct?

2 MS. CLARK: Yes. In fact, the staff is
3 planning to discuss the impacts of the deconversion
4 facility in the environmental impact statement. I will
5 say that, for that reason, it's something that I think one
6 could say should have been included in the environmental
7 report.

8 However, the staff, in the process of -- we are
9 now in the process of drafting that document. We have not
10 chosen to request any additional information through the
11 RAI process from LES on this matter. And, in fact, we
12 anticipate that we will be able to make that analysis
13 without any additional information from the applicant.

14 JUDGE BOLLWERK: So I take it, if this omission
15 is to be cured, it's not going to happen until the draft
16 EIS comes out at the earliest.

17 MS. CLARK: Correct.

18 JUDGE BOLLWERK: All right.

19 JUDGE ABRAMSON: I'm still having a procedural
20 hiccup here. It's never going to be in the ER? It's only
21 going to be in the EIS, and, therefore, it would -- the
22 allegation of the omission from the ER would not be cured.
23 Am I hearing this right or am I missing something?

24 MS. CLARK: I think that maybe what the point
25 is, not that -- there was an omission from the ER, but,

1 ultimately, the obligation is upon the staff to make this
2 analysis. And we rely on the ER to make our analysis, but
3 we do it independently. And in this case we are
4 proceeding with out independent evaluation.

5 And, given the fact that there have been, as
6 LES has stated, extensive environmental reports prepared
7 by DOE, we are relying to a large extent on those in doing
8 our analysis.

9 MR. CURTISS: Dr. Abramson, maybe I can just
10 help --

11 JUDGE ABRAMSON: Please.

12 MR. CURTISS: -- either clarify or confuse the
13 answer to the question. I think it was our view, in
14 submitting the application, that, because this issue was
15 explicitly addressed in the bounding way in LES 1, and the
16 facts haven't changed, A, and, B, because the Commission
17 specifically spoke about relying on information in the DOE
18 PEIS, that that should provide sufficient information to
19 address this in the EIS.

20 Having said that, if at any point in the
21 process, and, particularly, if necessary to cure an
22 omission, we need to and are asked to submit additional
23 information at any point in the EIS process, I think the
24 applicant is prepared to do that.

25 JUDGE BOLLWERK: All right. We will leave it

1 at that subject to your rebuttal.

2 MR. LOVEJOY: Well, I'm partially pleased, I
3 suppose. I am not hearing that the deficiency in the ER
4 will conclusively be cured. I think it should be.

5 And I'm also hearing that there's a lot of good
6 work out there that people can use, so it shouldn't be too
7 big a job. I think the contention is a valid one.

8 JUDGE BOLLWERK: Anything -- any more
9 questions?

10 JUDGE ABRAMSON: I gather it will not satisfy
11 NIRS that this matter will be addressed in the EIS, which
12 is the staff's responsibility -- that your contention
13 would remain independent of that.

14 MR. LOVEJOY: Well, I'm not sure when the
15 staff's EIS is coming out. And so --

16 JUDGE BOLLWERK: We'll be talking about that a
17 little later.

18 MR. LOVEJOY: I'm concerned that they may --
19 there may be a significant delay because of that.

20 JUDGE BOLLWERK: All right. Anything further
21 on this contention?

22 MS. CLARK: Just for information, our draft EIS
23 is due September 30 of this year.

24 JUDGE KELBER: I didn't get that.

25 JUDGE BOLLWERK: September 30, 2004, for the

1 draft EIS. All right. In terms of -- so we're now on
2 general category number 9, Groundwater and Surface Water
3 Impacts. And this NIRS contention EC-1 as we designate it
4 or their contention as they designate it 1.1.

5 MR. LOVEJOY: Thank you. Our contention here,
6 again, goes to the ER and states that it does not contain
7 a complete or adequate assessment of the potential
8 environmental impacts of the proposed project on ground
9 and surface water contrary to the regulations.

10 It's a conventional requirement of an EIS to
11 incorporate a full explanation of the groundwater and
12 subsurface hydrology for the general purpose of
13 understanding the likely fate and transport conditions of
14 contaminants should they escape from the facility.

15 It's conceded by LES that there is what they
16 call a remote possibility of storm water runoff from the
17 cylinder storage pad becoming contaminated with UF_6 or its
18 derivatives.

19 LES states also in the ER that the sources of
20 potential water runoff contamination, albeit it unlikely,
21 would be either residual contamination on the cylinders
22 from routine handling or accidental releases of UF_6 and
23 its derivatives resulting from a leaking cylinder or
24 cylinder valve caused by corrosion, transportation, or
25 handling accidents or other factors, unquote. In other

1 words, they're saying that there can be releases of
2 contaminants.

3 Now, in NUREG 1748, the environmental ruling --
4 review guidance, calls upon the applicant to, quote,
5 describe site specific and regional data on the physical
6 and hydrological characteristics of ground and surface
7 water in sufficient detail to provide the basic data for
8 the evaluation of impacts on water bodies, aquifers,
9 aquatic ecosystems, and social and economic structures of
10 the area. And it goes on to describe how this discussion
11 provides input for other sections.

12 Apparently, in response to that requirement,
13 LES has already set forth certain analysis of groundwater
14 and hydrology in Section 3.4 of the ER, and states that
15 the purpose of this section is to provide "the basis for
16 evaluation of any potential facility impacts on surface
17 waters, ground waters, aquifers, water use, and water
18 quality."

