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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

Louisiana Energy Services, L.P.
National Enrichment Facility

Docket No. 70-3103

ASLBP No. 04-826-01-ML

REPLY ON BEHALF OF NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN IN SUPPORT OF PETITION FOR REVIEW OF THIRD PARTIAL INITIAL DECISION ON SAFETY-RELATED CONTENTIONS

Preliminary statement

This Reply is submitted on behalf of Intervenors Nuclear Information and Resource Service and Public Citizen ("NIRS/PC"), in support of their Petition for Review, filed on June 12, 2006, seeking Commission review, pursuant to 10 CFR Sec. 2.341, of the Third Partial Initial Decision (Safety-Related Contentions), dated May 31, 2006 (the "Decision") of the Atomic Safety and Licensing Board (the "Board").

Argument

a. Challenge to DOE cost estimate: LES argues that, in seeking to challenge nonbinding estimates of the cost of dispositioning depleted uranium by the U.S. Department of Energy ("DOE"), NIRS/PC are actually challenging the "*plausibility* of the DOE disposition option." (LES Br. 13; id. 12-14). This is incorrect.

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"Plausible strategy" and a decommissioning cost estimate are related but distinct questions. (See Decision 38-40; Memorandum and Order, June 30, 2005, at 13-14 & n.11). The Board has ruled that the "DOE option"[1] is deemed to be a plausible strategy. (Memorandum and Order, July 19, 2004, at 25; May 3, 2005, at 10; June 30, 2005, at 12 n.10). The issue here, however, is different and involves the decommissioning cost estimate. After the estimate was made available in June of 2005 (LES Br. 7), NIRS/PC moved to add contentions addressing it. (NIRS/PC Motion to Amend, July 5, 2005, at 30-35). The Board held the motion timely as to estimates for the "DOE option." (Memorandum and Order, Aug. 4, 2005, at 19). The Board made no suggestion that the contention addresses "plausible strategy." In declining review, the Commission also gave no sign that the claim was barred as a "plausible strategy" issue:

> "The Board did find timely one of NIRS/PC's claims, a challenge to the Department of Energy's estimate of the costs of depleted uranium disposal. The Board noted that the estimate had only been made available June 6, 2005, just 30 days prior to NIRS/PC's July 5 submission of their late-filed contentions. The Board went on, however, to find challenges to the DOE cost estimate beyond the scope of this proceeding. It said that in estimating the disposal costs, DOE had acted pursuant to it statutory authority under section 3113 of the USEC Privatization Act, and that therefore DOE cost calculations "are outside the scope of this proceeding and lacking materiality in that the agency has no basis for assuming DOE has erred in computing its fees and no authority to direct or challenge DOE's fee estimates established pursuant to its statutory authority." (CLI-05-21, at 4 (Oct. 19, 2005)(*footnotes omitted*)).

The Commission stated that the issue was appropriate for interlocutory review, but given the imminent hearing, it would conduct review after a final decision on the financial issues:

> "If warranted, we can review the USEC Privatization Act question on a focused petition for review following the Board's final decision on financial issues." (id.).

Thus, neither the Board nor the Commission deemed the claim to involve "plausible strategy."

To be sure, plausible strategy and the cost estimate are related matters. (Decision 38-39). Thus, DOE's performance on waste management projects bears on likely cost increases and the

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1 The "DOE option" is to tender depleted uranium to the DOE under Sec. 3113 of the USEC Privatization Act, 42 USC 2297h-11.

appropriate contingency allowance. Dr. Makhijani's declaration, supporting the NIRS/PC motion for stay, indicates that DOE's cost projections have repeatedly been revised upwards, far exceeding a 25% contingency. (Makhijani declaration, June 12, 2006, at 5-6).

LES points out that some of the bases in NIRS/PC's July 5, 2005 motion were disallowed on alternative grounds. (LES Br. 7-8). *All* bases about the DOE estimate were excluded on the ground that Sec. 3113 puts DOE cost estimates "outside the scope of this proceeding." (Memorandum and Order, Aug. 4, 2005, at 22). This Petition seeks a reversal of that judgment, in which event the Board would clearly need to consider basis (f), on the contingency provision, which it deemed "sufficient to establish a genuine material dispute adequate to warrant further inquiry." (id. 22 n.15). Remand should also include basis (a), on disposal at Envirocare, since whether Envirocare is a "plausible strategy" is also raised in the Petition. Other contentions may arise based on the supplemental information obtained in Staff's review. (See Petition 4 n.2).

The assertion that NIRS/PC have not supported the admissibility of their contentions (LES Br. 16-17) ignores, inter alia, NIRS/PC's arguments that would exclude disposal at Envirocare. (Petition 17-25). The DOE estimate assumes disposal at Envirocare, which NIRS/PC have vigorously argued would not meet Part 61 limits; NIRS/PC should be allowed to show so on remand. The assertion that NIRS/PC have failed to challenge the 25% contingency factor accepted by LES (LES Br. 17) ignores the fact that this claim was held otherwise admissible and NIRS/PC's detailed evidence of DOE cost overruns far exceeding 25%. (Disposal direct at 59-64, Sept. 16, 2005; Contingency rebuttal at 12-15, Oct. 11, 2005).

