

RAS 8880

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Paul B. Abramson
Dr. Charles N. Kelber

In the Matter of

LOUISIANA ENERGY SERVICES, L.P.

(National Enrichment Facility)

Docket No. 70-3103-ML

ASLBP No. 04-826-01-ML

November 22, 2004

**MEMORANDUM AND ORDER
(Ruling on Late-Filed Contentions)**

In two separate filings dated October 20, 2004, intervenor the New Mexico Environment Department (NMED) and joint intervenors the Nuclear Resource and Information Service and Public Citizen (NIRS/PC) submitted late-filed contentions relating to the pending application of Louisiana Energy Services, L.P., (LES) for a 10 C.F.R. Part 70 license to possess and use source, byproduct, and special nuclear material to enrich natural uranium at a facility -- the National Enrichment Facility (NEF) -- to be constructed near Eunice, New Mexico. In responses to these filings, LES asserts that none of the NMED or NIRS/PC late-filed contentions are admissible. The NRC staff opposes the admission of all of NMED's contentions, and submits that, with the exception of one additional basis in support of a previously admitted contention, this Board should likewise reject NIRS/PC's late-filed contentions.

For the reasons set forth below, this Board finds that (1) NMED has not proffered any new admissible late-filed contentions; and (2) three of NIRS/PC's late-filed amendments to existing contentions are admissible, but the remainder are not and so are rejected.

I. BACKGROUND

On December 12, 2003, LES filed with the Nuclear Regulatory Commission (NRC) an application to obtain a license to possess and use source, byproduct, and special nuclear material to enrich natural uranium at the NEF. On March 23 and April 5, 2004, respectively, NMED and the Attorney General of New Mexico (AGNM) petitioned to intervene in the application proceeding pursuant to 10 C.F.R. § 2.309(a). See [NMED] Request for Hearing and Petition for Leave To Intervene (Mar. 23, 2004) [hereinafter NMED Petition]; [AGNM] Request for Hearing and Petition for Leave To Intervene (Apr. 5, 2004) [hereinafter AGNM Petition]. Public interest groups NIRS/PC subsequently filed a joint petition to intervene on April 6, 2004. See Petition To Intervene by [NIRS/PC] (Apr. 6, 2004) [hereinafter NIRS/PC Petition].

In separate issuances dated April 1, April 6, and May 20, respectively, the Commission found that (1) as governmental participants under 10 C.F.R. § 2.309(d)(2), neither NMED or AGNM was required to establish standing; and (2) NIRS/PC met the requirements for standing to intervene.¹ See LBP-04-14, 60 NRC 40, 53-54 (2004). On June 15, 2004, the Licensing Board conducted a prehearing conference with the petitioners, LES, and the staff in Hobbs, New Mexico, during which all these participants gave oral presentations on the admissibility of the petitioners' contentions. See Tr. at 1-290. The Board subsequently issued a July 19, 2004 order admitting each petitioner as a party to the proceeding pursuant to 10 C.F.R. § 2.309(a)-(b) as having established the requisite standing and having submitted at least one admissible contention. See LBP-04-14, 60 NRC 40 (2004).

¹ The Commission previously indicated in a January 2004 issuance that it would make all threshold determinations regarding standing. See CLI-04-03, 59 NRC 10, 13-15 (2004) (69 Fed. Reg. 5873 (Feb. 6, 2004)).

By order dated August 16, 2004, the Board set a general schedule for this proceeding. See Licensing Board Order (Memorializing and Ruling on Matters Raised in Conjunction with August 3, 2004 Conference Call and Setting General Schedule for Proceeding) (Aug. 16, 2004) (unpublished). Pursuant to that portion of the schedule that set a deadline for submitting late-filed environmental contentions, on October 20, 2004 NMED and NIRS/PC filed separate motions to admit late-filed contentions and/or amend or supplement previously admitted contentions. See NMED's Motion To File Late Filed Contentions (Oct. 20, 2004) [hereinafter NMED Motion]; Motion on Behalf of [NIRS/PC] To Amend and Supplement Contentions (Oct. 20, 2004) [hereinafter NIRS/PC Motion]. For its part, NMED sought the admission of contentions that the Board previously had declined to admit. See NMED Motion at 1. NIRS/PC, on the other hand, sought to amend admitted contentions based on certain additional information contained in the Department of Energy's (DOE) final environmental impact statements (FEIS) regarding conversion facilities in Paducah, Kentucky, and Portsmouth, Ohio, the staff's draft environmental impact statement (DEIS) for the NEF, and other information that came to light during discovery in this proceeding. See NIRS/PC Motion at 1-2. Both NMED and NIRS/PC assert their new or revised contentions merit admission under the eight criteria for nontimely filings set forth in 10 C.F.R. § 2.309(c).