19 Well, with this background, petitioners have
20 brought forward the analysis by a hydrologist, Mr. George
21 Rice, outlining several unanswered questions about the
22 hydrology of the site. It seems to be clear that the
23 questions actually are unanswered and that they relate to
24 the hydrology of the area.

25 We cite in our brief language from a Board

1 decision in the Private Fuel Storage case involving an
2 independent spent-fuel storage installation where a
3 similar contention about the insufficiency of discussion
4 of contaminant pathways, possible fate and transport of
5 contaminants, appeared in the application. And the Board
6 in that case allowed the contention to be admitted.

7 We submit that the contention is admissible on
8 similar reasoning. This is a basic part of the ER -- to
9 explain hydrology of the site.

10 JUDGE BOLLWERK: Anything further? I'll turn
11 to LES then?

12 MR. CURTISS: Yes, sir. We won't repeat what's
13 in our answer. It's my mantra I guess here.

14 I think I would make three points here. Number
15 one, the contention here is fundamentally, as we look at
16 it, a series of RAIs. It's a series of questions that are
17 asked, beginning under Basis A -- how much water would
18 infiltrate into the alluvium from the treated affluent
19 basin in the UBC storage pad and so forth and so on.

20 And nothing more than a series of questions
21 that have been asked that have, we think, an important
22 premise missing. And that is that the petitioner has
23 failed to substantiate the key premise that underlies
24 their concern -- that is to say that surface waters will
25 communicate in some way with groundwater under the site or

1 enter surface waters, of which I would put out, as you've
2 seen around the area, there's not much surface water
3 around here.

4 So, in addition to being a series of questions
5 that have been asked, with nothing more than areas of
6 inquiry, I think the key premise in our view is that
7 the -- this contention doesn't mount any specific
8 challenge to the design of the systems or any deficiency
9 that is alleged in the systems that are laid out in
10 specific detail in the application, but, instead, merely
11 assumes that those systems will fail in some respect and
12 that contaminated water will, therefore, enter the
13 alluvium below the site.

14 Now, I think it's important to say that we are
15 not maintaining, as was proffered in the petitioner's
16 reply, that the systems are perfect. But, nevertheless,
17 we think the petitioner has an obligation to identify some
18 deficiency here that's going to lead to the contamination
19 that is the crux of this contention.

20 And, instead, we have nothing more than a
21 series of questions that we've been asked to address.
22 And we think the application is thorough in laying out the
23 design that will address these questions.

24 Fundamentally no argument has been made here
25 that there will be communication between the surface

1 waters and the groundwater. And we think that's the core
2 of the issue here. So, with that, I would welcome any
3 questions.

4 JUDGE BOLLWERK: Judge Kelber?

5 JUDGE KELBER: Yes. Monitoring wells are
6 usually placed near these -- and I believe in your report
7 you refer to monitoring wells --

8 MR. CURTISS: Yes, sir.

9 JUDGE KELBER: -- being near the lined pool.
10 Suppose a monitoring well does detect leakage? Are there
11 references in your application to remediation plans or
12 efforts to remediate that leak?

13 MR. CURTISS: Yes. I'm going to invite Rod
14 Krich to address that because he's our licensing expert
15 and can address that specific question.

16 MR. KRICH: As I understand your question, is
17 there anything in the application regarding remediation
18 plans should there be a leak or should there be some type
19 of leakage from the basins?

20 JUDGE KELBER: Correct.

21 MR. KRICH: And, yes, there is a statement --
22 or there are statements regarding how we would go about
23 doing remediation. In other words, if there were some
24 type of leak we would then -- in fact, the pond is
25 designed with a divider so that you can pump the water

1 from one side to the other side and do the remediation.

2 JUDGE KELBER: Could you give me a section
3 reference so I don't have to plow through the whole
4 report?

5 MR. KRICH: Okay. Let me look it up and I'll
6 get it for you.

7 JUDGE KELBER: Okay. Thank you. I have a
8 question also for NIRS, if that's --

9 JUDGE BOLLWERK: All right.

10 JUDGE KELBER: In the experience of your expert
11 what is the frequency -- and I don't care how you put it,
12 whether you put it qualitatively or quantitatively -- is
13 the frequency of leaks from such lined pools as have been
14 described?

15 MR. LOVEJOY: You know, he does not state it in
16 numerical terms.

17 JUDGE KELBER: Well, I said I don't care how
18 you put it. To your expert's best knowledge what is the
19 frequency -- however he wants to describe it?

20 MR. LOVEJOY: Well, he says in various places
21 some water from the evaporation basins and septic leach
22 field will infiltrate into the alluvium. I don't think
23 the plans in the environmental analyses of a facility like
24 this assume that the facility functions perfectly. And I
25 don't think it's realistic to do so.

1 JUDGE KELBER: No, I was trying to get an idea
2 of just whether this is something that is asked to be
3 faced every year or what -- now, the question -- the next
4 question is, in your expert's opinion, was there -- is
5 there any discussion of the effectiveness of remediation
6 efforts?

7 MR. LOVEJOY: No. He does not address
8 remediation.

9 JUDGE KELBER: Thank you.

10 JUDGE BOLLWERK: All right. Let's turn then --
11 do you have anything further you want to say or --

12 MR. CURTISS: Nothing further. No, sir.

13 JUDGE BOLLWERK: Let's turn to the staff then.

14 MS. CLARK: The staff does not oppose admission
15 of this contention. We'll rest on our pleadings. I'll
16 just note one thing in response to Judge Abramson's
17 question regarding the last contention.