Staff assert that any contention about the contingency factor is moot (NRC Br. 7-9), because, based on "additional details and clarification," a 25% contingency factor was added to the DOE estimate. (id. 8). However, the Makhijani declaration shows that DOE costs on other

projects have exceeded estimates by well over 25%. (at 5-6). Put simply, Staff's willingness, on undisclosed grounds, to settle for a 25% allowance does not render NIRS/PC's contention—supported by the demonstrated need for a far larger allowance—"moot" in way.

LES also argues that the Board allowed a limited challenge based upon omissions from the DOE estimates, and that NIRS/PC failed to make such a challenge. (LES Br. 9, 18). In fact, NIRS/PC filed direct testimony on September 16, 2005, addressing defects in the cost estimate for the "DOE option," such as likely cost escalation that is not accounted for. (Deconversion direct at 20-24; Disposal direct at 59-64, Contingency direct at 29-34). The Board excluded all such testimony. (Memorandum and Order, Oct. 4, 2005, at 7-8, 12, 17). NIRS/PC filed rebuttal testimony on October 11, 2005, again addressing the DOE cost estimate. (Deconversion rebuttal at 15-19; Contingency rebuttal at 11-15). The Board excluded substantially all such testimony, including evidence of DOE cost overruns from 56% to 368%. (Memorandum and Order, Oct. 20, 2005, at 2, 7). The Board's grant of permission proved illusory.

LES contends that "prudential considerations" prevent the Commission from investigating DOE estimates. (LES Br. 15). Such "considerations" did not stop Staff from investigating, and LES from amending, the DOE estimates. (See Petition 4 n.2). To suggest that questioning a DOE contractor's decommissioning cost estimate, which is the basis for financial assurance, is "Commission interference or oversight in areas outside its domain" (LES Br. 15), counsels abandonment of this Commission's duties and should not be entertained.

b. Plausibility of near-surface disposal. LES argues that the Commission should ignore the Board's departure from CLI-05-19, where the Commission allowed proceedings "to go forward because a formal waste classification finding is not necessary . . . " (at 29-30). The Board here based its "plausible strategy" finding on classification of depleted uranium from enrichment as

Class A waste, despite the Commission's direction and the lack of NEPA analysis. (Decision 96 n.71). LES urges that this illegality be overlooked, since Staff was instructed to investigate the classification *outside* of this proceeding. (LES Br. 19-20). But to direct a Staff investigation does not eliminate the illegality nor excuse the Board's disregard of the terms of remand.

LES urges that "plausible strategy" does not call for examination of compliance with Part 61, quoting from CLI-06-15 at 5. (LES Br. 21). But the Commission's language—that this is "*not* a proceeding to license a near-surface waste disposal facility"—describes a NEPA inquiry, not "plausible strategy."[2] Caselaw on "plausible strategy" calls for determination of compliance with the dose limits of Part 61. (See Petition 19-21). The Board recognized that "whether near-surface disposal at a particular site would meet the requirements of Part 61 is the bottom line inquiry relative to the plausibility of such disposal." (Decision 95). The Board failed to make that critical bottom-line inquiry and instead passed the buck, relying on an inadequately documented investigation by the Utah DRC. Reversal is required.

Conclusion

For the foregoing reasons, the Commission should undertake review and reverse the Board's Decision to reject the safety-related contentions made by NIRS/PC.

Respectfully submitted,

Lindsay A. Lovejoy, Jr.
618 Paseo de Peralta, Unit B
Santa Fe, NM 87501
(505) 983-1800
(505) 983-0036 (facsimile)
E-mail: lindsay@lindsaylovejoy.com

2 Thus, CLI-06-15 states that, under NEPA, "[o]ur decision today is not a Part 61 compliance review." (id. 5).

Counsel for Petitioners
Nuclear Information and Resource Service
6930 Carroll Avenue, Suite 340
Takoma Park, MD 20912
(301) 270-6477

and

Public Citizen
1600 20th St., N.W.
Washington, D.C. 20009
(202) 588-1000

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CERTIFICATE OF SERVICE

Pursuant to 10 CFR § 2.305 the undersigned attorney of record certifies that on June 27, 2005, the foregoing Reply on behalf of Nuclear Information and Resource Service and Public Citizen in support of Petition for Review of Third Partial Initial Decision on Safety-Related Contentions was served electronically and by first class mail upon the following:

G. Paul Bollwerk, III
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: gpb@nrc.gov

Dr. Paul B. Abramson
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: pba@nrc.gov

Dr. Charles N. Kelber
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: CKelber@att.net

James R. Curtiss, Esq.
David A. Repka, Esq.
Martin J. O'Neill, Esq.
Winston & Strawn
1700 K St., N.W.
Washington, D.C. 20006
e-mail: jcurtiss@winston.com
drepka@winston.com
moneill@winston.com

John W. Lawrence, Esq.
National Enrichment Facility
100 Sun Avenue, N.E.
Albuquerque, NM 87109
e-mail: jlawrence@nefnm.com

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Associate General Counsel for Hearings, Enforcement, and Administration
e-mail: OGCMailCenter@nrc.gov
lbc@nrc.gov
abc1@nrc.gov
jth@nrc.gov
dmr1@nrc.gov
dac3@nrc.gov

Office of Commission Appellate Adjudication
Mail Stop O-16C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications Staff (original and two copies)
e-mail: hearingdocket@nrc.gov

Lindsay A. Lovejoy, Jr.
618 Paseo de Peralta, Unit B
Santa Fe, NM 87501
(505) 983-1800
(505) 983-0036 (facsimile)
e-mail: lindsay@lindsaylovejoy.com