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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

ANSWER OF LOUISIANA ENERGY SERVICES, L.P. TO MOTION
ON BEHALF OF NUCLEAR INFORMATION AND RESOURCE SERVICE
AND PUBLIC CITIZEN FOR ADMISSION OF LATE-FILED CONTENTIONS

I. INTRODUCTION

On February 2, 2005, Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") filed a motion to amend certain admitted NIRS/PC contentions, purportedly based on the availability of new information.¹ Pursuant to the Atomic Safety and Licensing Board's ("Board") Order (Schedule for Responses to Motion To Admit Late-Filed Contentions) of February 4, 2005, Louisiana Energy Services, L.P. ("LES") herein responds in opposition to the Motion.

II. DISCUSSION

A. Procedural History and Relevant Background

The Board has admitted (and later amended) several NIRS/PC contentions relating to LES's proposed private sector strategy for the disposition of depleted uranium hexafluoride ("DUF₆") from the proposed National Enrichment Facility ("NEF"). See Contentions NIRS/PC EC-4; NIRS/PC EC-3/TC-1; NIRS/PC EC-5/TC-2 – AGNM TC-i; and

¹ "Motion on Behalf of Petitioners Nuclear Information and Resource Service and Public Citizen for Admission of Late-Filed Contentions," dated February 2, 2005 ("Motion").

NIRS/PC EC-6/TC-3. (The parties completed the evidentiary hearing on the environmental contention NIRS/PC EC-4 in early February, and the record on that contention has been closed.) The admitted contentions were predicated principally on information set forth by LES in Section 4.13 (“Waste Management Impacts”) of the NEF Environmental Report (“ER”). Section 4.13 provides information regarding LES’s proposed alternatives or “plausible strategies” for disposition of DUF₆, including the deconversion and disposal of depleted uranium tails by commercial entities or the Department of Energy (“DOE”), and the potential environmental impacts and costs associated with the disposition of depleted uranium.

NIRS/PC now seek to amend three of the four contentions identified above. In seeking to establish good cause for their proposed late-filed amendments, NIRS/PC rely on a very limited quantum of purportedly “new” or “previously unavailable” information. That first includes a January 7, 2005 LES response to an NRC Staff request for additional information (“RAI”) regarding LES’s cost estimate for the disposition of DUF₆. *See* Motion at 3-5. The RAI response clarifies LES’s use of historical cost estimates (*i.e.*, the “LLNL” and “CEC” estimates) and actual tails disposition cost data (*i.e.*, the “UDS” and Urenco contracts) in developing its original \$5.50 per kgU (\$5.62 per kgU when escalated to 2004 dollars) cost estimate. The response also provides, at the request of the NRC Staff, an updated cost estimate that reflects recent information obtained from commercial deconversion, disposal, and transportation vendors (*e.g.*, the increased cost of fuel relative to transportation costs). Significantly, the updated cost estimate, \$5.85 per kgU (in 2004 dollars and including a 25% contingency) is comparable to LES’s original estimate of \$5.62 per kgU (2004 dollars). Notwithstanding, the amended contentions now proposed by NIRS/PC far exceed in scope cost-related concerns, and raise cost-related concerns that could have been (and generally were) raised previously.

In addition to the January 7, 2005 RAI response, NIRS/PC also rely on certain Board and Commission statements as purportedly providing good cause for their contention amendment requests. Specifically, NIRS/PC rely on the following statement, which the Board made on November 22, 2004, when it in rejected a prior attempt by NIRS/PC to amend Contention NIRS/PC EC-4 to encompass disposal-related issues:

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.*²

However, this passage makes clear that any opportunity for a renewed motion relative to Contention NIRS/PC EC-3/TC-1 was subject to an important condition precedent: a Commission *holding* that “the Board should hear the waste classification issue relative to that contention.” Contrary to the intervenors’ assertion, no such holding was rendered by the Commission. In ruling on the Board’s referral, the Commission held that “depleted uranium properly is considered a form of low-level radioactive waste” under the Low-Level Radioactive Policy Act, and that disposal of NEF-generated depleted uranium pursuant to Section 3113 of the USEC Privatization Act is a “plausible strategy.”³ In doing so, the Commission actually “reverse[d] the admission to this proceeding of the portion of the intervenors’ plausible strategy contention

² Memorandum and Order (Ruling on Late-Filed Contentions) (unpublished) (Nov. 22, 2004), at 14 (emphasis added) (“Ruling on Late-Filed Contentions”).

³ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-5, 61 NRC __ (slip op. Jan. 18, 2005), at 17.

NIRS/PC EC-3/TC-1 that challenges the DOE disposal option (termed Basis ‘D’ in the intervenors’ contention and renamed by the Board Basis ‘C’).”⁴

As NIRS/PC point out, the Commission did state that a “definitive conclusion . . . cannot be reached at this time” with respect to “whether the LES material, in the volumes and concentrations proposed, will meet the Part 61 requirements for near-surface disposal.”⁵ The Commission did not, however, “remand” this issue to the Board for further consideration within the context of Contention NIRS/PC EC-3/TC-1, as NIRS/PC wrongly suggest. *See* Motion at 3. Indeed, in acknowledging that the plausibility of LES’s proposed private disposal options and associated cost considerations “remain before the Board,” the Commission specifically cited Contentions NIRS/PC EC-5/TC-2 – AGNM TC-i (Decommissioning Costs) and NIRS/PC EC-6/TC-3 (Costs and Management and Disposal of Depleted Uranium UF₆) in their existing form.⁶ Further, the Commission emphasized that the acceptability of near surface disposal “is not a question we need answer in considering the *plausible strategy contention*,” i.e., NIRS/PC EC-3/TC-1.⁷ As further discussed below, neither the Board’s mention of a possible renewed motion in its November 22 decision, nor the Commission’s holding in CLI-05-5, provide good cause for the untimely contention amendments now proffered by NIRS/PC.⁸

⁴ *Id.*

⁵ *Id.* at 16.

⁶ CLI-05-5, 61 NRC __ (slip op. Jan. 18, 2005), at 16 n.64.

⁷ *Id.* (emphasis added).

⁸ Although the Board recognized the *possibility* of a renewed motion (subject to the Commission’s ruling on the certified question), LES does not believe that the Board contemplated a wholesale reworking and expansion of the October 2004 NIRS/PC motion. As shown below, however, NIRS/PC have done precisely that, providing a veritable “laundry list” of untimely new claims that are more akin to merits arguments (though LES does not concede their admissibility in the October evidentiary hearings). Indeed, the untimely bases appear to have been extracted almost verbatim from the November 24, 2004 expert report of NIRS/PC witness Arjun Makhijani. *See*

B. Legal Standards Governing Admissibility of Late-Filed Contentions

The standards governing the admissibility of late-filed and amended contentions are set forth in the Board's November 22, 2004 ruling on late-filed contentions.⁹ In short, where, as here, the issue of an intervenor's standing already has been resolved, the Board must weigh the following five factors: (1) good cause, if any, for the failure to file on time; (2) the availability of other means whereby the requestor's interest will be protected; (3) the extent to which the requestor's interests will be represented by existing parties; (4) the extent to which the requestor's participation will broaden the issues or delay the proceeding; and (5) the extent to which the requestor's participation may reasonably be expected to assist in developing a sound record.¹⁰ The first factor, good cause for lateness, carries the most weight in the balancing test, and the lack thereof requires the petitioner to make a "compelling showing" relative to the remaining factors.¹¹ The finding of good cause for late-filing of contentions is related to the *total previous unavailability* of information.¹²

Additionally, the proffered late-filed contentions also must meet the admissibility standards set forth in 10 C.F.R. § 2.309(f)(1), which are discussed at length in the Board's July

A. Makhijani and B. Smith, "Costs and Risks of Management of Depleted Uranium from the National Enrichment Facility to Be Built in Lea County, New Mexico by LES" (Nov. 24, 2004).

⁹ Ruling on Late-Filed Contentions, at 5-6.

¹⁰ See 10 C.F.R. § 2.309(c)(1)(i), (v)-(viii).

¹¹ See *State of New Jersey* (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 296 (1993) (citations omitted).