In response, LES maintains that none of the contentions filed by NMED or NIRS/PC meet the criteria for admitting late-filed contentions. As to NMED, LES avers that NMED does not raise any new issues or rely on new information, but merely reasserts arguments that are pending before the Commission in connection with the Board's determination to admit previously proffered issue statements. See Response of [LES] to [NMED] Motion to File Late Filed Contentions (Nov. 5, 2004) [hereinafter LES Response to NMED Motion]. Relative to the NIRS/PC late-filed contentions, LES states that none of the contentions meet the

section 2.309(c) late-filing criteria and/or the section 2.309(f) general admissibility standards. See Answer of [LES] to Motion on Behalf of [NIRS/PC] to **Amend and Supplement Contentions** (Nov. 5, 2004) [hereinafter LES Response to NIRS/PC Motion]. The staff submits that none of NMED's late-filed contentions meet the section 2.309(c) late-filing criteria or the section 2.309(f) admissibility criteria. See NRC Staff's Response to "NMED's Motion to File Late-Filed Contentions" (Nov. 5, 2004) [hereinafter Staff Response to NMED Motion]. The staff took a similar approach to the NIRS/PC contentions, maintaining that, with the exception of the **addition of** basis J in support of NIRS/PC EC-6/TC-3, the amendments and modifications advanced by NIRS/PC fail to meet the section 2.309(c) late-filing criteria and the section 2.309(f) general admissibility standards. See NRC Staff's Response to [NIRS/PC] Motion to Amend and Supplement Contentions (Nov. 5, 2004) [hereinafter Staff Response to NIRS/PC Motion].

Finally, on November 11, 2004, NIRS/PC filed a motion for leave to file a reply and reply to the LES and NRC staff responses, in which NIRS/PC continued to maintain the admissibility of its amended and supplemented contentions under the standards of both section 2.309(c) and section 2.309(f). See Motion on Behalf of [NIRS/PC] For Leave to Reply to Opposition of Applicant and NRC Staff Response to Motion to Amend and Supplement Contentions and Reply on Motion to Amend and Supplement Contentions (Nov. 11, 2004) [hereinafter NIRS/PC Reply]. LES and the staff each responded to this motion in filings dated November 17. See Response of [LES] to Motion for Leave To File Reply Filed on Behalf of [NIRS/PC] (Nov. 17, 2004) [hereinafter LES Response to NIRS/PC Reply]; NRC Staff's Response to NIRS/PC Motion for Leave To Reply (Nov. 17, 2004) [hereinafter Staff Response to NIRS/PC Reply]. The staff contended that this Board's Scheduling Order did not provide the opportunity to submit replies to the responses to late-filed contentions, and that NIRS/PC did not make a

showing of good cause for modification of this schedule as required by 10 C.F.R. § 2.332(b). See Staff Response to NIRS/PC Reply at 2. The staff further averred that, should this Board grant the reply motion, we should consider only those portions of the reply that directly respond to the staff and LES responses. See id. at 3 n.3. LES similarly opposed the motion on procedural grounds, asserting that this Board's initial prehearing order stated that no reply could be filed without leave from this Board, see LES Response to NIRS/PC Reply at 2, and both the initial prehearing order and 10 C.F.R. § 2.323(c) showed that such leave would only be granted after a showing of good cause or under compelling circumstances. See id. at 2-6.

II. ANALYSIS

A. Standards Governing Admissibility of Late-Filed Contentions

The deadline for timely filing contentions in this proceeding **has long since passed**. See **CLI-04-03, 59 NRC 10 (2004) (69 Fed. Reg. 5873 (Feb. 6, 2004))**. Accordingly, the contentions now before the Board, as well as any that might be advanced in the future, must meet the standard for nontimely filings established in 10 C.F.R. § 2.309(c).² Section 2.309(c) provides that the issue of whether late-filed contentions must be considered is based on a balancing of eight factors: (1) good cause, if any, for failure to file on time; (2) nature of the petitioner's right to be made a party to the proceeding; (3) nature and extent of the petitioner's property, financial or other interest in the proceeding; (4) possible effect of any order that may be entered in the proceeding on the petitioner's interest; (5) availability of other means whereby the petitioner's interest will be protected; (6) extent to which the petitioner's interests will be represented by

² Section 2.309(c)(i), (v)-(viii) of the agency's current rules of practice encompass the five late-filing criteria previously found in 10 C.F.R. § 2.714(a)(1) of the agency's recently superseded 10 C.F.R. Part 2 rules. Section 2.309(c)(ii)-(iv) mirror the factors set forth in former section 2.714(d)(1).

existing parties; (7) extent to which petitioner's participation will broaden the issues or delay the proceeding; and (8) extent to which petitioner's participation may reasonably be expected to assist in developing a sound record. Factors two, three, and four essentially deal with the question of whether a petitioner has standing to intervene. As noted above, the question of standing has already been settled for both NMED and NIRS/PC. Thus, this Board will only address factor one and factors five through eight.

Finally, should a petitioner show, upon a balancing of the foregoing factors, that it has met the late-filing criteria, the proffered contentions still must meet the issue admissibility standards set forth in 10 C.F.R. § 2.309(f). The Board discussed the general standards for admissibility of contentions in a previous decision in this case, and will not reiterate that explanation here. See LBP-04-14, 60 NRC 40, 54-58 (2004).

An assessment of each of the Petitioners' late-filed contentions relative to those standards discussed above follows.

B. NMED Contentions

As an initial matter, we note that **NMED has failed to set forth the specific language of the issue statements for which it seeks late-filed admission, although it appears it is seeking again to have admitted matters previously proffered to the Board. See NMED Motion at 4-5. While this itself might well be grounds for declining any additional consideration of its motion, we nonetheless analyze the contentions for which it apparently seeks admission under the section 2.309(c) criteria.**

DISCUSSION: NMED Motion at 1, 4-8; NMED Petition at 2-3; LES Response to NMED Motion; Staff Response to NMED Motion.