18 This was an area in which the staff found
19 deficiencies in the applicant's ER. The staff has
20 submitted RAI's to the applicant. And they actually have
21 responded, and the staff is in the process of reviewing
22 those.

23 JUDGE ABRAMSON: On this particular --

24 MS. CLARK: On this -- on these particular
25 issues. Exactly. The staff has not reached a conclusion

1 on the adequacy of those responses yet, however.

2 JUDGE ABRAMSON: And so that means all of --
3 because I was intending to ask you, since your response
4 had said that it did have sufficient specificity in bases,
5 whether you had -- whether you could tell me what the
6 specificity was. Apparently you have beat me to the punch
7 and actually issued RAI's.

8 MS. CLARK: That is correct.

9 JUDGE ABRAMSON: Has NIRS seen the request for
10 additional information?

11 MR. LOVEJOY: I have seen -- excuse me? Go
12 ahead. Mr. Marriotte is going to address that.

13 MR. MARRIOTTE: We do not on a routine basis
14 receive LES's answers to NRC questions. We only receive
15 the questions from NRC.

16 JUDGE ABRAMSON: Okay. So we need to --

17 MR. CURTISS: I would just say that they are --
18 all the answers are available on the NRC website.

19 MR. MARRIOTTE: But we don't know when they're
20 posted.

21 JUDGE ABRAMSON: Okay. But --

22 MR. MARIOTTE: We'd prefer to receive them
23 routinely.

24 JUDGE ABRAMSON: I understand. But at least we
25 now know -- and you now know -- that there have been RAIs

1 post and that there have been answers. And perhaps
2 counsel for LES can make sure that they get those answers
3 so they can take a look at them. Or you can give them the
4 right reference to the website so they can pull them down.

5 MR. CURTISS: I think we can provide the
6 reference to the website.

7 JUDGE ABRAMSON: Okay.

8 MR. CURTISS: That would be the most efficient
9 way.

10 JUDGE ABRAMSON: And then we can see whether
11 that deals with the issues that you're worrying about or
12 not.

13 JUDGE BOLLWERK: Let me see if there's any
14 further -- is staff finished? I'm sorry.

15 MS. CLARK: Yes.

16 JUDGE BOLLWERK: Are you completed? Any
17 further rebuttal?

18 MR. LOVEJOY: No rebuttal. Thank you.

19 JUDGE BOLLWERK: All right. Turn then -- we
20 are now on the tenth category, which is Water Supply
21 Impacts. This is contention NIRS -- what we designated
22 EC-2, which was formerly NIRS 1.2. Mr. Lovejoy?

23 MR. LOVEJOY: Thank you. This one concerns
24 water supply impacts. We contend that the ER does not
25 contain a complete or adequate assessment of the potential

1 environmental impacts of the proposed project on water
2 supplies in the area, contrary to the NEPA regulations.

3 This plant would be in operation for a period
4 of 30 years plus into the future. And, under present
5 circumstances, there is no doubt that Lea County, the area
6 where the facility is proposed for, has an ongoing water
7 shortage, and withdrawals from the aquifer exceed supply.

8 LES has stated in its application that the
9 municipalities of Eunice and Hobbs have nominal water
10 supply capacities that are sufficient to meet the needs of
11 the facility at ER 4.4.5.

12 However, it is clear, regardless of the nominal
13 capacities of those systems -- clear from the regional
14 water plan that the groundwater in the underground water
15 basin that these municipal supplies rely upon is being
16 withdrawn faster than recharge is taking place, and the
17 water level has fallen as much as 70 feet since the 1920s.
18 That plan projects that water usage will actually double
19 by the year 2040.

20 For completeness of environmental analysis, we
21 submit that the ER should include an analysis of the
22 impact of the additional usage of the proposed facility on
23 the declining water supply that supplies this area and
24 address issues such as how will priorities be set when
25 supplies become very short and who will give up their

1 water in order to keep this facility going.

2 Certainly this plant is going to accelerate the
3 decline to a certain extent in water supplies in the area.
4 What we're claiming here is an omission from the ER. And,
5 in the case involving the Private Fuel Storage facility,
6 the Board admitted a similar contention, which asserted
7 that the applicant had failed adequately to address the
8 effects of applicant's water usage on other well users and
9 on the aquifer, unquote.

10 On this basis we think the contention should be
11 admitted.

12 JUDGE BOLLWERK: All right. We'll turn to LES
13 then.

14 MR. CURTISS: Yes, sir. This issue is one that
15 we address in our answer. Let me summarize the position
16 we have taken.

17 This issue of the usage of water from a
18 municipal water system is an issue that, in our view, is
19 uniquely within the purview of the municipal authorities
20 that are addressing the water usage issue.

21 Let me put this in context, because the Lea
22 County Water Users Association has addressed this usage.
23 And in a release -- or a letter of September 29,
24 2003 -- let me just put this in context so it doesn't
25 appear as if we're draining the overall aquifer with this

1 facility.

2 The estimated water usage for the NEF will be
3 approximately 75-acre feet of water annually. To put this
4 amount in perspective, consider this. The 75-acre feet is
5 the same amount of water allowed for 25 acres of
6 irrigation. The Eunice golf course uses 210-acre feet a
7 year. The Hobbs County -- Hobbs Country Club uses 283-
8 acre feet a year. And the New Mexico Game Commission uses
9 170-acre feet a year.

10 It is for this reason that in December of 2003,
11 in a communication from the water use authorities in Lea
12 County, Hobbs, and Eunice, communicated in the form of an
13 MOU their view that the water usage impacts of this
14 facility are manageable within the current system.

