

RAS 7723

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 05/05/04

BEFORE THE COMMISSION

In the Matter of

LOUISIANA ENERGY SERVICES, L.P.

(National Enrichment Facility)

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Docket No. 70-3103-ML

ASLBP No. 04-826-01-ML

NRC STAFF'S RESPONSE TO PETITION TO INTERVENE
BY NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN

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May 3, 2004

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h), the staff of the Nuclear Regulatory Commission ("Staff") hereby files its response to the Joint Petition to Intervene filed by the Nuclear Information and Resource Service and Public Citizen.¹ For the reasons set forth herein, the Staff submits that NIRS and Public Citizen have adequately demonstrated standing and have submitted at least one admissible contention, thereby satisfying the requirements outlined in 10 C.F.R. § 2.309. Thus, the Staff submits that the NIRS Petition, in large part, should be granted.

BACKGROUND

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

¹ "Petition to Intervene by Nuclear Information and Resource Service and Public Citizen," dated April 6, 2004 ("NIRS Petition").

² See "In the Matter of Louisiana Energy Services, L.P. (National Enrichment Facility); Notice of Receipt of Application for License; Notice of Availability of Applicant's Environmental

the hearing in this proceeding will be subject to the recently-revised provisions in 10 C.F.R. Part 2, and provided a broad overview of the requirements regarding the admissibility of contentions that may be proffered by petitioners. In its Order, the Commission also addressed specific issues which could be raised in the hearing, noting that a number of Commission decisions had been issued in the course of a previous enrichment facility licensing proceeding which could be relied upon as precedent.³

Additionally, the Order included a Notice of Hearing requiring interested persons to file petitions for leave to intervene in the hearing with the Commission by April 6, 2004. In response to this Notice, Petitions to Intervene were filed by the New Mexico Environment Department, the New Mexico Attorney General, and by NIRS.⁴ Because the petitions filed by the New Mexico Environment Department and by the New Mexico Attorney General did not raise issues of standing or environmental justice, issues reserved for the Commission's determination (see Order at 5,875), those petitions were referred to the Atomic Safety and Licensing Board Panel. Remaining before the Commission is the sole petition which raises standing issues, the petition filed by NIRS, to which the Staff now responds⁵.

Report; Notice of Consideration of Issuance of License; and Notice of Hearing and Commission Order," 69 Fed. Reg. 5,873 (February 6, 2004) ("Order").

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

⁴ See "The New Mexico Environment Department's Request for Hearing and Petition for Leave to Intervene," filed March 23, 2004; "The New Mexico Attorney General's Request for Hearing and Petition for Leave to Intervene," filed April 5, 2004; "Supplemental Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene," filed April 23, 2004; and "Petition for Leave to Intervene by Nuclear Information and Resource Service and Public Citizen," filed April 6, 2004.

⁵While the Commission will only be ruling on the issue of whether NIRS has established standing, the Order did not direct that responses to contentions should be filed separately. Accordingly, the Staff also presents its position on the admissibility of the contentions advanced

DISCUSSION

I. NIRS and Public Citizen Have Adequately Demonstrated that they Meet the Commission's Standing Requirements

A. Legal Requirements for Intervention.

It is fundamental that any person who requests a hearing or seeks to intervene in a Commission proceeding must demonstrate that it has standing to do so. The Commission's regulations in 10 C.F.R. § 2.309(a) provide that a petition to intervene or request for hearing will be granted "if the requestor/petitioner has standing under the provisions of paragraph (d) of this section...". Section 2.309(d) outlines the general requirements for standing, and explains that a request for hearing or petition for leave to intervene must state:

- (i) The name, address, and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

10 C.F.R. § 2.309(d)(1).

In determining whether a petitioner has established the requisite interest, the Commission has traditionally applied contemporaneous judicial concepts of standing. *See, e.g., Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994). In order to establish standing, a petitioner must show that the proposed action will cause "injury in fact" to the petitioner's interest and that the injury is arguably within the "zone of interests" protected by the statutes governing the proceeding. *See, e.g., Georgia Power Co.* (Vogtle Electric Generating Plants, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993). In Commission proceedings, the injury

by NIRS.

must fall within the zone of interests sought to be protected by the AEA or the National Environmental Policy Act ("NEPA"). *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985).

