

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

Before Administrative Judges:

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

In the Matter of

Docket No. 70-3103-ML

LOUISIANA ENERGY SERVICES, L.P.

ASLBP No. 04-826-01-ML

(National Enrichment Facility)

June 30, 2005

MEMORANDUM AND ORDER

(Ruling on NIRS/PC Late-Filed Contention Amendments)

On May 16, 2005, joint intervenors Nuclear Information and Resource Service and Public Citizen (NIRS/PC) filed two separate motions seeking admission of amendments and/or supplements to previously-admitted environmental/technical contentions (EC/TC) -- NIRS/PC EC-5/TC-2, Decommissioning Costs, and NIRS/PC EC-3/TC-1, Depleted Uranium Hexafluoride Storage and Disposal -- 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 proposed facility, designated as the National Enrichment Facility (NEF), to be constructed near Eunice, New Mexico. On May 20, 2005, NIRS/PC filed a third motion proffering additional supporting bases for the proposed amendments relating to contention NIRS/PC EC-5/TC-2. In responses to these filings, each dated June 3, 2005, LES and the NRC staff separately oppose the admission of all proposed amendments and/or supplements to previously-admitted contentions.

For the reasons set forth below, this Board finds that none of the contention amendments and/or supplements are admissible, and so are rejected, although in the case of contention

NIRS/PC EC-5/TC-2, we decline to permit the amendment because we conclude the matters NIRS/PC wants to include can be litigated under the existing contention without further amendment.

I. BACKGROUND

On December 12, 2003, LES filed with the agency an application to obtain a license to possess and use source, byproduct, and special nuclear material to enrich natural uranium at the NEF. On April 6, 2004, public interest groups NIRS/PC filed a joint petition to intervene in the application proceeding pursuant to 10 C.F.R. § 2.309(a), see Petition To Intervene by [NIRS/PC] (Apr. 6, 2004), and in an issuance dated May 20, 2004, the Commission found that NIRS/PC met the requirements for standing to intervene.¹ See LBP-04-14, 60 NRC 40, 53-54 (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)).

On June 15, 2004, the Licensing Board conducted a prehearing conference with the petitioners,² 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. In a July 14, 2004 memorandum and order, the Board admitted NIRS/PC as a party to this 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 at 75. As is pertinent here, the Board admitted contentions NIRS/PC EC-3/TC-1 and NIRS/PC EC-5/TC-2.³ See id. at 67, 68.

By a subsequent memorandum and order dated August 16, 2004, the Board set a general schedule for this proceeding. See Licensing Board Memorandum and 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) [hereinafter August Scheduling Order]. Pursuant to that portion of the schedule that set a deadline for submitting late-filed environmental contentions, on October 20, 2004, NIRS/PC filed a motion to amend or supplement previously admitted contentions, including EC-3/TC-1 and EC-5/TC-2, based on certain additional information contained in, among other documents, the staff's draft environmental impact statement (DEIS) for the NEF. See Motion on Behalf of [NIRS/PC] To

² Two governmental entities associated with the State of New Mexico -- the New Mexico Environment Department (NMED) and the Attorney General of New Mexico (AGNM) -- also filed petitions to intervene in the LES licensing proceeding on, respectively, March 23, 2004, and April 5, 2004. See [NMED] Request for Hearing and Petition for Leave to Intervene (Mar. 23, 2004); [AGNM] Request for Hearing and Petition for Leave to Intervene (Apr. 5, 2004). The Board subsequently admitted both NMED and the AGNM to this proceeding as having proffered at least one admissible contention. See LBP-04-14, 60 NRC 40, 75 (2004).

³ In ruling on the admission of contention NIRS/PC EC-5/TC-2, the Board consolidated the admitted portions of this contention with the admitted aspects of contention AGNM TC-i based on their similar subject matters, and designated NIRS/PC as lead party on the consolidated contention. See LBP-04-14, 60 NRC at 68, 72. For simplicity's sake in the context of this ruling, the Board will refer to this contention only as NIRS/PC EC-5/TC-2.