¹² See 10 C.F.R. § 2.309(f)(2); *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

19, 2004 ruling in this proceeding.¹³ These standards require, *inter alia*, a showing that a genuine dispute exists on a material issue of law or fact.

C. The Timeliness of Intervenors' Proposed Contention Amendments

1. *Contention NIRS/PC EC-4 – "Impacts of Waste Storage"*

NIRS/PC seek to amend Contention NIRS/PC EC-4 to include the following additional paragraph:

The DEIS fails to discuss the environmental impacts of the transportation and disposal of depleted uranium. The analyses of disposal methods in the DEIS are unsupported and technically deficient, and such proposed methods would fail to meet relevant health requirements, such as the Commission's standards for disposal of low-level radioactive waste. Thus, the DEIS lacks adequate information to make an informed licensing judgment.

Motion at 8. As set forth below, this proposed amendment is inadmissible for several reasons.

First and foremost, the parties completed the evidentiary hearing on Contention NIRS/PC EC-4 on February 8, 2005, and submitted transcript corrections on February 28, 2005. The record on this contention is closed. NIRS/PC have not filed the requisite motion to reopen the record. Such a motion must address a significant safety or environmental issue, and demonstrate that a materially different result would be likely had the newly proffered evidence been considered initially. *See* 10 C.F.R. § 2.326.

Moreover, Contention NIRS/PC EC-4 relates specifically to the potential environmental impacts of a commercial deconversion facility that might be built to deconvert depleted UF₆ from the NEF to depleted U₃O₈. This contention has nothing to do with the *transportation* or *ultimate disposal* of that depleted uranium. The Board has ruled repeatedly that issues pertaining to the disposal of depleted uranium (*e.g.*, the waste classification of

¹³ *See Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 54-58 (2004).

depleted uranium and the particular disposal form, *i.e.*, U₃O₈ versus UO₂) fall outside the narrow scope of this contention.¹⁴ Any amended contention on the matters raised by NIRS/PC cannot be linked to Contention EC-4. It must stand on its own and with an appropriate basis for late-filing.

NIRS/PC have failed to show good cause for the untimely submission of the issues raised in their proposed amendment to Contention NIRS/PC EC-4. As set forth below, of the 25 “bases” presented by NIRS/PC, all involve issues that NIRS/PC could have raised, or, in fact, have raised, previously. Thus, they are *not* based on the January 7, 2005 RAI response, the only legitimately “new” (at least for purposes of late-filing) substantive piece of information cited by NIRS/PC in their motion. Likewise, nothing in the Commission’s decision on depleted uranium justifies late-filed amendments to Contention NIRS/PC EC-4.

2. *Contention NIRS/PC EC-3/TC-1 – “Depleted Uranium Hexafluoride Storage and Disposal”*

With respect to Contention NIRS/PC EC-3/TC-1, NIRS/PC seek to amend the contention to include the following additional paragraphs:

- (D) LES has not presented any reasonable or credible plan for deconversion, transportation, and disposal that meets the Commission’s standards for a “plausible strategy.” LES has only stated cost estimates for deconversion, transportation, and disposal, without showing the elements of the plan to which such estimates apply or identifying the source of the estimates. LES has no adequately described decommissioning strategy.

¹⁴ When NIRS/PC sought to amend this contention in October 2004, they asserted that the DEIS assumes that depleted uranium may be disposed of as low-level waste, and inappropriately treats depleted uranium as suitable for near-surface disposal. The Board rejected this proposed amendment, stating that “we decline to admit this issue in the context of an environmental contention relating to the DEIS.” Ruling on Late-Filed Contentions, at 14. Further, the Board similarly rejected multiple attempts by NIRS/PC to introduce disposal-related issues in their prefiled direct and rebuttal testimony on Contention NIRS/PC EC-4. *See, e.g.*, Memorandum and Order (Ruling on In Limine Motions and Providing Administrative Directives) (unpublished) (Jan. 21, 2005), at 7-8. Issues involving the transportation of depleted uranium are likewise beyond the narrow scope of this already-litigated contention.