RULING: Among the late-filing criteria enumerated in section 2.309(c), the first factor -- good cause for failure to file on time -- "has been accorded a preeminent role such that the moving party's failure to satisfy this requirement mandates a compelling showing in connection

with the other [] factors.” See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 293 (1998) (citation omitted). In other words, if a petitioner is unable to establish good cause, it will have a significant hurdle to overcome in supporting the admissibility of the proffered contention. Further, the availability of new information generally is a focal point in determining whether a petitioner has good cause for late filing. In this regard, the Commission has held that the petitioner must show that (1) the information is new so that the petitioner could not have **presented it at an** earlier time; and (2) the petitioner filed the contention promptly after learning of the new information. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69-73 (1992).

NMED has not shown good cause for its failure timely to file the contentions it appears to identify as being the subject of its October 20 motion. In fact, it seeks to reassert contentions that the Board and the Commission have repeatedly rejected, based on information of which NMED could have availed itself even before it filed its original intervention petition. See CLI-04-25, 60 NRC at 225; LBP-04-14, 60 NRC at 58. Moreover, to the extent that any of the late-filing factors weigh in favor of admission, they are not compelling.

NMED’s attempt to utilize the opportunity to submit late-filed contentions to once again seek to overcome the deficiencies in its initial contention filings is equally unavailing. An NMED reconsideration motion regarding the Commission’s determination to not admit these issues is pending. See NMED’s Motion for Leave to File Motion for Reconsideration and Motion for **Reconsideration (Aug. 27, 2004)**. **At this juncture, only** Commission reversal of its earlier determination that these contentions are not admissible would provide cause for the Board to consider them in this litigation.

C. NIRS/PC Contentions

NIRS/PC EC-1 — IMPACTS UPON GROUND AND SURFACE WATER³

CONTENTION: Petitioners contend that the Environmental Report contained in the application does not contain a complete or adequate assessment of the potential environmental impacts of the proposed project on ground and surface water, contrary to the requirements of 10 C.F.R. 51.45.

The Draft Environmental Impact Statement, NUREG-1790 (September 2004) (“DEIS”) does not contain a complete or adequate assessment of the potential environmental impacts of the proposed project on ground and surface water, contrary to the requirements of 10 C.F.R. Part 51.

1. Late-Filing Standards

DISCUSSION: NIRS/PC Motion at 3-6; LES Response to NIRS/PC Motion at 6-25; Staff Response to NIRS/PC Motion at 12-21; NIRS/PC Reply at 4-7.⁴

RULING: NIRS/PC proffers nine bases in connection with the proposed amendment to this contention. As to asserted basis B, NIRS/PC have not met their burden to establish good cause for late filing pursuant to section 2.309(c)(i) as they have made no showing that this basis relies on new information first revealed in the DEIS.

Of the remaining late-filing criteria, factors five and six -- availability of other means to protect petitioner's interest and extent of representation of petitioner's interests by existing parties -- are accorded less weight than factors seven and eight -- broadening the issues and/or delaying the proceeding and assistance in developing a sound record. See LBP-98-29, 48 NRC at 294 (citation omitted). As to factor eight, the Commission has indicated that specificity

³ To the degree NIRS/PC seeks to amend and/or supplement a contention already admitted in this proceeding, the new material is included in bold type. Moreover, relative to the “background” material that was part of the original contention, we continue to consider that part of the contention's basis. See LBP-04-14, 60 NRC at 66 n.10.

⁴ Although the various parties provide compelling competing views regarding whether NIRS/PC should have an opportunity to file a reply to the LES and staff responses to its late-filed contention admission request, at this juncture we need not resolve that matter since we conclude that the matters discussed in the NIRS/PC reply do not alter any of the rulings we make below.

regarding the identification of witnesses and summaries of proposed testimony is necessary if this factor is to carry significant weight. See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). Basis B fails to make any mention of proposed witnesses or testimony. Relative to factor seven, the fact that this proceeding is well into the formal discovery stage indicates that pursuit of this basis will both broaden and delay the proceeding. On the other hand, factors five and six tend to support admitting this basis since this proceeding is the opportunity for NIRS/PC to participate as a litigant challenging the issuance of the NEF license, and no other party will be representing NIRS/PC interests relative to this issue statement. Nonetheless, we conclude that a balancing of the four criteria does not provide the compelling showing necessary to overcome the lack of good cause.

The remainder of the bases supporting the amendment to this contention appear to contemplate significant new data that was first revealed in the DEIS or recent witness depositions so as to provide the requisite showing of good cause under late-filing factor one. After balancing this support for admission with the remaining four factors described above, we conclude that, relative to bases A and C through I, admission of the amended portion of this contention is not precluded by the fact that it was late-filed.⁵

2. Admissibility

DISCUSSION: NIRS/PC Motion at 3-6; LES Response to NIRS/PC Motion at 6-25; Staff Response to NIRS/PC Motion at 12-21.