Amend and Supplement Contentions (Oct. 20, 2004). In a November 22, 2004 memorandum and order, the Board found the proposed supplements to contention EC-3/TC-1 inadmissible as, among other things, outside the scope of the contention as admitted, but did admit a supplement to EC-5/TC-2, finding that the proffered new material met both the standard for late filing set forth in 10 C.F.R. § 2.309(c) and the general contention admissibility requirements of 10 C.F.R. § 2.309(f). See Licensing Board Memorandum and Order (Ruling on Late-Filed Contentions) (Nov. 22, 2004) at 12-14, 16-17 (unpublished) [hereinafter November Late-Filing Ruling].⁴

⁴ With regard to the supplement to contention EC-5/TC-2, the Board admitted a supplement initially proffered by NIRS/PC relative to contention NIRS/PC EC-6/TC-3, Costs of Management and Disposal of Depleted UF₆, which the Board found timely and otherwise admissible, but relevant to the subject matter of EC-5/TC-2. See November Late-Filing Ruling at 16-17.

On February 2, 2005, NIRS/PC filed with the Board a second motion for the admission of late-filed contentions, seeking to amend and/or supplement three previously-admitted contentions including EC-3/TC-1 and EC-5/TC-2. See Motion on Behalf of Intervenor [NIRS/PC] For Admission of Late-Filed Contentions (Feb. 2, 2005). The Board ruled on the admissibility of these proffered amendments and/or supplements in a May 3, 2005 memorandum and order, again declining to admit proffered supplements to EC-3/TC-1, but admitting a supplement to EC-5/TC-2 as supported by a basis sufficient to meet the section 2.309(c) late-filing standards and section 2.309(f) general admissibility requirements. See Licensing Board Memorandum and Order (Ruling on NIRS/PC Late-Filed Contentions and Providing Administrative Directives) (May 3, 2005) at 6-9, 11-13 (unpublished) [hereinafter May Late-Filing Ruling].⁵

On May 16, 2005, NIRS/PC filed two separate motions, again seeking admission of amendments and/or supplements to EC-3/TC-1 and EC-5/TC-2. See Motion on Behalf of Intervenor [NIRS/PC] for Admission of Late-Filed Contentions Concerning LES Disposal Strategy (May 16, 2005) [hereinafter Motion to Amend EC-3/TC-1]; Motion on Behalf of Intervenor [NIRS/PC] for Admission of Late-Filed Contentions Concerning Dispositioning Cost Estimates (May 16, 2005) [hereinafter First Motion to Amend EC-5/TC-2]. In addition, on May 20, 2005, NIRS/PC filed a second motion with regard to EC-5/TC-2 providing additional

⁵ In addition, relative to contention EC-3/TC-1, the Board also noted that, per the Commission's January 18, 2005 ruling, see CLI-05-5, 61 NRC 22, 36 (2005), the previously admitted paragraph C to this contention had been ruled inadmissible. See May Late-Filing Ruling at 9.

bases in support of the amendment and/or supplement to that contention proffered in its May 16 motion. See Motion on Behalf of Intervenors [NIRS/PC] for Admission of Additional Bases for Late-Filed Contentions Concerning Dispositioning Cost Estimates (May 20, 2005) [hereinafter Second Motion to Amend EC-5/TC-2].

Specifically, with regard to EC-3/TC-1, NIRS/PC aver that recent disclosures by LES, including information regarding a Memorandum of Understanding (MOU) between LES and Waste Control Specialists (WCS) regarding LES's disposal strategy for depleted uranium hexafluoride (DUF_6) produced at the NEF, raise new information on which the contention amendments appropriately are based. See Motion to Amend EC-3/TC-1 at 1-5. As to the proposed amendment and/or supplement to EC-5/TC-2, NIRS/PC contends that, since the time NIRS/PC filed its February 2 motion to admit amendments to this contention, LES has continued to disclose new information regarding the projected costs of dispositioning DUF_6 from the NEF, and that such information provides an appropriate basis for contention amendment and/or supplementation. See First Motion to Amend EC-5/TC-2 at 1-6; Second Motion to Amend EC-5/TC-2 at 1-2.