- (E) Methods of disposal of depleted uranium described by LES or referred to by Commission Staff in the Draft Environmental Impact Statement, such as shallow land disposal or burial in an abandoned mine, do not constitute a plausible strategy, because such proposed methods would fail to meet applicable health requirements, such as the Commission's standards for disposal of low-level radioactive waste.

Motion at 7. Before specifically addressing each of the 25 "bases" proffered by NIRS/PC in support of the foregoing amendments to Contention NIRS/PC EC-3/TC-1, several general observations regarding the proposed contention amendments are in order.

First, proposed paragraph (D), in asserting the lack of "any reasonable or credible plan for deconversion, transportation, and disposal," is a restatement of Contention NIRS/PC EC-3/TC-1, *i.e.*, that "LES does not have a sound, reliable, or plausible strategy for private sector disposal" of NEF-generated depleted uranium. Moreover, in referring in proposed Paragraph (D) to LES's "cost estimates" for private sector disposal of depleted uranium, NIRS/PC again conflate two disparate issues, *i.e.*, (1) the plausibility of LES's "private sector" disposition strategy and (2) the economic cost of implementing that strategy. In fact, when NIRS/PC sought to amend Contention NIRS/PC EC-3/TC-1 in October 2004, they asserted that "[t]o 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." The Board rejected the proposed amendment, stating in part that, "in the context of plausible disposal strategies, the cost of implementation of particular strategy has *no bearing* upon whether any particular strategy is technically feasible."¹⁵ In this regard, the Board added that it "expects to deal thoroughly with economic considerations" in the context of other admitted contentions.¹⁶ None of the "new

¹⁵ Ruling on Late-Filed Contentions, at 12 (emphasis added).

¹⁶ *Id.* at 12-13.

information” now cited by NIRS/PC justifies revisiting this conclusion with respect to the scope of Contention NIRS/PC EC-3/TC-1.

Second, proposed Paragraph (E) only reiterates the NIRS/PC position that commercial disposal of depleted uranium in an underground mine or in a near-surface disposal facility is not plausible when viewed relative to the requirements of 10 C.F.R. Part 61, the Commission’s land disposal regulations. This proposed amendment involves issues that NIRS/PC have previously raised, and that the Board has previously admitted. *See* Bases H and I of Contention NIRS/PC EC-6/TC-3 (challenging LES’s depleted uranium disposition cost estimates on the ground that neither mine disposal nor shallow land disposal in an “engineered trench” is likely to be acceptable if DUF_6 is not considered low-level waste). Therefore, the proposed contention amendments do not raise any new issues in response to previously unavailable information. There is no reason to further confuse the contentions in the proceeding by, in effect, raising every issue NIRS/PC may have under multiple contentions.

Third, a number of the issues identified by NIRS/PC in their February 2, 2005 Motion were earlier raised by NIRS/PC (or other parties) and rejected by the Board and/or Commission. Examples include the specific disposal form of depleted uranium (DU_3O_8 versus DUO_2), the plausibility of the Section 3113 disposal option, the DOE’s performance history, and the degree of certitude required for a plausible strategy.

Fourth, it is well-established that contentions must be based on documents or other information available *at the time the petition is filed*, such as the license application, supporting safety analysis report, environmental report, and other supporting documents filed by an applicant. *See* 10 C.F.R. § 2.309(f)(2). An amended contention cannot serve “to insert

numerous discrete claims that arguably might have been raised earlier.”¹⁷ While the proposed amendments to Contention NIRS/PC EC-3/TC-1 (*i.e.*, paragraphs (D) and (E)) do not on their face raise new issues, many of the 25 “bases” presented by NIRS/PC in support of the proposed amendments in fact constitute discrete claims that could have been raised earlier. At the very least, the new claims are unrelated to the only substantive “new” piece of information cited by NIRS/PC, *i.e.*, the updated cost estimate contained in LES’s January 7, 2005 RAI response.