RULING: Admitted, as supported by bases C, D, F, G, and I, which are sufficient to raise genuine issues of material fact adequate to warrant further inquiry. Basis A is inadequate

⁵ Although, as we indicated above, the NIRS/PC submission relative to factor eight -- ability to contribute to a sound record -- is not sufficient in connection with basis B to overcome the lack of good cause, we do not consider any deficiencies relating to this factor in connection with the other bases to be sufficient to overbalance the good cause finding.

to support the amended portion of this contention in that it lacks sufficient technical support.⁶ As we have previously stated, petitioners have an obligation to present specific factual information and expert opinion in support of proffered contentions. See LBP-04-14, 60 NRC at 55-56. NIRS/PC has not furnished adequate factual support and/or expert opinion to substantiate basis A. Basis E is similarly unsubstantiated, as it raises a series of questions, yet fails to establish with specificity any genuine material dispute with the DEIS and/or lacks adequate factual or expert opinion support. See id. at 55-56. Finally, basis H wholly fails to establish with specificity any genuine material dispute with the DEIS and/or lacks adequate factual or expert opinion support. See id.

A revised version of this contention incorporating this ruling is set forth in Appendix A to this memorandum and order.

NIRS/PC EC-2 — IMPACT UPON WATER SUPPLIES⁷

CONTENTION: Petitioners contend that the Environmental Report (ER) contained in the application does not contain a complete or adequate assessment of the potential environmental impacts of the proposed project upon water supplies in the area of the project, contrary to 10 C.F.R. 51.45.

To introduce a new industrial facility with significant water needs in an area with a projected water shortage runs counter to the federal responsibility to act “as a trustee of the environment for succeeding generations,” according to the National Environmental Policy Act § 101(b)(1) and 55 U.S.C. § 4331(b)(1). To present a full statement of the costs and benefits of the proposed facility the ER should set forth the impacts of the National Enrichment Facility on groundwater supplies.

The water used at the proposed facility would be pumped from the Hobbs well field (Lea County Underground Water Basin, Ogallala Aquifer) (ER Rev. 2 at 4.4-5). Groundwater in the Basin is being pumped at a rate faster than it is being recharged (Lea County Regional Water Plan, prepared for Lea County Water Users Association,

⁶ Although we do not necessarily need to reach the question given our ruling of the late-filing factors, we nonetheless note that the same would be true relative to the admissibility of basis B.

⁷ To the degree NIRS/PC seeks to amend and/or supplement a contention already admitted in this proceeding, the new material is included in bold type.

Summary at 1; at 5-4). The DEIS compares the water use of the proposed facility to the amount of water stored in the Ogallala Aquifer in the entire State of New Mexico (DEIS at 4-15). However, NRC has not shown in the DEIS how this pumpage would affect water levels and the long-term productivity of the Hobbs well field or the Lea County Underground Water Basin.

1. Late-Filing Standards

DISCUSSION: NIRS/PC Motion at 6-7; LES Response to NIRS/PC Motion at 26-27; Staff Response to NIRS/PC Motion at 21-22; NIRS/PC Reply at 7-8.

RULING: The first two sentences of the proposed amendment to this contention provide no new data; they merely rely on documents that were previously available in this proceeding and/or to the general public. Thus, although they provide context for the contention amendment, these particular sentences add nothing of substance to the balance of the amendment, which itself appears to be based on new information relative to the staff DEIS sufficient to provide the requisite good cause under factor one. When balanced with the remaining late-filing criteria, the Board concludes that amending this contention with the last two sentences of the proposed amendment is not precluded by the fact that it was late-filed.

2. Admissibility

DISCUSSION: NIRS/PC Motion at 6-7; LES Response to NIRS/PC Motion at 26-27; Staff Response to NIRS/PC Motion at 21-22; NIRS/PC Reply at 7-8.

RULING: Admitted as supported by bases sufficient to raise genuine issues of material fact adequate to warrant further inquiry. See LBP-04-14, 60 NRC at 54-55; cf. Licensing Board Order (Discovery Rulings) (Oct. 20, 2004) at 12-13 (unpublished).

A revised version of this contention incorporating this ruling is set forth in Appendix A to this memorandum and order.

NIRS/PC EC-3/TC-1 — DEPLETED URANIUM HEXAFLUORIDE STORAGE AND DISPOSAL

CONTENTION: Petitioners contend that Louisiana Energy Service, L.P., (LES) does not have a sound, reliable, or plausible strategy for private sector disposal of the large amounts of radioactive and hazardous Depleted Uranium Hexafluoride ("DUF₆") waste that the operation of the plant would produce.

- (D) **To show that it has a plausible strategy for disposal of depleted uranium, LES must set forth its strategy in sufficient detail so that the cost of pursuing the strategy can be estimated. LES has failed to set forth the strategy of private conversion and disposal with sufficient specificity. LES relies exclusively upon a cost estimate confirmed by Urenco, which estimate fails to describe any deconversion and disposal process relevant to the NEF, because it involves conversion by a process not planned for use in any United States facility, and it does not involve disposal at all, but only storage of the converted DU₃O₈.**
- (E) **It is not a plausible strategy for LES to propose to transfer DU to DOE under Sec. 3113 of the USEC Privatization Act, since it appears that the DU from the NEF would not be able to be converted in the DOE plants for several decades, and the cost of such conversion cannot be determined.⁸**

1. Late-Filing Standards

DISCUSSION: NIRS/PC Motion at 7-12; LES Response to NIRS/PC Motion at 27-29; Staff Response to NIRS/PC Motion at 22-24; NIRS/PC Reply at 8-9.