LES and the staff each filed responses to the three NIRS/PC motions on June 3, 2005. In its response, LES opposes admission of the proposed amendments and/or supplements to both EC-3/TC-1 and EC-5/TC-2, asserting that neither contention amendment meets the section 2.309(c) late-filing standard or the section 2.309(f) general admissibility requirements for contentions. See Answer of [LES] to Motions on Behalf of [NIRS/PC] For Admission of Late-Filed Contentions Concerning LES' Commercial Strategy and Cost Estimates for the Disposition of Depleted Uranium (June 3, 2005) [hereinafter LES Response]. The staff likewise opposes the admission of all proffered amendments to EC-3/TC-1 and EC-5/TC-2 as not meeting the section 2.309(c) and section 2.309(f) standards. See NRC Staff Response to

Motion on Behalf of Intervenor [NIRS/PC] For Admission of Late-Filed Contentions and Additional Bases (June 3, 2005) [hereinafter Staff Response].

II. ANALYSIS

A. Standards Governing Admissibility of Late-Filed Contentions

As it is relevant to the matters at issue here, section 2.309(c) of the agency's procedural rules provides that the issue of whether late-filed contentions, or untimely amendments to previously-admitted contentions, must be considered by a Licensing Board is based on a balancing of five factors:⁶ (1) good cause, if any, for failure to file on time; (2) availability of other means whereby the petitioner's interest will be protected; (3) extent to which the petitioner's interests will be represented by existing parties; (4) extent to which the petitioner's participation will broaden the issues or delay the proceeding; and (5) extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record. It is well-established that the first factor, good cause for failure to file on time, carries the most weight, and that if good cause is lacking, a compelling showing must be made as to the remaining four factors such as would outweigh the lack of good cause. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 293 (1998) (citation omitted). Because this Board has further elaborated on this balancing test on other occasions in this proceeding, we need not do so here. See, e.g., Licensing Board Order (Ruling on

⁶ As the Board has noted in several previous orders, section 2.309(c) actually includes eight factors. See, e.g., November Late-Filing Ruling at 5-6. 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 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), factors that essentially deal with the question of whether a petitioner has standing to intervene. Because standing is not at issue here, we will address only section 2.309(c) factors one and five through eight.

Commission-Referred Late-Filed Contentions) (Jan. 26, 2005) at 10-11 n.11 (unpublished); November Late-Filing Ruling at 6-7.

Additionally, upon a balancing of the section 2.309(c) factors, should a petitioner show that it has met the standard for late-filing, its late-filed contention still must meet the section 2.309(f) contention admissibility standards. The Board likewise has discussed at length the general standards for contention admissibility in a prior decision in this case, and will not elaborate on those here. See LBP-04-14, 60 NRC at 54-58. An assessment of NIRS/PC's late-filed amendments to its contentions relative to those standards discussed above follows.

B. NIRS/PC Contentions⁷

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

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

* * * * *

- (C) The disclosure by LES that it now apparently plans to dispose of depleted U3O8 in the near-surface disposal site of Waste Control Specialists ("WCS") indicates that LES has chosen a disposal strategy that the Commission could not consider plausible, because the application filed by WCS for a license to dispose of low-level radioactive waste does not consider the disposal of bulk DU3O8, and shows that WCS lacks the necessary understanding of uranium to enable it to project the performance of a nuclear waste disposal site, to manage uranium bearing wastes, or even to accept waste in a reliable and safe manner that would ensure that WCS understood that the shipments were in compliance with waste acceptance criteria and that the waste did not contain non-permitted materials.

⁷ As NIRS/PC seek to amend and/or supplement two contentions already admitted in this proceeding, the newly-proffered material is included in **bold**.