To establish injury in fact and standing, the petitioner must establish (a) that he personally has suffered or will suffer a "distinct and palpable" harm that constitutes injury in fact; (b) that the injury can fairly be traced to the challenged action; and (c) that the injury is likely to be redressed by a favorable decision in the proceeding. *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988); *Vogtle*, 38 NRC at 32. It must be likely, rather than speculative, that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. at 560. A petitioner must have a "real stake" in the outcome of the proceeding to establish injury in fact or standing; while this stake need not be a "substantial" one, it must be "actual," "direct" or "genuine." *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48, *aff'd*, ALAB-549, 9 NRC 644 (1979).

A mere academic interest in the outcome of a proceeding or an interest in the litigation is insufficient to confer standing; the requestor must allege some injury that will occur as a result of the action taken. *Puget Sound Power and Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 983 (1982), *citing Allied General Nuclear Services* (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976). Similarly, an abstract, hypothetical injury is insufficient to establish standing to intervene. *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 NRC 229, 252 (1991), *aff'd in part on other grounds*, CLI-92-11, 36 NRC 47 (1992).

In order for an organization to establish standing, it must either demonstrate standing in its own right or claim standing through one or more individual members who have standing. *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995). An organization may meet the injury in fact test either (1) by showing an effect upon its

organizational interests, or (2) by showing that at least one of its members would suffer injury as a result of the challenged action, sufficient to confer upon it “derivative” or “representational” standing. *Houston Lighting and Power Co.* (South Texas Project Units 1 and 2), ALAB-549, 9 NRC 644, 646-47 (1979), *aff’d* LBP-79-10, 9 NRC 439, 447-48 (1979). An organization seeking to intervene in its own right must demonstrate a palpable injury in fact to its organizational interests that is within the zone of interests protected by the AEA or NEPA. *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-30 (1991). Where the organization relies upon the interests of its members, it must show that at least one member who would possess standing in his individual capacity has authorized the organization to represent him. *Georgia Institute of Technology*, 42 NRC at 115.

In certain types of proceedings, (e.g. reactor licensing and ISFSI licensing) a petition may be presumed to have fulfilled the first of the required standing showings based upon geographical proximity to the facility, without having specifically to plead that element if the petitioner reside within the facility’s zone of possible harm. See *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146, *aff’d*, CLI-01-17, 54 NRC 3 (2001). Whether this presumption applies depends upon whether there is an obvious potential for offsite consequences (See *id.* at 148) and the zone of possible harm varies depending on the type of proceeding. See *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-00-2, 51 NRC 25, 28 (2000).

B. NIRS and Public Citizen Have Established
Standing to Intervene in this Proceeding.

Applying these principles to the Petition filed by NIRS and Public Citizen, the Staff contends that NIRS and Public Citizen, through several of their individual members, have established standing to intervene in this proceeding. In support of its petition and to evidence its claim of standing, NIRS provides the declarations of 10 of its members, two of whom reside within 2.5 miles

of the proposed facility. Similarly, Public Citizen provides the declaration of a single member who resides within 4.9 miles of the proposed facility. While no specific geographic zone of possible harm has been established for enrichment facility licensing matters, the Staff is of the view that it is reasonable to assume that the 2.5 and 4.9 mile distances from the proposed LES site are within the geographical zone that might be affected by construction, operation or decommissioning of the facility. See, *Turkey Point*, 53 NRC at 146; see also, generally, *Pacific Gas and Electric Company* (Diablo Canyon Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 429 (2002). Further, each of the individual member's declarations submitted by NIRS and Public Citizen assert a variety of concerns fairly traceable to the proposed action and likely to be redressed by a decision favorable to them in the proceeding.⁶ The declarations identify, among other things, concerns of health impacts to themselves and their families from a potential accidental atmospheric release of radiation and from the impact of slow releases of radioactivity to air or ground water. NIRS Petition at 7 - 17. Thus, NIRS and Public Citizen have established the first necessary element of standing, that of "injury."

Because at least one of NIRS' members and the single Public Citizen member satisfy the Commission's regulatory requirements for standing, and those individuals have authorized NIRS and Public Citizen, as appropriate, to represent them in this proceeding, NIRS and Public Citizen have established organizational standing. See *Hydro Resources, Inc.* (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261 (1998).

II. NIRS⁷ Has Proposed At Least
One Admissible Contention

⁶ Other than the individuals names and the distance they reside from the proposed facility, all the declarations submitted by NIRS and Public Citizen are otherwise identical and thus will be addressed collectively. See NIRS Petition, pg. 7 - 17.