15 There's no expansion or modification of the
16 municipal water system that's required here, A. B, from
17 our perspective -- and I think it's consistent with the
18 discussion we went through -- are essentially de minimus
19 or very modest compared to other uses.

20 And so, in the context of the water usage
21 issue, I think we'd leave you with two points, which are
22 amplified upon in our answer to this contention.

23 Number one, this issue is uniquely committed in
24 our view to the jurisdiction and decision making of
25 municipal water authorities. And, number two, in the MOUs

1 that have been entered to address this issue they have
2 identified a very modest impact that can be managed within
3 the current system and will not have any adverse impact
4 from their view on the overall aquifer.

5 JUDGE ABRAMSON: Is there 75-acre feet a year
6 for this facility -- is that correct?

7 MR. CURTISS: Yes, sir.

8 JUDGE ABRAMSON: And several hundred -- or a
9 couple of hundred per golf course. Can you give me an
10 idea of what the overall use by users in Hobbs or in other
11 areas is? And I'd like to get an idea for what the
12 generic percentage that this 75-acre feet represents.

13 MR. CURTISS: I can. I can. As we set forth
14 in our application, the current capacities for the Eunice
15 and Hobbs municipal water systems are 16,350 cubic meters
16 a day and 75,700 cubic meters a day respectively for those
17 two water systems.

18 Average and peak potable water requirements for
19 the operation of the NEF are expected to be, respectively,
20 about 85 cubic meters a year and --

21 JUDGE ABRAMSON: A year or a day?

22 MR. CURTISS: A year -- an hour -- excuse me --
23 and 240 cubic meters a day.

24 JUDGE ABRAMSON: And the other numbers you gave
25 me were in cubic meters a day?

1 MR. CURTISS: Yes. And that's set forth in our
2 application, so we can get you a reference for that as
3 well. It's in -- it's been pointed out to me that it's in
4 4.4-6 of the application, pages 16 and 17, including notes
5 17 and 18.

6 MR. KRICH: I think that was our answer
7 actually.

8 MR. CURTISS: I'm sorry -- in the answer -- the
9 application 4.4-6.

10 JUDGE BOLLWERK: Anything further? No? Judge
11 Kelber?

12 Let me turn to the staff then.

13 MS. CLARK: The staff supports admission of
14 this contention. Again, we basically rest on our
15 pleading. The staff was relying upon the fact that NIRS
16 cited to a specific document here. LES has cited to
17 documents. And those two documents could be seen as
18 relatively inconsistent in some respect, and, therefore,
19 discussion was warranted.

20 JUDGE ABRAMSON: And staff has not issued any
21 RAIs on this point?

22 MS. CLARK: At this point the staff has not
23 issued any specific RAIs to LES. However, the staff is
24 conducting additional analyses in this area.

25 JUDGE KELBER: Excuse me. What are the two

1 documents you're referring to? I heard one document.

2 MS. CLARK: The -- NIRS refers to the Lea
3 County Regional Water Plan. And then the applicant's ER
4 cites to various documents. But that's what I was
5 referencing -- the information contained in the ER versus
6 the information contained in this Lea County Regional
7 Water Plan as presented by NIRS.

8 JUDGE BOLLWERK: All right. Anything further
9 from the Board?

10 JUDGE ABRAMSON: Yes, I'd like to ask NIRS, we
11 have an omission -- an alleged omission from the ER
12 again -- that the ER fails to address the effect on the
13 long-term supply. What would you like to see in the ER on
14 that point?

15 It seems to me they've talked about numbers --
16 so I'm hearing -- they withdraw 75-acre feet a year, and
17 that the overall capacities of these two systems are X and
18 Y. What additional information would you like to see in
19 terms of addressing this?

20 MR. LOVEJOY: Essentially a discussion of the
21 impacts on other users and other use of water from this
22 aquifer going out 30 plus years into the future. What
23 effect will this have? Who will have to give up their
24 water to supply this facility -- if that can be projected.

25 JUDGE ABRAMSON: Do you -- are you aware of any

1 growth of water use in Lea County? Are there other
2 projected industrial facilities or are there other
3 projected housing or commercial facilities coming in?

4 MR. LOVEJOY: I can't be specific, but the
5 water plan which we cite projects the water usage will
6 double by the year 2040.

7 JUDGE ABRAMSON: I see. And what percentage of
8 that doubling does this represent?

9 MR. LOVEJOY: It's not a huge amount.

10 JUDGE BOLLWERK: All right. Any other further
11 questions?

12 All right. Nothing from Judge Kelber. All
13 right. Then we're now to -- I'm sorry. You had rebuttal
14 time. Do you have anything else you wanted to say?

15 MR. LOVEJOY: No, thank you.

16 JUDGE BOLLWERK: I apologize.

17 MR. LOVEJOY: I think I'm done.

18 JUDGE BOLLWERK: All right. We're in category
19 number 11, Natural Gas Transmission Facility Accident
20 Impacts. This is NIRS EC-9/TC-6 and formerly NIRS 6.1.

21 MR. LOVEJOY: Let me say first that we've
22 looked further into the transportation department
23 regulations governing natural gas pipelines. And we're
24 going to withdraw Contention C.

25 It seems that there would be some impact with

1 the location of this facility closely adjacent to these
2 pipelines, but it's probably not such as would legally
3 require relocation or changing the location of the
4 facility. So we're withdrawing C.