1. Late-Filing Standards

DISCUSSION: Motion to Amend EC-3/TC-1, at 2-6; LES Response at 2-4, 6, 11-13; Staff Response at 5-10.

RULING: As this Board has discussed in the context of other late-filed contentions in this proceeding, in evaluating the question of whether good cause exists for late filing, the focus is often on whether new information has recently become available that serves as the basis for the new contention. In this instance, on January 31, 2005, LES provided to NIRS/PC an MOU with WCS regarding the disposal of depleted uranium from the NEF. We consider this to be the latest date on which new information relating to a plausible disposal strategy was arguably made available to NIRS/PC. Though NIRS/PC lists numerous other subsequent dates on which allegedly new information was made available, this information all appears to relate to disposal and dispositioning costs, matters that properly are the subject of two other contentions in this proceeding. Indeed, the proposed amendment itself makes no mention of costs but instead focuses on WCS's ability to take control and dispose of depleted uranium from the NEF and to obtain an appropriate license from the relevant authority of the State of Texas. Therefore, the "trigger date" on which new information last became available to NIRS/PC, and therefore the date from which NIRS/PC's good cause for late filing should be measured, is January 31.

NIRS/PC assert that the fact the parties were occupied in evidentiary hearings in this proceeding and in submitting proposed findings of fact and conclusions of law following that proceeding somehow tolled the time to file its motion following the January 31 disclosure of the WCS MOU. See Motion to Amend EC-3/TC-1, at 5. Even assuming this to be true, NIRS/PC still did not file its motion until forty-two days after April 4, 2005, the date on which NIRS/PC made its last filing with regard to the February 2005 evidentiary hearings, and has provided no explanation for the length of that period of additional delay. Thirty days has been the outer

boundary of what previously has been considered timely in this proceeding, see May Late-Filing Ruling at 12 (good cause established when motion made 26 days following availability of new information); August Scheduling Order at App. A (allowing 20 days for contentions following issuance of DEIS and Safety Evaluation Report), and this longer delay should have been the subject of a NIRS/PC motion for extension of time in which to file the late-filed contention amendment.⁸ In sum, even putting aside the extensive passage of time between the January 31 production date for the MOU and the date of the NIRS/PC motion and assuming that the time for a NIRS/PC request was tolled until April 4, the Board finds that, having made no timely effort to obtain an extension of time to submit its late-filing request, NIRS/PC has not demonstrated good cause for its late filing.

Good cause not having been established, in considering the remaining four section 2.309(c) factors, the Board must look to see whether they provide the compelling showing necessary to outweigh the lack of good cause for late filing. Factors five and six, availability of other means to protect NIRS/PC's interests and the extent to which other parties will protect those interests, weigh in favor of NIRS/PC, albeit carrying less significance than factors seven and eight. As to the more important delay-to-the-proceeding factor, the Board finds this weighs only slightly against NIRS/PC at this juncture. While any addition to an existing

⁸ Indeed, on February 2, 2005, two business days before the scheduled start of evidentiary hearings in this proceeding, NIRS/PC filed a motion to admit late-filed contentions. In response, LES and the staff filed a joint motion for extension of time in which to respond given the timing of the NIRS/PC motion and the evidentiary hearing, a motion which the Board granted in part. See May Late-Filing Ruling at 4 n.4.

contention is likely to cause some delay in that it will likely add time to the scheduled evidentiary hearing on that contention, given the extended time remaining before those evidentiary sessions begin, any additional discovery would presumably be completed without affecting the start date for the hearing.