⁷ Because the contentions submitted by NIRS and Public Citizen have been submitted collectively and both have adequately demonstrated standing, the Staff will hereinafter collectively refer to the parties as "NIRS".

A. Legal Standards Governing the Admission of Contentions

In addition to satisfying the standing requirements, NIRS must also provide at least one admissible contention in order to be admitted into this proceeding. See 10 C.F.R. § 2.309(a); see *also* Commission Order, of February 6, 2004. It is well established that contentions may only be admitted in an NRC proceeding if they fall within the scope of issues set forth in the *Federal Register* notice of hearing and comply with the requirements of 10 C.F.R. § 2.309(f)⁸ and applicable Commission case law. See, e.g., *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-171 (1976).

As explained in the Commission Order, a petitioner must state with particularity the contentions sought to be raised. See 10 C.F.R. § 2.309(f)(1). Furthermore, each contention must be accompanied by: (1) a specific statement of the issue of law or fact to be raised or controverted, (2) a brief explanation of the basis for the contention, (3) a demonstration that the issue is within the scope of the proceeding, (4) a demonstration that the issue is material to the findings the NRC must make regarding the action subject to the proceeding, (5) a concise statement of the alleged facts or expert opinions which support the contention and on which the petitioner intends to rely at hearing, including references to the specific sources and documents, and (6) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.

⁸ This reference to section 2.309 of the Commission's regulations, and all subsequent references to Part 2 of the Commission regulations, reflect the recent amendments to 10 C.F.R. Part 2. See "Changes to Adjudicatory Process; Final Rule," 69 Fed. Reg. 2,182 (January 14, 2004). Prior to the amendment of 10 C.F.R. Part 2, the contention requirements were outlined in 10 C.F.R. § 2.714(b).

See 10 C.F.R. § 2.309(f)(1)(I)-(vi).

In addition to the threshold requirements established in section 2.309(f), there are a number of other criteria that govern the admissibility of contentions. For example, a contention that, even if proven, would not entitle the petitioner to relief and, thus would make no difference in the outcome of the proceeding, must be rejected. See *Pacific Gas and Electric Co.* (Diablo Canyon Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 437-438 (2002), citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998), citing *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974). Except under special circumstances, a contention will also be rejected if it challenges an existing Commission rule or attempts to litigate an issue that is or is about to become the subject of a Commission rulemaking. See *id.* at 438; see also § 2.335(a)-(b). Furthermore, to be admissible, contentions must fall within the scope of the proceeding as defined by the notice of hearing. See *id.* citing, e.g., *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-171 (1976). With these general principles in mind, the Staff addresses each contention in turn.

B. The Admissibility of Petitioners' Contentions

1. **NIRS Contention 1.1:**

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 on ground and surface water, contrary to requirements of 10 C.F.R. 51.45.

Staff Response:

The Staff does not oppose the admission of this contention, limited to the matters raised in the statements offered in support of the basis. In support of this contention, NIRS claims that the Environmental Report ("ER") submitted as part of the National Enrichment Facility ("NEF") application is inadequate in its analysis of groundwater runoff issues, including whether

groundwater currently exists in the alluvium, the amount of water that will infiltrate the alluvium from the various basins proposed by NEF, and where water entering the alluvium would be discharged. NIRS Petition at 1.1, basis A(a-f), pg. 19-22. Additionally, the petitioners raise issues regarding the Santa Rosa aquifer, including the depth of the aquifer, whether NEF has proposed an adequate amount of wells to discover potential contamination of the aquifer, and whether the Santa Rosa aquifer is potable or not. NIRS Petition at 1.1, Basis A(g,h,i), pg. 22-23. Finally, petitioners raise other groundwater issues, including, how a 5 ppm detection limit as proposed by NEF is adequate in light of more stringent public health and safety standards imposed by the EPA, what other hazardous materials may be contained in the feedstock, and whether the permeabilities as presented in the ER are based upon laboratory measurements. (NIRS Petition at 1.1, Basis A (i,j,k), pg. 22-23). The arguments advanced by NIRS provide sufficient specificity and basis to raise genuine issues of material fact and law on these matters.

2. NIRS Contention 1.2:

Petitioners contend that the 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.