5 JUDGE BOLLWERK: So you're withdrawing Basis C?

6 MR. LOVEJOY: Yes.

7 JUDGE BOLLWERK: Okay.

8 JUDGE ABRAMSON: So this --

9 JUDGE BOLLWERK: No, no. Just Basis C.

10 JUDGE ABRAMSON: Just Basis C.

11 MR. LOVEJOY: Yes. Our contention here though
12 is that the ER does not contain a complete or adequate
13 assessment of the impacts of accidents involving natural
14 gas transmission facilities and that there has been no
15 sufficient integrated safety analysis based on module
16 specific data. And this is, again, a deficiency in the
17 ER.

18 It's asserted here that there is a likelihood
19 of a gas -- a definable likelihood of a gas pipeline leak
20 and explosion, and that LES, in its safety analysis
21 report, arrived at an unrealistically low probability for
22 such an accident.

23 And the likelihood assigned to that incident
24 leading to a pipeline explosion was calculated to be 4.2
25 times 10 to the minus 6. And the reference is SER Section

1 3.2.2.4. So this is not merely an ER; this is an SER
2 contention.

3 LES, based on that, concludes that the
4 probability meets the definition of unlikely in 70.61 I
5 believe, and that no items relied on for safety are
6 required. But the analysis, according to the application,
7 was done without a detailed facility design, and,
8 particularly, a design which indicated the location of
9 combustibles within the plant.

10 LES asserts that it could conduct the analysis,
11 nevertheless, using design data from the facility. But
12 there wasn't any showing that those data would apply to
13 this plant.

14 And that is -- that about sums up that that
15 contention.

16 JUDGE BOLLWERK: All right. Any questions at
17 this point?

18 (Pause.)

19 Let's turn then to LES.

20 MR. CURTISS: We can conclude here perhaps
21 earlier than your seven o'clock target with our
22 understanding that the only basis that remains has to do
23 with the probability of the gas explosion.

24 I think our view is that in NIRS's argument
25 here they have alleged a deficiency with I think very

1 modest -- in fact, very little expert opinion or facts.
2 What they assert is that we're required to conduct a
3 module specific analysis as to what the probability is
4 without really providing a basis, in our view -- and,
5 here, this is set forth in our answer, so I won't go into
6 this in detail -- or explanation for why the conclusion
7 set forth in the application is inadequate.

8 And, with that, I think we'll just submit the
9 argument based upon our answer and have nothing further to
10 offer here unless you have questions.

11 JUDGE BOLLWERK: All right. Let me just
12 clarify. Is, in fact, there only one basis left? I
13 haven't got my list in front of me, but does that --

14 MR. LOVEJOY: There's only one basis left. .

15 JUDGE ABRAMSON: What about the security
16 consideration? Because that was also one of your bases.

17 MR. LOVEJOY: B and D were previously
18 withdrawn.

19 JUDGE BOLLWERK: All right.

20 JUDGE ABRAMSON: Oh, okay.

21 JUDGE BOLLWERK: All right. We'll turn to
22 staff then.

23 MS. CLARK: The staff did not oppose admission
24 of the contention to the extent that it is premised on
25 Basis A. And we continue to take that position. I don't'

1 have anything further.

2 JUDGE ABRAMSON: No RAIs?

3 MS. CLARK: We actually have contracted out
4 this analysis. And we have not heard yet from the
5 contractor whether they have any additional questions.

6 JUDGE ABRAMSON: So you've contracted a
7 probabilistic analysis or -- what are you after here?

8 MS. CLARK: I'll ask Tim Johnson to speak to
9 that.

10 MR. JOHNSON: We've asked the Center for
11 Nuclear Waste and Regulatory Analysis to look at the --
12 whether or not there's an impact in terms of the design of
13 the facility in terms of facility safety.

14 At this point in time they have reviewed some
15 calculations performed by LES, but at this time they
16 haven't provided me any evaluation on whether or not they
17 need additional information. But the emphasis is on the
18 safety of the facility in the event of an explosion.

19 JUDGE ABRAMSON: With the assumptions on
20 frequency of explosion or probability of the explosion and
21 the magnitude?

22 MR. JOHNSON: That would be factored in in
23 terms of our overall performance requirements for the
24 integrated safety analysis. That does include a
25 likelihood evaluation to the facility.

1 But our regulations do not require a
2 probabilistic risk assessment. It does allow people to
3 use a semi-quantitative method, which LES has proposed in
4 their application. And, on that basis, we would review
5 it.

6 JUDGE ABRAMSON: So you're using
7 calculations -- I'm sorry; let me -- I'm just trying to
8 understand the process here. You provided LES
9 calculations to --

10 MR. JOHNSON: Well, LES provided their
11 calculations for the Center's review. That review was
12 completed about two weeks ago. And they're assessing that
13 and whether or not they need additional information.

14 JUDGE ABRAMSON: And were the calculations that
15 were supplied those that were contained in the LES
16 application or were these additional?

17 MR. JOHNSON: There were not provided in the
18 application, but they were provided as supporting
19 information for the integrated safety analysis.

20 JUDGE ABRAMSON: Provided in response to an
21 RAI? Or provided by discussion with the staff? Or how
22 did this happen?

23 MR. JOHNSON: Normally what we do with an
24 integrated safety analysis is, under the regulation, the
25 applicant is required to provide a summary integrated

1 safety analysis. But they don't need to provide all the
2 backup data in detailed calculations.

3 With that information -- our process is to go
4 to the facility and review documentation -- supporting
5 documentation for the ISA. And this review that was
6 performed two weeks ago was intended to do that -- to
7 review the supporting information that was used to prepare
8 the integrated safety analysis and the integrated safety
9 analysis summary that was provided in the application.