Finally, factor eight, regarding contribution to the development of a sound record, weighs against NIRS/PC in this context. Though NIRS/PC has presented the type of information this Board has previously deemed necessary for this factor to carry significant weight (e.g., precise issues to be covered, identity of prospective witnesses, and summary of proposed testimony),⁹ presentation of this information is not itself dispositive of this issue. As another Licensing Board recognized in a similar context, "the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record is only meaningful when the proposed participation is on a significant, triable issue." See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-30, 20 NRC 426, 440 (1984) (quoting Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1143 (1983)). As discussed further below, this amendment is outside the scope of this proceeding and is, therefore, an untriable issue. As a consequence, to the degree two of the four factors weigh in favor of admitting this amendment, they do not provide the compelling showing necessary to outweigh the lack of good cause.

2. Admissibility

DISCUSSION: Motion to Amend EC-3/TC-1, at 7-18; LES Response at 7-10, 13-16; Staff Response at 10-11.

⁹ See, e.g., May Late-Filing Ruling at 8; November Late-Filing Ruling at 8-9.

RULING: Even if a balancing of the late-filing factors did not bar admission of this contention amendment, the amendment is inadmissible as failing to meet the substantive admissibility standards of section 2.309(f). In this regard, the thrust of the contention amendment and its supporting bases is to contest the sufficiency of the WCS application for a license to dispose of low-level radioactive waste that is currently pending before the Texas Commission on Environmental Quality (TCEQ). This Board does not have jurisdiction over matters properly before state regulatory bodies such as the TCEQ. See Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 121-22 (1998). Accordingly, in the absence of some statutory or regulatory authority that would definitively establish that a WCS application to dispose of NEF waste is outside the jurisdiction of that state authority, the sufficiency of the application is a matter outside the scope of this proceeding.

Additionally, this contention as admitted concerns only potential private plausible strategies for disposal. As both the Commission and this Board have stated on several prior occasions, see, e.g., CLI-05-05, 61 NRC 22, 36 (2005); November Late-Filing Ruling at 13-14, LES has one plausible strategy for disposal in the Department of Energy (DOE),¹⁰ and we are aware of no authority that requires it have more than one. Nonetheless, admitted paragraphs (A) and (B) of this contention refer, respectively, to disposal by ConverDyn and Cogema, two companies that LES expressly relied on to support its "private" plausible strategy showing in its Environmental Report (ER). See LES, National Enrichment Facility Environmental Report (Dec. 2003) at 4.13-8 (ADAMS Access. No. ML040050348) [hereinafter ER]. To be sure, LES stated

¹⁰ Specifically, DOE is obligated under the USEC Privatization Act to accept and dispose of low-level radioactive waste generated by any entity licensed by the NRC to operate a uranium enrichment facility. Since the Commission has found that depleted uranium as would be produced at the NEF is low-level waste, DOE is per se a plausible strategy for disposal. See CLI-05-05, 61 NRC at 36.

in its ER that its "preferred option" for disposition is private sector conversion and disposal, see ER at 4.13-6, in an apparent effort to "keep open" the private sector option. Yet, to the Board's knowledge these options have not been further developed by LES. Indeed, the staff does not rely on or discuss either of these options in its recently issued Final Environmental Impact Statement, other than a passing reference to the fact that, though LES states disposal of the depleted uranium in an abandoned mine as its preferred option, no such licensed mine currently exists. See Environmental Impact Statement for the Proposed National Enrichment Facility in Lea County, New Mexico, NUREG-1790, at 2-31 (June 2005).

Thus, in the Board's view, there is a serious question as to whether, in connection with the matter of a plausible strategy for NEF waste disposition as it relates to the agency's decommissioning funding requirements, LES continues to rely on the ConverDyn and Cogema options as originally discussed in its ER. As a consequence, we request that on or before Friday, July 8, 2005, LES provide us with a filing indicating whether it continues to rely upon either the ConverDyn or Cogema options that are the focus of this contention as the basis for any showing regarding a "plausible strategy" for waste disposition relative to the agency's decommissioning funding requirement.