Staff Response:

The Staff does not oppose the admission of this contention, limited to the matters raised in the statements offered in support of the basis. In support of this contention, NIRS claims that the NEF ER fails to adequately address the long-term water shortage problem of Lea County. NIRS' claim is based upon the Lea County Regional Water Plan, which states that groundwater in the Underground Water Basin, from which most potable water in Lea County is drawn, is being withdrawn faster than it is being recharged. NIRS Petition 1.2, Basis A, pg. 24. NIRS has appropriately raised a specific and genuine issue of material fact, namely that the applicant's ER needs to address the potential long-term shortage of water in the Underground Water Basin, and

NIRS has provided the basis for its claim - the Lea County Regional Water Plan. Therefore, the arguments advanced by NIRS provide sufficient specificity and basis to raise a genuine issue of material fact and law on this matter.

3. **NIRS Contention 2.1:**

Petitioners contend that LES does not have 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. See NRC Order, 69 Fed Reg. 5873, 5877 (Feb. 6, 2004)

Staff Response:

The Staff does not oppose admission of this contention, limited to the matters raised in the statements in support of the basis as discussed below. The concept of "plausible strategy" as it relates to the disposition of the waste produced by the facility, Depleted Uranium ("DU"), was initially addressed during an earlier proceeding which was initiated for the purpose of licensing an enrichment facility. Like this proceeding, the earlier proceeding was subject to an order issued by the Commission which noticed the hearing and set forth a statement of applicable rules and regulations.⁹ In the earlier order, the Commission stated that the applicable regulations require the applicant to address the technical, financial and insurance provisions and resources for dealing with the disposition of depleted uranium hexafluoride tails. *Id.* at 23,313. The Commission further stated that "[p]lausible strategies for the disposition of tails include: storing, as a potential resource, uranium hexafluoride tails at the plant site; continuously converting uranium hexafluoride tails to uranium oxide (or tetrafluoride) as a potential resource or for disposal; and a combination of both - onsite storage with conversion of uranium hexafluoride at the end of plant life." *Id.* at 23,313.

The Commission provided further direction regarding this issue in the order noticing this

⁹See, "Notice of Receipt of Application of License Notice of Availability of Applicant's Environmental Report; Notice of Consideration of Issuance of License; and Notice of Hearing and Commission Order; Louisiana Energy Services, L.P.; Claiborne Enrichment Center", 56 Fed. Reg. 23,310 (May 21, 1991).

proceeding. Specifically, the Commission stated that unless LES demonstrates a use for the uranium in the depleted tails as a potential resource, the tails may be considered waste. 69 Fed. Reg at 5,877. Additionally, the Commission stated that if such waste meets the definition of “waste” in 10 C.F.R. § 61.2, the tails are to be considered low-level radioactive waste in which case a proposal to transfer the tails to DOE for disposal pursuant to Section 3113 of the USEC Privatization Act would constitute a plausible strategy for disposition. *Id.* The Commission also directed that the health, safety and security issues associated with storage of depleted uranium tails pending removal for disposal or DOE dispositioning must be addressed.

In its application, LES identifies six strategies for disposing of DU, only two of which it considered plausible. They are: (1) U.S. private sector conversion and disposal and (2) DOE conversion and disposal. NEF ER Vol. 2, 4.13.3.1.3. LES states that option (1) involves transporting depleted UF₆ from NEF to a private sector conversion facility, followed by permanent disposal in a western U.S., exhausted underground uranium mine, a strategy that was previously found to be plausible the licensing board in *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-97-3, 45 NRC 99, 108 (1997). *Id.* LES supports the plausibility of this option by stating that one company, ConverDyn, is engaged in converting U₃O₈ material to UF₆ for enrichment, has the technical capability to operate a conversion facility, and has a partner which may have access to an exhausted uranium mine where the U₃O₈ could be disposed. *Id.* LES notes that it also has held discussions with another company, Cogema, which has experience with this type of facility and is processing depleted UF₆ in France, concerning a private conversion facility. *Id.*