10 JUDGE ABRAMSON: And let me ask the staff
11 counsel -- how does this in your mind factor into the
12 contention that NIRS has made that there was an omission?
13 I understand you're pursuing getting the information and
14 there's been some exchange of information. How does this
15 deal with this alleged omission?

16 MS. CLARK: As I read the NIRS contention, they
17 are alleging that there isn't a basis for the calculation
18 that LES arrived at. And they're alleging that more
19 substantial analysis has to be done in order to reach this
20 calculation. So that's the way we read the contention.

21 JUDGE ABRAMSON: And your pursuit of dealing
22 with that is by getting more detailed calculations from
23 LES --

24 MS. CLARK: Exactly.

25 JUDGE ABRAMSON: -- and then having the staff

1 deal with it and contract it?

2 MS. CLARK: Yes.

3 JUDGE ABRAMSON: I'm not sure what that -- how
4 that information gets transmitted to NIRS or what --
5 whether that's going to deal with this adequately.

6 MR. LOVEJOY: I don't know. I have not seen
7 anything written up concerning the review two weeks ago.
8 Perhaps it's going to be written up and put in the record,
9 but --

10 MS. CLARK: We will -- there will be a summary
11 of the onsite review, and it will be provided to you.

12 MR. CURTISS: I'm advised by LES's licensing
13 manager that the responses to the questions that have been
14 asked should be provided next week, and that will be
15 provided on the docket. And perhaps upon evaluation of
16 that information, if that cures the alleged omission, we
17 can follow up on a discussion with that. But that's the
18 current posture of the information that the applicant is
19 submitting.

20 JUDGE BOLLWERK: All right. Let's see.
21 Anything further the staff wants to say?

22 MS. CLARK: No.

23 JUDGE BOLLWERK: No? Anything further for the
24 Board on staff?

25 If not, then we'll turn to you, Mr. Lovejoy,

1 and see what you have to say.

2 MR. LOVEJOY: Well, really, I can't say very
3 much till I see what's put into the record.

4 JUDGE BOLLWERK: All right.

5 MR. LOVEJOY: You know, it may satisfy the
6 contention; it may not.

7 JUDGE BOLLWERK: All right. Anything further
8 you want to say in response to anything you've heard?

9 MR. LOVEJOY: I think not.

10 JUDGE BOLLWERK: All right. At this point then
11 we've completed going through the arguments on all the
12 contentions that were submitted. And I think -- why don't
13 we take just a really very brief break here -- about five
14 minutes. And then we'll sit down -- let's talk about some
15 procedural things for a couple of minutes. And then, in
16 theory, we will be finished for the evening. So why don't
17 we take a five-minute break?

18 (Whereupon, a short recess was taken.)

19 JUDGE BOLLWERK: If everybody will come back to
20 order we'll go ahead and try to finish up our business
21 this afternoon. Can we go back on the record, please?

22 THE REPORTER: We're on the record.

23 JUDGE BOLLWERK: All right. As I mentioned
24 before we took a brief break, this -- the arguments with
25 respect to all the contentions at this point are

1 concluded.

2 I wanted to discuss briefly with the parties
3 some potential procedures going forward -- and we're going
4 to make some assumptions here, one of them being that the
5 questions of standing have already been basically ruled on
6 by the Commission.

7 So then the next question becomes admissibility
8 of contentions. We have not made any of those rulings yet
9 and we're not making them tonight, but, obviously, there
10 are some non-contested or uncontested contentions here.
11 The potential is obviously there that some contentions may
12 well come in and the case will move forward.

13 With those kind of assumptions I wanted to ask
14 the staff, what is the -- you mentioned the date for the
15 issuance of the draft EIS, which was September of 2004 --
16 September 30 I believe it was?

17 MS. CLARK: Correct.

18 JUDGE BOLLWERK: And do you have at this point
19 any date for issuance of -- it's going to be -- you're
20 going to issue a draft SER?

21 MS. CLARK: We are not. Right now we are
22 planning to issue the final SER and the final FES on June
23 15, '05.

24 JUDGE BOLLWERK: June 15, 2005.

25 MS. CLARK: Correct.

1 JUDGE BOLLWERK: All right. And the draft EIS
2 is September 30, 2004. Okay. All right. Looking at the
3 schedule that the Commission has set forth in the order
4 that's been referred to a number of times today, if the
5 Board were to admit contentions and the case were to go
6 forward there are several things that would happen fairly
7 promptly.

8 One would be that the staff would put together
9 and submit a hearing file. You may be aware that in the
10 recent past we have done several of those electronically,
11 and that's what we would contemplate here if that were to
12 happen.

13 And if you're not aware of that process,
14 basically, the documents are compiled, put in an
15 electronic form, and put onto the NRC website where
16 they're acceptable to everyone. That seems to have worked
17 well in the other case that it's been used. I don't know
18 if you all are aware of the procedure we've used, but
19 that's what we would contemplate here. That has to happen
20 within 30 days.

21 There is also then a requirement in the rule --
22 or in the Commission -- both in the rules and the
23 Commission's order that the informal discovery process
24 that's set forth in 2.704(a) I believe it is go forward.
25 That requires an informal discovery be completed within 45

1 days.

2 And there are several things that are involved
3 there, the main ones being there has to be an exchange of
4 names of individuals with discoverable information and
5 also this exchange of relevant documents.