RULING: The new proffered bases D and E appear to rest, respectively, on information obtained by NIRS/PC during the early October depositions of a witness for LES,⁹ and from DOE FEISs regarding the Paducah, Kentucky and Portsmouth, Ohio conversion facilities analyzed in the staff's DEIS. This new information is sufficient to provide the requisite good cause under

⁸ Once again, relative to the "background" material that was part of the original contention, we continue to consider that part of the contention's basis. See LBP-04-14, 60 NRC at 67 n.11.

⁹ Although the general schedule date for late-filed submissions was keyed to the staff's DEIS issuance, to the degree NIRS/PC relies on the testimony of deposition witnesses as the basis for its contention revisions, so long as the late-filed admission request is submitted promptly after the deposition, it can be given favorable consideration under the "good cause" factor.

late-filing factor one as to both bases. A balancing of this and the remaining late-filing factors leads this Board to conclude that the admission of these new bases is not precluded by late-filing.

2. Admissibility

DISCUSSION: NIRS/PC Motion at 7-12; LES Response to NIRS/PC Motion at 27-29; Staff Response to NIRS/PC Motion at 22-24; NIRS/PC Reply at 8-9.

RULING: This contention amendment raises the issue of economic cost relative to the issue of whether LES has shown that it has a plausible strategy for disposal of depleted uranium. While the concepts of technical feasibility of a particular strategy and the costs of implementing such a strategy might arguably be linked in the common term “plausible,” in the context of plausible disposal strategies, the cost of implementation of a particular strategy has no bearing upon whether any particular strategy is technically plausible. In this instance, the Board expects to deal thoroughly with economic considerations in evaluating: (a) the decommissioning funding rate and the projected required funding amounts at various times during the life cycle of the facility; and (b) LES’s ability to enter the marketplace (which, as we have repeatedly held, does not require LES to present its “business plan” or to provide detailed market projections and cost analysis). See LBP-04-14, 60 NRC at 69. Therefore, in considering this contention regarding plausibility, we deal solely with the technical feasibility of the strategy.

In this context, proposed additional basis D is inadmissible in that it (1) deals with the issue of economic cost and is thus outside the scope of this contention as admitted; and/or (2) lacks the support of adequate factual information or expert opinion. See LBP-04-14, 60 NRC at 55-56. Basis E, on the other hand, impermissibly challenges a Commission regulation or rulemaking-associated generic determination, in that it contests the acceptability of a “plausible strategy” for disposal which the Commission expressly recognized as “plausible” in its

January 30, 2004 hearing opportunity notice. See CLI-04-03, 59 NRC 10, 11 (2004) (69 Fed. Reg. 5873 (Feb. 6, 2004)). Thus, this proposed addition also fails to provide admissible support for this contention.

NIRS/PC EC-4 — IMPACTS OF WASTE STORAGE AND DISPOSAL¹⁰

CONTENTION: Petitioners contend that the Louisiana Energy Services, L.P. Environmental Report (ER) lacks adequate information to make an informed licensing judgement, contrary to the requirements of 10 C.F.R. Part 51. The ER fails to discuss the environmental impacts of construction and lifetime operation of a conversion plant for the Depleted Uranium Hexafluoride ("UF₆") waste that is required in conjunction with the proposed enrichment plant.

The DEIS fails to discuss the environmental impacts of the construction and operation of a conversion plant for the depleted uranium hexafluoride waste. The DEIS entirely relies upon final EISs issued in connection with the construction of two conversion plants at Paducah, Kentucky, and Portsmouth, Ohio, that will convert the Department of Energy's inventory of depleted uranium (DEIS at 2-28, 2-30, 4-53, 4-54). Such reliance is erroneous, because the DOE plants are unlike the private conversion plant contemplated by LES.

The DEIS contains an incorrect analysis of the environmental impacts of the disposal of depleted uranium hexafluoride waste. The DEIS assumes that depleted uranium may be disposed of as low-level waste, which is incorrect. The DEIS fails to recognize the Commission's stated position that depleted uranium is not appropriate for near-surface disposal. The DEIS fails to support or explain the modeling of disposal of depleted uranium.

1. Late-Filing Standards

DISCUSSION: NIRS/PC Motion at 12-16; LES Response to NIRS/PC Motion at 29-34; Staff Response to NIRS/PC Motion at 24-26; NIRS/PC Reply at 9-11.

RULING: This amendment to the contention appears to be based on significant new information revealed in the staff DEIS sufficient to provide the requisite good cause under factor one. This support for admission, as balanced with the remaining late-filing criteria, leads the

¹⁰ To the degree NIRS/PC seeks to amend and/or supplement a contention already admitted in this proceeding, the new material is included in bold type.

Board to conclude that proposed paragraphs two and three of this contention are not precluded by the fact that they are late-filed.

2. Admissibility

DISCUSSION: NIRS/PC Motion at 12-16; LES Response to NIRS/PC Motion at 29-34; Staff Response to NIRS/PC Motion at 24-26; NIRS/PC Reply at 9-11.