Finally, as discussed below in the context of contention EC-5/TC-2, the WCS proposal and the WCS-related cost estimates on which LES relies at this juncture are most certainly relevant in the context of that contention. In that vein, the parties should be mindful that, although the Board has found that the cost of implementing a particular strategy has no bearing upon whether any particular strategy is technically plausible, see November Late-Filing Ruling at 13, as LES notes in its response, the issues of "plausible strategy" for waste disposal/dispositioning and decommissioning costs are closely related.¹¹ Therefore, the

¹¹ Thus, as the Commission has indicated, see CLI-05-05, 61 NRC at 35, NIRS/PC

reasonableness of the estimated costs of either the DOE plausible strategy or any potential private disposal strategy will be at issue in this proceeding.¹²

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.

LES has presented additional estimates for the costs of deconversion, transportation, and disposal of depleted uranium for purposes of the decommissioning and funding plan required by 42 USC 2243 and 10 CFR 30.35, 40.36, and 70.25. See LES Response to RAI dated January 7, 2005. Such presentations are insufficient because they contain no factual bases or documented support for the amounts of the following particular current LES estimates, i.e., \$2.69/kgU for conversion, \$1.14/kgU for disposal, \$0.85/kgU for transportation, and a total of \$5.85/kgU including contingency, and cannot be the basis for financial assurance.

Since January 7, 2005, LES has presented additional material to the Commission Staff concerning the costs of dispositioning of depleted uranium. However, the supplemental material fails to explain or support the cost estimates offered by LES. LES has not shown that its cost estimates account for several factors that must be considered in estimating the cost of dispositioning of depleted uranium, including the likely unsuitability of depleted uranium for near-surface disposal, scaling of cost estimates to fit facilities that would meet the needs of the NEF, exchange rate uncertainties, emerging scientific information on potential uranium risks, and licensing delays.

attempts to posit a challenge to the LES cost estimates relating to near-surface disposal, see First Motion to Amend EC-5/TC-2, at 21; Second Motion to Amend EC-5/TC-2, at 7-8, would be litigable to the extent they seek to establish that the depleted uranium from the NEF, albeit low-level waste, would be "at some particular radionuclide concentration level and volume" so as "to require disposal by methods more stringent than near-surface disposal," i.e., by land disposal methods in accordance with 10 C.F.R. Part 61 other than near-surface disposal.

¹² To be sure, the choice regarding a "plausible strategy," and the concomitant need to provide a reasonable explanation of the costs of that choice as they relate to its financial qualifications/decommissioning funding responsibilities, rests with LES in the first instance. What is less apparent is the degree to which, if LES chooses as its plausible strategy a "private" disposal option rather than relying on a DOE facility, DOE disposal costs would be a relevant consideration (or visa versa, if DOE conversion were to be the LES chosen tails disposition strategy).

DISCUSSION: First Motion to Amend EC-5/TC-2, at 7-24; Second Motion to Amend EC-5/TC-2, at 3-10; LES Response at 16-17, 18-24, 27-29; Staff Response at 14-15, 18-20.

RULING: As noted above, see supra p. 4, in a May 3 memorandum and order, this Board admitted an amendment to contention NIRS/PC EC-5/TC-2 regarding an alleged lack of support for LES "estimates for the costs of deconversion, transportation, and disposal of depleted uranium for purposes of the decommissioning and funding plan" The current amendments/supplements proffered by NIRS/PC, to the degree they relate to material matters that are within the scope of this proceeding,¹³ add nothing to that previously-admitted

¹³ In this regard, the health effects concerns NIRS/PC again seeks to raise in both their May 16 and May 20 filings, see First Motion to Amend EC-5/TC-2, at 23; Second Motion to Amend EC-5/TC-2, at 7, are an impermissible challenge to the Commission's regulations (as the Board noted in its May 3 ruling, see May Late-Filing Ruling at 13 n.13). Moreover, the NIRS/PC concern about currency conversion, see First Motion to Amend EC-5/TC-2, at 22-23; Second Motion to Amend EC-5/TC-2, at 6, appears to lack materiality given the parties' indication in their May 23 joint report that they intend to provide dispositioning costs in 2004 dollars. See Joint