6 The -- I would anticipate that some of the
7 things that are going to be in the hearing file may well
8 be -- could be, I guess, identified by folks as relevant
9 potentially. And it's my understanding that they -- you
10 could do that by simply designating those documents in the
11 hearing file as being relevant in terms of what you
12 indicate in your information.

13 The Commission's order also indicates that all
14 discovery is supposed to be completed for all admitted
15 contentions within 90 days of the issuance of the order.
16 Looking at this schedule, that means that there is
17 basically, depending on how you want to read it, 45 days
18 for depositions. That is a very tight schedule,
19 especially if there are multiple contentions to be
20 admitted.

21 The suggestion that I would make to you all --
22 in fact, I hope -- I can't issue anything -- I'm not going
23 to issue anything right now, but let me tell you what you
24 may see in an order like that. We would contemplate that
25 the parties would, as soon as the order -- any order came

1 out, and there were admitted contentions, have an
2 immediate conference among themselves to talk about the
3 discovery schedule.

4 Obviously, one of the focus would be on how to
5 get depositions done -- and whatever schedule the parties
6 deem would be appropriate, bearing in mind the 90 days and
7 bearing in mind the other things that have to be taken in
8 account.

9 Probably within a week to ten days after the
10 order issues we will set up a pre-hearing -- a
11 conference -- probably a telephone conference to talk
12 about discovery. At that point I hope that the parties
13 will have had their discussion and be willing to provide
14 the Board with their views on how a discovery schedule
15 should go forward.

16 I'm aware of the 90-day schedule. I'm aware of
17 the Commission's responsibility that's placed on the Board
18 to keep the schedule, to inform the Commission is there's
19 any slippages and what the reasons are and how they're
20 going to be cured.

21 I also understand this could be a lot of work
22 to do in 45 days. So bear all that in mind and let's be
23 efficient, but let's try to be as reasonable as we can
24 under the circumstances. That's sort of the general
25 guidance I would give you.

1 But, again, if, in having your discussions you
2 can't agree, then we'll listen to the disagreements there
3 are and resolve them. But, hopefully -- I have to say in
4 the context of the Private Fuel Storage case that I was --
5 through a couple of years that the parties were able to
6 reach a number of agreements on discovery that satisfied
7 everybody's concerns. And that seemed to work fairly well
8 there. So I simply throw that out for whatever it's
9 worth.

10 It's better for you all to work these things
11 out on your own rather than coming to the Board where the
12 response you get makes no one happy. That just -- as a
13 general matter.

14 Probably thought we -- if you look at the
15 Private Fuel order you will see some other things that we
16 required. I think some of those things, frankly, have
17 been adopted in the Commission's rules now. For instance,
18 if you have some objection to discovery that you need to
19 contact opposing counsel to try to discuss the matter at
20 least first before you file a motion to compel or a motion
21 for protective order or whatever.

22 Again, that's simply an opportunity to have the
23 parties have a brief discussion, see if there's -- many
24 times there's a misunderstanding about what's being
25 requested or what the problem is. And if that --

1 sometimes that discussion will resolve things; sometimes
2 it won't. So, again, that will be the sort of thing we'll
3 be expecting of the parties in terms of the discovery
4 process.

5 One other thing I would mention, there's also a
6 schedule in the Commission's order for summary
7 disposition. Potentially, at least from some of the
8 things we're hearing here, some of these contentions of
9 omission, quote, unquote, could move fairly rapidly to
10 summary disposition, depending on what happens with some
11 of the things that are going to be going on over the next
12 several weeks and months. So I would, again, put that out
13 before you as something to think about as a way to resolve
14 some of those issues.

15 Having said that globally, it sounds like there
16 are a number of things going to be happening in terms of
17 documents that are going to be exchanged. Things are
18 going to be happening. If those need to be the
19 discussion -- the subject of discussions in terms of what
20 the contentions that are in front of the Board, it would
21 be a good idea to go ahead and do that. And we won't --
22 I'm sure -- our schedule right now under the Commission's
23 order is to issue something by the middle of July. I'm
24 sure we'll be in the middle of July.

25 So there is some opportunity here for you all

1 to have some discussions. If there's something you can
2 resolve let us know. If not, we're prepared to rule on
3 whatever is in front of us when we make the ruling.

4 But, again, if there are things that you all
5 are satisfied with, best to get them off the docket and
6 move to the things that we are -- there is concerns about.
7 So, again, I will put that out as something to think
8 about.

9 Let me just see if any of the other two Board
10 members has any discussion -- any questions I can answer
11 for anyone about the procedural prospects going forward.
12 Okay.

13 JUDGE ABRAMSON: I'd like to just mention to
14 all of you one thing that I will, as a Board member, be
15 pushing for. And that is to combine, coalesce, and
16 simplify contentions into a number of simple
17 straightforward to-the-point contentions. So if you want
18 to work on that among yourselves, rather than have us
19 dictate it, it might be useful.

20 JUDGE BOLLWERK: All right. I would anticipate
21 that the order that we put out will have some fairly
22 specific rulings in terms of contentions, potentially
23 perhaps combining some things, trying to specify scope of
24 things. It's been my experience as well that one of the
25 things the Board needs to do is to be as specific as we

1 can about what we admit so there's no confusion among
2 anyone. And if there's issues to be appealed then you can
3 take them up. That's the way it work.

4 But I think it's important that we let you know
5 from our perspective what we're anticipating is going to
6 be litigated and keep things in -- sort of in perspective
7 that way. So that will be one of the things that will
8 happen as well.