LES states option (2) involves transportation from NEF to DOE conversion facilities for ultimate disposition. To justify the plausibility of this option, LES notes that DOE has confirmed that this option is “a plausible strategy for disposal of DU from private sector domestic uranium enrichment plant license applicants” and that DOE has contracted for the construction and

operation of conversion facilities in Paducah, KY and Portsmouth, OH. *Id.*

NIRS, in this contention, alleges that these strategies are not plausible for several reasons. First, NIRS claims that it is not plausible that a private conversion plant will be constructed or used by LES. As the basis for this claim, NIRS notes that DOE is constructing its own conversion facilities. In NIRS' view, the fact that a conversion facility for DOE material must be constructed at taxpayer expense shows that this type of facility "does not make economic sense," and presumably would never be constructed. NIRS Petition at 25-26. This is mere speculation on the part of NIRS and, as such, does not provide sufficient foundation for an admissible contention. NIRS also notes that transportation to the conversion facility involves risks, concluding that it would be preferable to build the conversion facility as part of the enrichment facility. *Id.* at 26. An argument regarding the preferable location of a conversion facility, however, simply does not raise an issue as to the plausibility of this option and thus fails to raise a genuine issue of material fact in this proceeding.

NIRS goes on to state that LES has not provided adequate justification for concluding that private conversion of the DU followed by burial in an exhausted underground uranium mine is plausible. In support of this claim NIRS alleges two shortcomings in the LES application with respect to option (1). First, NIRS notes that, with regard to the availability of a mine for disposal, LES only represents that a ConverDyn partner may have access to an exhausted uranium mine which could be used. In NIRS's opinion, this is inadequate to support a finding of plausibility. *Id.* at 26. In addition, NIRS notes that LES reports that it has had discussions with Cogema, but does not report the outcome of those discussions, and concludes that LES has provided no substantive support for plausibility from this representation. *Id.* at 26-27. These claims are sufficient to raise a genuine question as to the adequacy of the application in justifying the plausibility of this option and therefore form an admissible contention.

NIRS also contends that option (2), involving conversion and disposition by DOE, is not

plausible because, as a precondition for acceptance by DOE, the DU must first be determined to be low-level waste and, in their view, DU does not meet the NRC's definition for low-level waste. NIRS, by providing a detailed analysis for its conclusion that the DU cannot be considered low level waste, has raised a genuine issue of fact which is material to this proceeding further supporting the admission of this contention.

4. **NIRS Contention 2.2:**

Petitioners contend also that the LES ER lacks adequate information to make an informed licensing judgment, contrary to the requirements of 10 C.F.R. Part 51. As set forth below, the ER fails to discuss the impacts of construction and operation of deconversion and disposal facilities that are required in conjunction with the proposed enrichment plant.

Staff Response:

Staff does not oppose admission of this contention to the extent that it is based on the claim that LES's ER is inadequate because it does not take into account the environmental impacts of construction and operation of a deconversion facility by a private entity even though this would be necessary under one of the strategies LES considers plausible for dispositioning of DU. NIRS Petition at 31-32. To the extent this contention is premised on this basis, it presents a material issue of fact which is relevant to the subject of this proceeding and is admissible.

The other basis provided by NIRS, however, that the ER is inadequate because it does not discuss the environmental impacts of construction and operation of a geological repository, does not raise an issue which must be resolved in deciding the outcome of this proceeding. The consequences of constructing and operating such a repository are not addressed, and need not be, because this option is not contemplated as an option for disposing of DU.

5. **NIRS Contention 3.1:**

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 SAR 10.0 through 10.3; ER 4.13.3. Petitioners contest the sufficiency of such presentations, as set forth more specifically herein.

Staff Response:

The Staff does not oppose admission of this contention to the extent it is based on the claim that the decommissioning cost estimate presented by LES is premised on a contingency factor which is too low. However, the remaining allegations of deficiencies in the cost estimate by NIRS do not raise litigable issues. NIRS' claim that the cost estimate is premised on insufficient capital costs and inadequate disposal costs is not supported by sufficient facts or expert opinion to demonstrate that a genuine dispute exists on these issues. To support these claims, NIRS only alleges that the cost of capital is too low and unrealistic and speculates that disposal costs may be higher if the waste is not considered low-level waste. This is not sufficient to meet the Commission's standards for admission, which require a concise statement of facts or expert opinions on which the petitioner intends to rely at hearing. See, 10 C.F.R. § 2.309(f)(v).