Re
currency
conversion

(But we have
claims about the
risk of future
fluctuations)

amendment that requires further rewording of the contention. In other words, to the extent NIRS/PC takes issue with cost estimate information provided by LES since January 7, 2005, having already admitted a contention amendment on this subject, the Board will evaluate any relevant information placed before it on that matter, including material relating to post-January 7, 2005 LES submissions.¹⁴

Report in Response to the Licensing Board's May 3, 2005 Administrative Directives (May 23, 2005) at 2 [hereinafter May 23 Joint Report]. Further, NIRS/PC's failure to demonstrate adequately the materiality of their purported concerns regarding DOE program and licensing delay costs, see First Motion to Amend EC-5/TC-2, at 16-17, 23, is fatal to the admissibility of those matters as well. Thus, none of these subjects is litigable in the context of this contention.

¹⁴ This information would be considered in light of previously-established financial qualifications and decommissioning funding tenets, including the precepts that (1) a "plausible strategy" does not need "to include completion of all necessary contractual arrangements," CLI-04-25, 60 NRC 223, 226 (2004); and (2) a decommissioning plan, which is to be utilized at the end of a facility's existence, involves uncertainties, see Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 257, 262 (1996), and so decommissioning funding estimates are subject to triennial updating to provide an opportunity to address changing circumstances, see 10 C.F.R. § 70.25(e).

Because the Board finds the proposed amendments/supplements to be unnecessary for these intervenors to litigate relevant post-January 7 LES information relating to this contention,¹⁵ it sees no need to permit further amendment/supplementation of the contention (nor to discuss whether such amendment/supplementation would be barred as untimely).¹⁶

III. CONCLUSION

¹⁵ Although NIRS/PC make various assertions in their May 16 and 20 motions about the adequacy of the post-January 7 LES submissions based on their lack of access to various types of underlying/supporting information, our ruling here does not address the separate question whether such information is discoverable or relevant in connection with this contention. See, e.g., Licensing Board Memorandum and Order (Discovery Rulings) (Oct. 20, 2004) at 3-4 (unpublished).

¹⁶ In accord with the parties' May 23, 2005 joint report, the Board does not anticipate that its rulings in this motion will have any impact on the existing general schedule for this proceeding relative to discovery and summary disposition filings. See May 23 Joint Report at 4-5. If, however, that is not the case, on or before Friday, July 8, 2005, the parties should provide the Board with a supplemental report within seven days of the issuance of this memorandum and order. Additionally, per the parties' joint report, id. at 5-6, within that time frame, the Board should be provided with updated information on the projected time frame for the fall 2005 hearings.

The Board finds the contention amendments/supplements presented by NIRS/PC in its three May 2005 motions to be inadmissible because (1) in the case of contention NIRS/PC EC-3/TC-1, based on a balancing of the pertinent section 2.309(c) late-filing factors, the lack of good cause for late filing has not been outweighed by a compelling showing regarding the other four pertinent factors, and it fails to satisfy the substantive admissibility standards of section 2.309(f) in that it falls outside the scope of this proceeding; and (2) in the case of NIRS/PC EC-5/TC-2, admission is unnecessary to permit NIRS/PC to litigate its appropriate challenges to post-January 7, 2005 LES information.

For the foregoing reasons, it is this thirtieth day of June 2005, ORDERED, that:

1. The May 16, 2005 and May 20, 2005 NIRS/PC motions for admission of late-filed issues are denied; and

2. LES and/or the parties shall provide the filings requested in section II above in accordance with the schedules described therein.

THE ATOMIC SAFETY
AND LICENSING BOARD¹⁷

Original Signed By
G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Original Signed By
Paul B. Abramson
ADMINISTRATIVE JUDGE

Original Signed By
Charles N. Kelber
ADMINISTRATIVE JUDGE

Rockville, Maryland

June 30, 2005

¹⁷ 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 AGNM, and NIRS/PC; and (3) the staff.