9 Let me just say that I found personally -- I'll
10 let the other two Board members comment on it. The
11 presentations we heard today were excellent. We
12 appreciate very much the information that you all gave us.
13 I think you very much took to heart what we said about
14 keeping to the important points. I think we heard what
15 the real issues are among all of you. And I -- we do
16 appreciate that.

17 I'm surprised we got done in a day, but I guess
18 that's to the good for everyone. You did address the
19 things that we needed to hear, and I appreciate that.
20 Anybody else want to say anything at this point?

21 If -- let me ask again once more if there are
22 any other questions from any of the parties at this
23 point -- any of the participants?

24 MR. LOVEJOY: Well, just one small matter.
25 Under the protective order that's in effect --

1 JUDGE BOLLWERK: Yes.

2 MR. LOVEJOY: -- I think -- the way it works
3 one is not allowed to serve and file electronically. And
4 the mechanics of it work out so that one gets kind of a
5 day less to prepare one's papers if one is referring to
6 protected matter.

7 And I was just wondering whether it would be
8 acceptable to modify that order simply to say that
9 documents containing protected matter may be served
10 electronically in form with the protected matter deleted
11 provided that one then follows up by serving by Federal
12 Express, or the like, the same document with the protected
13 matter.

14 JUDGE BOLLWERK: I'll throw it to -- that's a
15 suggestion; it's a good one. Let us think about that.
16 One suggestion -- I don't know, again, what the concern --
17 well, I know there are concerns.

18 Frankly, we've been exchange proprietary
19 information in the Private Fuel Storage case by electronic
20 mail with the consent of the parties -- now, this is
21 nothing we've been doing --for two years. I don't know
22 that anyone's ever had a problem. That may be something
23 that LES may wants think about. If you don't feel
24 comfortable that's up to you. That was something that PFS
25 apparently did not have a problem with, and I'm not aware

1 that anything proprietary has ever gotten out.

2 But, having said that, if there is a problem --
3 at a minimum, we need to make sure that everyone's getting
4 the appropriate amount of time, which is -- if it's served
5 by overnight mail you get an additional day, or if it's
6 put in the mail I guess you would get five days. Although
7 I think what we would prefer is to see things put in
8 overnight mail to keep things up. But you should get an
9 additional day if that happens.

10 Ane one thing I think -- I've been thinking
11 about was not in the protective order, and it kind of
12 illustrates what happened with the Attorney General's
13 filing. In Private Fuel we had a requirement that any
14 proprietary documents had to be -- at a minimum, at least
15 the cover page had to be served on all the parties simply
16 so everyone would know that something had been put into
17 the file that was proprietary.

18 If that had happened I would then have known
19 that there was something that was sent -- that we weren't
20 seeing the whole documents, but at least there's been
21 something filed. And I may go back and look at the
22 protective order. I may need to modify that one as well.

23 And that way, even people that aren't parties
24 to what's going on with the protective material will at
25 least know that there have been filings being made. And

1 that's -- you know, they're participants in the case and
2 they ought to at least know what's going back and forth.

3 JUDGE KELBER: Such documents would be in the
4 hearing file.

5 JUDGE BOLLWERK: Yes. And, generally, what
6 happens is the cover page to a document doesn't generally
7 have proprietary material on it. Simply submitting that
8 cover page to the other parties will let them know that
9 this has been submitted -- we're not giving you the whole
10 thing.

11 At least let's everyone know that there's
12 something out there. It's not going to get you access to
13 the information, but at least it will let you know there's
14 filings going on. So that's something we'd -- all right.

15 Let me take both of those under consideration
16 and maybe we need to issue a modification of the
17 protective order. Does anybody have an objection to any
18 of that? No? And you all can think about whether
19 proprietary should be or shouldn't be by e-mail. And,
20 again, that's your decision.

21 MR. CURTISS: We'll take that under
22 consideration.

23 JUDGE BOLLWERK: All right.

24 MR. CURTISS: Thank you.

25 JUDGE BOLLWERK: It's your information and --

1 MR. CURTISS: Yes, sir.

2 JUDGE BOLLWERK: -- you need to be comfortable
3 with however it's served. All right. Any other
4 questions? Yes.

5 MR. CURTISS: We will take the opportunity
6 here, with the numerous references that have been provided
7 and an understanding that the Board will want to follow up
8 on specific references, that as soon as we get the
9 transcript, if there are any references that are confusing
10 or lacking or in error --

11 JUDGE BOLLWERK: All right.

12 MR. CURTISS: -- we'll provide that information
13 to all the parties and the Board as soon as we get that
14 transcript and have an opportunity to review it.

15 JUDGE BOLLWERK: And I think we've asked for a
16 transcript of that in three days I believe. I think
17 that's what the request was. It may be missing you, but I
18 remember that was the box that was checked. So if that's
19 a problem let us know, but I think that's what we
20 requested.

21 At this point anything either of you have?
22 (Pause.) Again, we appreciate your efforts. It's been a
23 very long day, but we did find what you had to tell us
24 very useful. And at this point it's submitted to us, so
25 it's our responsibility now to issue a determination of

1 all the admissibility of the contentions. We'll be
2 getting back to you on that in the near term. And, with
3 that, I thank you all, and we're adjourned.

4 (Whereupon, at 5:45 p.m., the hearing was
5 concluded.)
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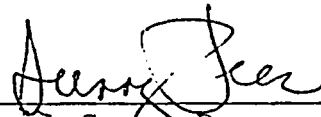
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Name of Proceeding: Louisiana Energy Services
Pre-Hearing Conference

Docket Number: n/a

Location: Hobbs, NM

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