RULING: **Proposed paragraph three of this contention deals** with the issue of classification of depleted uranium as low-level waste.¹¹ Since the Board has already ruled on this question in relation to a predominately technical contention -- NIRS/PC EC-3/TC-1 -- and referred our ruling to the Commission, see LBP-04-14, 60 NRC at 67, where it now awaits review, see CLI-04-25, 60 NRC at 226-27, at this juncture we decline to admit this issue in the context of an environmental contention relating to the DEIS. We do so, however, without prejudice to a renewed motion should the Commission hold that the Board should hear the waste classification issue relative to that contention.

To the **extent proposed paragraph two is supported** by basis A, it is admitted as supported by a basis sufficient to establish a genuine material dispute adequate to warrant further inquiry. Basis B is insufficient to support admitting this paragraph in that it focuses on economics and cost which, as we discuss above in relation to NIRS/PC EC-3/TC-1, is outside the admissible scope of this contention. See LBP-04-14, 60 NRC at 55. Additionally, to clarify the scope of this contention, we will delete the words "and Disposal" from its title.

A revised version of this contention incorporating this ruling is set forth in Appendix A to this memorandum and order.

¹¹ In its response, LES asserts that the contention as originally admitted should be dismissed as moot because ER revision two cured the asserted omission. See LES Response at 29-30. To the degree this is the case, it affords the basis for a summary disposition motion relative to this contention, which LES has not filed.

NIRS/PC EC-5/TC-2; AGNM TC-i — DECOMMISSIONING COSTS¹²

CONTENTION: Louisiana Energy Services, L.P., (LES) has presented estimates of the costs of decommissioning and funding plan as required by 42 U.S.C. 2243 and 10 C.F.R. 30.35, 40.36, and 70.25 to be included in a license application. See Safety Analysis Report 10.0 through 10.3; ER 4.13.1. Petitioners contest the sufficiency of such presentations as based on (1) a contingency factor that is too low; (2) a low estimate of the cost of capital; and (3) an incorrect assumption that the costs are for low-level waste only.

The DEIS similarly states that the depleted uranium will be low-level radioactive waste, which is incorrect, and results in an incorrect and low estimate of disposal costs. (DEIS at 2-27, 2-31).

DISCUSSION: NIRS/PC Motion at 16-17; LES Response to NIRS/PC Motion at 34; Staff Response to NIRS/PC Motion at 26-27; NIRS/PC Reply at 11-12.

RULING: **As with proposed paragraph three of contention** NIRS/PC EC-4 above, the amendment to this contention deals with the issue of classification of depleted uranium as low level waste. Thus, we decline to admit it at this time in the context of this essentially technical contention for the reasons discussed in regard to contention NIRS/PC EC-4, proposed paragraph three.

NIRS/PC EC-6/TC-3 — COSTS OF MANAGEMENT AND DISPOSAL OF DEPLETED UF₆

CONTENTION: Petitioners contend that the Louisiana Energy Services, L.P., (LES) application seriously underestimates the costs and the feasibility of managing and disposing of the Depleted Uranium Hexafluoride ("DUF₆") produced in the planned enrichment facility.

- (J) **In fact, LES does not have any relevant estimate for the cost of converting and disposing of depleted uranium, because it does not rely upon the three examples cited in the application, i.e., the CEC estimate from 1993, the LLNL Report, or the UDS contract. LES would not supply any estimate for dispositioning costs based on commercial contacts. LES refers only to the Urenco data from 2003 for its decommissioning and disposal cost estimate, and Urenco data are not relevant to establishment of costs in the United States.**

¹² To the degree NIRS/PC seeks to amend and/or supplement a contention already admitted in this proceeding, the new material is included in bold type.

1. Late-Filing Standards

DISCUSSION: NIRS/PC Motion at 17-20; LES Response to NIRS/PC Motion at 34-38; Staff Response to NIRS/PC Motion at 27; NIRS/PC Reply at 12-13.

RULING: The new proffered basis J appears to rest on information obtained by NIRS/PC during two separate depositions of an LES witness. We conclude that this new information is sufficient to provide the requisite good cause under late-filing factor one, and a balancing of this and the remaining late-filing factors do not preclude the admission of basis J based on the fact that it is late-filed.

2. Admissibility

DISCUSSION: NIRS/PC Motion at 17-20; LES Response to NIRS/PC Motion at 34-38; Staff Response to NIRS/PC Motion at 27; NIRS/PC Reply at 12-13.

RULING: Admissible as sufficient to raise genuine issues of material fact adequate to warrant further inquiry, albeit relative to contention NIRS/PC EC-5/TC-2; AGNM TC-i. **A revised version of that contention incorporating this ruling is set forth in Appendix A to this memorandum and order.**

NIRS/PC EC-7 — NEED FOR THE FACILITY¹³

CONTENTION: Petitioners contend that the Environmental Report (ER) does not adequately describe or weigh the environmental, social, and economic impacts and costs of operating the National Enrichment Facility (See ER 1.1.1 et seq.).¹⁴

The DEIS likewise omits to discuss the impact of the proposed NEF, in particular upon the market for enrichment services, by failing to consider the effect of the addition of the NEF to the existing range of suppliers and other forthcoming suppliers, the nature of competition that will occur, and the impacts upon market participants and consumers.