Similarly, NIRS' claim that LES inappropriately relied on costs from short-term projects carried out in Europe does not provide a basis for an admissible contention. With regard to that aspect of its contention, NIRS states that the costs depend in large part on the length of time the facility has been operated. However, NIRS has not provided any basis for concluding that reliance on costs incurred at those facilities resulted in LES significantly underestimating its costs. Nor has NIRS proposed other cost estimates which it believes would be more appropriate. Instead, NIRS notes that the cost of decommissioning are inherently difficult to estimate in advance because it depends on numerous conditions, such as the nature and extent of contamination that occurs during operations. The fact that these uncertainties exist, and complicate the process of estimating costs, is simply a fact that must be acknowledged rather than an issue of fact or law which may be adjudicated in this proceeding.

6. **NIRS Contention 4.1:**

Petitioners contend that LES's application seriously underestimates the costs and the feasibility of managing and disposing of the depleted UF_6 ("DUF₆") produced in the planned enrichment facility.

Staff Response:

The Staff does not oppose admission of this contention. In support of this contention, NIRS claims that the LLNL report relied on by LES for estimating costs for deconversion and disposal does not accurately reflect the conditions present at the proposed LES enrichment facility. In addition, NIRS identifies reasons that it believes that the disposition methods on which the costs estimates are premised are not plausible. In the bases supporting this contention, NIRS raises specific concerns such as, LES' use of LLNL's median cost levels; cost estimates based upon travel distances of only 1000 kilometers; the assumption that some material used in construction would be recycled; revenues assumed from the sale of CaF₂ and MgF₂ in light of potential contamination of the material; and the lack of information in LES' application to support the proposed "plausible strategies." The arguments advanced by NIRS thus provide sufficient specificity and basis to raise a genuine issues of material fact and law on these matters.

7. NIRS Contention 5.1:

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.

Staff Response:

The Staff does not contest the admission of this contention, as supported by Bases A, B, and F. The Staff submits that Bases A and B are admissible to the extent they specifically challenge the information submitted in the NEF ER regarding domestic enrichment capacity and the need for domestic enrichment services. Additionally, the Staff does not contest the admission of Contention 5.1 as supported by Basis F in which the petitioners contend that the NEF ER does not contain sufficient cost information. The Staff opposes Bases C, D, E, and G, however, on the grounds that they do not set forth sufficient information to show that a genuine dispute exists regarding the applicant's discussion of need, and, instead constitute a generalization of NIRS' views on what they want the need analysis to include, but not what is required.

In Basis C petitioners allege that LES's analysis does not account for licensed facilities which, for a variety of reasons, will not extend their license. However, NEF's ER does indeed discuss this issue in NEF ER 1.1.2.1. The petitioners have failed to note any specific inadequacy with the applicant's analysis of this issue and thus, this Basis does not provide adequate support of the contention.

Likewise, in Bases D, E, and G, petitioners pose vague concerns which, for a variety of reasons, fail to meet the specificity necessary to support their admission under the Commission's requirements. Basis D states NIRS' dissatisfaction with alleged assumptions utilized by the applicant regarding its market analysis, yet fail to cite to where such an assumption was made by the applicant, nor any factual support for NIRS' position that such assumption, if made, is unreasonable. Basis E is a recitation of items LES has allegedly not proven in its analysis of need, yet with no accompanying indication of which conclusions of the applicant, if any, are rendered inaccurate due to the alleged lack of this information. Basis G states that it was a "fundamental omission" for the NEF ER not to discuss the "megatons to megawatts" program, yet fails to acknowledge the applicant's discussion of precisely that issue in sections 1.1 and 7.3 of its ER and why LES' discussion was inadequate. Moreover, to the extent this basis raises concerns about non-proliferation, such concerns are outside the scope of this proceeding.

In sum, the bases advanced by NIRS do not cite to any specific deficiencies in the applicant's extensive analysis of need, do not set forth any facts to demonstrate a reason to believe the applicant's analysis is inadequate, nor do they cite to any requirement that would mandate the applicant to perform an additional or more detailed analysis. Without more precise information, the vague assertions contained in these Bases do not put the parties on notice as to a material issue of fact or law raised by the contention and, thus, should be denied. When, as here, the application addresses an issue which a petitioner wishes to contest in a hearing, Commission regulations require the petitioner to examine the application, identify the specific deficiencies it wishes to

address, and provide support for its contention that the application is deficient. *Baltimore Gas and Electric Company* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-19, 48 NRC 132, 134 (1998); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, 3), CLI-99-11, 49 NRC 328, 333 (1999). In this instance, NIRS has failed to meet the necessary level of specificity regarding Bases C, D, E, and G and, thus, these bases should be denied.

8. NIRS Contention 5.2:

Petitioners also contend that operation of the proposed LES facility would pose an unnecessary and unwarranted challenge to national security and to global nuclear non-proliferation.

Staff Response:

The Staff opposes the admission of this contention on the grounds that it fails to provide sufficient information to show that a genuine dispute exists with the applicant regarding national security concerns. To the extent that the various bases challenge the applicant's satisfaction of the Commission's security regulations, they must be denied in that NIRS fails to identify any shortcoming in the various security plans that LES submitted in support of its application. The LES NEF application incorporates sufficient security information to satisfy the requirements of 10 C.F.R. Part 73, "Physical Protection of Plants and Materials," Part 74, "Material Control and Accounting of Special Nuclear Material," and Part 95, "Facility Security Clearance and Safeguarding of National Security Information and Restricted Data."

Furthermore, the Plan for the Protection of Classified Matter addresses the information protection measures that will be in place to prevent the inadvertent release of classified information. The application also contains a Foreign Ownership Control and Influence package which initiates the NRC review of the applicant in order to determine suitability of the applicant to obtain and control classified information and receive security clearances. The Physical Security and Fundamental Nuclear Material Control Plans are intended to address national security by reducing the risk to the material at the proposed NEF.

Additionally, NIRS' reference to Urenco's security lapses in Basis G are outside the scope of this proceeding. Urenco is not the subject of this proposed licensing action, nor were the Urenco facilities in Europe subject to the NRC's regulatory programs for precluding and detecting unauthorized production of enriched uranium, resolving indications of missing uranium, and of unauthorized production of enriched uranium.

Finally, the Bases in support of this contention which raise non-proliferation issues are not admissible. Although the domestic security measures are designed to minimize the potential for the proliferation of nuclear material, the Commission's regulations do not require an applicant to specifically address non-proliferation issues in the security and material control portions of the application. NIRS' attempt to impose broader requirements on the applicant constitutes an impermissible challenge to Commission regulations and should be rejected. *Pacific Gas and Electric Company* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 438 (2002). Moreover, to the extent this contention seeks admission of issues surrounding U.S. non-proliferation policies, these issues clearly go to matters beyond the scope of the NEF ER or SAR. *See generally, Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 456 (2001).

9. NIRS Contention 6.1:

Petitioners contend that the Environmental Report ("ER") does not contain a complete or adequate assessment of the potential environmental impacts of accidents involving natural gas transmission facilities. Further, there has been no Integrated Safety Analysis ("ISA") based on module-specific data.

Staff Response:

The Staff does not oppose admission of this contention except to the extent that it is premised on basis B, concerning the possibility of terrorists attacks. In this contention, NIRS claims that LES has not properly assessed the probability and environmental consequences of a gas explosion given the proximity of the facility to a natural gas pipeline. Basis A specifically challenges

the applicant's determination of the probability of a gas explosion without first conducting a module-specific analysis; basis C asserts that LES' proposed pipeline design would fail to meet Department of Transportation standards; and basis D notes the absence of the consideration of the risk posed by natural gas leaks ignited by a spark. These bases A, C, and D provide detailed and specific concerns with LES' application.

However, in basis B, NIRS states that the probability assigned by LES to a gas explosion, 1E-05 or highly unlikely, does not reflect "changes in security calculations since September 11, 2001." Petition at 49 -50. NIRS does not, however, identify what these alleged changes are, where or how they have been applied, or whether they would have any impact on the LES calculations. In the absence of any of this information, the basis is unduly vague and unsupported and must be rejected.

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that NIRS has established evidence that at least one member satisfies the Commission's standing requirements and has proposed at least one admissible contention. Therefore, the Staff submits that the NIRS petition should be granted and that at least a portion of all the contentions, other than contention 5.2, should be admitted into the proceeding.

Respectfully submitted,

/RA/

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Angela B. Coggins
Counsel for NRC Staff

Dated at Rockville, Maryland
this 3rd day of May, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
LOUISIANA ENERGY SERVICES, L.P.)	Docket No. 70-3103-ML
)	
(National Enrichment Facility))	ASLBP No. 04-826-01-ML
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO PETITION TO INTERVENE BY NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), by electronic mail as indicated by a double asterisk (**), and by facsimile as indicated by a triple asterisk (***) on this 3rd day of May, 2004.

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