¹³ To the degree NIRS/PC seeks to amend and/or supplement a contention already admitted in this proceeding, the new material is included in bold type.

¹⁴ As set forth by NIRS/PC in their motion to amend and supplement contentions, this contention contained several additional paragraphs, see NIRS/PC Motion at 20-21, which the Board has previously ruled clearly provide part of the basis for the contention. See LBP-04-14, 60 NRC at 69 n.14. Thus, we are not including them as part of the body of the contention.

1. Late-Filing Standards

DISCUSSION: NIRS/PC Motion at 20-21; LES Response to NIRS/PC Motion at 38-41; Staff Response to NIRS/PC Motion at 27-29.

RULING: This addition to the contention appears to be based on new information (in the form of an omission) revealed in the staff DEIS sufficient to provide the requisite good cause under factor one. This support for admission, as balanced with the remaining late-filing criteria, leads the Board to conclude that the amendment to this contention is not precluded by the fact that it was late-filed.

2. Admissibility

DISCUSSION: NIRS/PC Motion at 20-21; LES Response to NIRS/PC Motion at 38-41; Staff Response to NIRS/PC Motion at 27-29.

RULING: The proposed addition to this contention merely reasserts a subject matter that the Board has previously declined to address in relation to this contention. In our original order regarding contentions, we admitted this contention as an environmental contention only, expressly declining to require LES to present a “business case” or provide detailed market analysis. Thus, this proposed basis is inadmissible to support this contention in that it falls outside the scope of this proceeding. See LBP-04-14, 60 NRC at 55, 69-70.

III. PROCEDURAL/ADMINISTRATIVE MATTERS

Although a document shipping problem relating to the NIRS/PC reply pleading that was submitted as a “protected” document caused the Board to miss the general schedule deadline for deciding late-filed contentions relating to environmental matters by one business day, we do not see this as cause for any slippage of the schedule as it relates to discovery in connection with the matters we admit today that relate to the DEIS that currently is the subject of discovery against the staff or to the submission of prefiled direct testimony regarding those environmental

issues that are the subject of an evidentiary hearing in February 2005. Accordingly, the general schedule deadlines currently in effect will remain operable.

IV. CONCLUSION

For the reasons set forth above, we find that NMED has failed to establish that a balancing of the factors in 10 C.F.R. § 2.309(c) support admitting its late-filed contentions in this proceeding. As to NIRS/PC's late-filing motion, we find certain of the amendments and/or supplements to previously-admitted contentions met the standards set forth in 10 C.F.R. §§ 2.309(c) and (f), and admit them for consideration in this proceeding as set forth in Appendix A.

For the foregoing reasons, it is this twenty-second day of November 2004, ORDERED, that:

1. The October 20, 2004 NMED motion is denied while the October 20, 2004 NIRS/PC motion for admission of late-filed issues is granted in part and denied in part as set forth below.

2. The following petitioner contentions, as amended, are admitted for litigation in this proceeding: NIRS/PC EC-1 (as supported by Bases C, D, F, G, and I); NIRS/PC EC-2 (as modified to include an additional paragraph); NIRS/PC EC-4 (as modified to add an additional paragraph, as supported by Basis A); and NIRS/PC EC-5/TC-2; AGNM TC-i (as modified to incorporate what NIRS/PC had requested be included as basis J for NIRS/PC EC-6/TC-3).

3. The following petitioner contention modifications are rejected as inadmissible for litigation in this proceeding: NIRS/PC EC-3/TC-1; NIRS/PC EC-5/TC-2; AGNM TC-i; and NIRS/PC EC-7/TC-4.

4. As is noted in section III above, the August 16, 2004 general schedule remains in effect.

THE ATOMIC SAFETY
AND LICENSING BOARD¹⁵

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Paul B. Abramson
ADMINISTRATIVE JUDGE

/RA/

Charles N. Kelber
ADMINISTRATIVE JUDGE

Rockville, Maryland

November 22, 2004

¹⁵ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant LES; (2) intervenors NMED, the Attorney General of New Mexico, and NIRS/PC; and (3) the staff.

Appendix A: Late-Filed Contentions

1. NIRS/PC EC-1 — IMPACTS UPON GROUND AND SURFACE WATER

CONTENTION: Petitioners contend that the Environmental Report contained in the application does not contain a complete or adequate assessment of the potential environmental impacts of the proposed project on ground and surface water, contrary to the requirements of 10 C.F.R. 51.45.

The Draft Environmental Impact Statement, NUREG-1790 (September 2004) (“DEIS”) likewise does not contain a complete or adequate assessment of the potential environmental impacts of the proposed project on ground and surface water, contrary to the requirements of 10 C.F.R. Part 51 in that:

(A) The DEIS correctly notes that leakage from the stormwater detention basin and the septic leach fields will probably cause formation of perched bodies of groundwater at the alluvium/Chinle interface. (DEIS, 4-13, 4-14). The DEIS contains estimates of the dimensions of such water bodies, flow rates, and discharge areas. However, NRC provides no explanation of such calculations, and it is not possible to determine whether they are reasonable.

(B) The DEIS does not contain an estimate of the probability and frequency of leakage through the liners of the treated effluent basin or the stormwater detention basin. The basins are to be lined with geosynthetic materials (DEIS at 4-11, 4-12), such liners are known to leak (EPA, Hydrologic Evaluation of Landfill Performance (HELP) Model, User’s Guide for Version 3, EPA/600/R-94/168a, Sept. 1994), and such information is necessary to demonstrate the impact of such leakage. The DEIS should contain an estimate of the leakage rate and should show the fate of water and contaminants that leak from the basins.

(C) According to the DEIS, “... no precipitation recharge (i.e., rainfall seeping deeply into the ground) occurs in thick, desert vadose zones with desert vegetation (Walvoord et al., 2002)” (DEIS at 3-35). However, cuttings from one of the borings drilled in September 2003 were “slightly moist” (ER Rev. 2 at 3.4-2). In addition, the clay at the bottom of boring B-2 was “moist” (SAR at Fig. 3.2-11). The DEIS should explain the presence of this moisture, which conflicts with its statements about lack of recharge.

(D) The DEIS states: “Although the presence of fracture zones that can significantly increase vertical water transport through the Chinle Formation has not been precluded, the low measured permeabilities indicate the absence of such zones.” (DEIS at 3-35). Two permeability measurements have been made on the Chinle Formation at or near the site: laboratory measurement of core samples (ER Rev. 2 Table 3.3-2) and a slug test performed in MW-2 (Cook-Joyce, Hydrogeologic Investigation, Sec. 32, T. 21 R. 38, Nov. 19, 2003). Such extremely limited measurements, where faults are present, cannot describe the permeability of the entire site, and NRC should explain its reliance on such restricted data.

(E) The stormwater basin will discharge runoff containing numerous contaminants, which are not adequately identified in the DEIS, nor is their monitoring explained. LES has stated that the runoff will contain small amounts of oil and grease typically found in runoff from paved roadways and parking areas (RAI Response, May 20, 2004, at 33). However, other contaminants may be present, such as PAHs (USGS, Concentrations of PAHs and Major and Trace Elements in Simulated Rainfall Runoff from parking lots, 2003, Open File

Report 2004-1208), other organics such as aliphatic hydrocarbons and alcohols (Barrett, M.E., et al., Review and Evaluation of Literature Pertaining to the Quality and Control of Pollution from Highway Runoff and Construction, Tech. Report CRWR 239, April 1993), and other contaminants from spills and accidents. Their presence should be disclosed. Further, stormwater should be monitored for such contaminants.

2. NIRS/PC EC-2 — IMPACT UPON WATER SUPPLIES

CONTENTION: Petitioners contend that the Environmental Report (ER) contained in the application does not contain a complete or adequate assessment of the potential environmental impacts of the proposed project upon water supplies in the area of the project, contrary to 10 C.F.R. 51.45.

To introduce a new industrial facility with significant water needs in an area with a projected water shortage runs counter to the federal responsibility to act "as a trustee of the environment for succeeding generations," according to the National Environmental Policy Act § 101(b)(1) and 55 U.S.C. § 4331(b)(1). To present a full statement of the costs and benefits of the proposed facility the ER should set forth the impacts of the National Enrichment Facility on groundwater supplies.

The DEIS does compare the water use of the proposed facility to the amount of water stored in the Ogallala Aquifer in the entire State of New Mexico (DEIS at 4-15). However, NRC has not shown in the DEIS how this pumpage would affect water levels and the long-term productivity of the Hobbs well field or the Lea County Underground Water Basin.

3. NIRS/PC EC-4 — IMPACTS OF WASTE STORAGE

CONTENTION: Petitioners contend that the Louisiana Energy Services, L.P. Environmental Report (ER) lacks adequate information to make an informed licensing judgement, contrary to the requirements of 10 C.F.R. Part 51. The ER fails to discuss the environmental impacts of construction and lifetime operation of a conversion plant for the Depleted Uranium Hexafluoride ("UF₆") waste that is required in conjunction with the proposed enrichment plant.

The DEIS fails to discuss the environmental impacts of the construction and operation of a conversion plant for the depleted uranium hexafluoride waste. The DEIS entirely relies upon final EISs issued in connection with the construction of two conversion plants at Paducah, Kentucky, and Portsmouth, Ohio, that will convert the Department of Energy's inventory of depleted uranium (DEIS at 2-28, 2-30, 4-53, 4-54). Such reliance is erroneous, because the DOE plants are unlike the private conversion plant contemplated by LES.

4. NIRS/PC EC-5/TC-2; AGNM TC-i — DECOMMISSIONING COSTS

CONTENTION: Louisiana Energy Services, L.P., (LES) has presented estimates of the costs of decommissioning and funding plan as required by 42 U.S.C. 2243 and 10 C.F.R. 30.35, 40.36, and 70.25 to be included in a license application. See Safety Analysis Report 10.0 through 10.3; ER 4.13.1. Petitioners contest the sufficiency of such presentations as based on (1) a contingency factor that is too low; (2) a low estimate of the cost of capital; (3) an

incorrect assumption that the costs are for low-level waste only; and (4) the lack of any relevant estimate of the cost of converting and disposing of depleted uranium, given it does not rely upon the three examples -- the 1993 CEC estimate, the LLNL report, and the UDS contract -- cited in its application.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON LATE-FILED CONTENTIONS) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of November 2004