Fifth, as set forth in 10 C.F.R. § 2.309(f)(1)(iv), all contentions (and supporting bases) must assert an issue of law or fact that is material to the outcome of the licensing proceeding, *i.e.*, impact the grant or denial of a pending license application. As discussed herein, some of the untimely new claims asserted by NIRS/PC involve issues that are not material to the findings that the NRC must make relative to the NEF license application. Examples include compliance with certain EPA standards and guidance, the “track record” of DOE and prospective LES vendors, and the recommendations of certain research organizations. Against this backdrop, LES summarily addresses the timeliness and admissibility of the 25 “bases” proffered by NIRS/PC in support of the proposed amendments to Contention NIRS/PC EC-3/TC-1.

a. Late-Filed Basis A

NIRS/PC assert that while LES has provided updated cost estimates in its January 7, 2005 RAI response, “there is no explanation of the origin of the stated cost estimates.” Motion at 9. In a tenuous attempt to establish a link to Contention NIRS/PC EC-3/TC-1, NIRS/PC further assert that “[t]here is no description of a decommissioning strategy and reasonable or credible plan to dispose of the DUF₆ tails.” *Id.* However, as discussed above, cost is not the subject of this contention. Further, the issue of whether LES has a plausible

¹⁷ *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002)

commercial strategy for the disposition of depleted uranium already has been admitted under Contention NIRS/PC EC-6/TC-3, Bases G and H.

b. Late-Filed Bases B through E

Late-Filed Bases B through E all relate to the NIRS/PC contention that the “radiological properties” of depleted uranium pose disposal risks that are “most comparable to those associated with transuranic (“TRU”) waste.” Motion at 9. NIRS/PC maintain that shallow land disposal of depleted uranium waste is generally not appropriate, and deep geologic disposal is required. *See id.* at 9-11. None of these late-filed bases raises an issue that could not have been raised previously, nor is based on information contained in LES’s January 7 RAI response. Indeed, NIRS/PC voiced concerns about the radiological properties of depleted uranium in their April 6, 2004 intervention petition (pages 27-31), contending even then that depleted uranium is comparable to TRU and should be disposed of in a deep geologic repository. Therefore, there is no good cause to amend Contention NIRS/PC EC-3/TC-1 at this time to include these bases.

c. Late-Filed Basis F

In this basis, NIRS/PC present several disparate points: (1) EPA safe drinking water regulations limit the concentration of uranium in drinking water to 30 micrograms/liter; (2) exposure to uranium in water is regulated largely for chemical toxicity insofar as uranium is known to be nephrotoxic; (3) the nephrotoxicity of uranium to humans is the subject of ongoing research; and (4) exposure to depleted uranium via ingestion, inhalation, and external exposures to large quantities creates risks from ionizing radiation (*i.e.*, low-dose radiation effects). *See* Motion at 13-14. Undoubtedly, these are issues that NIRS/PC could have raised previously in this proceeding. Also, NIRS/PC have failed to show how these particular observations are

material to any finding that the NRC must make relative to the NEF license application or 10 C.F.R. Part 61.¹⁸ The issues raise no genuine dispute as to a material issue of law or fact.

d. Late-Filed Bases G, H, and I

These bases all relate generally to purported developments in, and the asserted need for, research involving the health effects of exposure to uranium. Basis G, for example, asserts that the understanding of the cancer risks due to radiation exposure to uranium, and kidney damage due to its heavy metal properties (including synergistic effects), has expanded greatly over the past decade. Motion at 14. NIRS/PC add that exposure to uranium may be mutagenic, cytotoxic, tumorigenic, teratogenic, and neurotoxic. *Id.* Bases H and I state that the World Health Organization, National Research Council, and Royal Society have all recommended additional studies on specified health impacts of uranium exposure, including impacts on children. *Id.* at 15-16. Again, these bases are not linked to LES's RAI response of January 7, 2005, nor did the Commission remand them for consideration under Contention NIRS/PC EC-3/TC-1. In any event, these issues could have been raised previously by NIRS/PC.

e. Late-Filed Basis J

NIRS/PC assert that the logic that depleted uranium disposal cannot be considered less risky than TRU disposal was adopted in 1992 by Kozak *et al.*, in a report entitled "Performance Assessment of the Proposed Disposal of Depleted Uranium as Class A Low-Level Waste." Motion at 16-17. NIRS/PC already have sought to challenge – in other admitted contentions – the technical and regulatory feasibility of "shallow" or near-surface disposal of depleted uranium. The mere identification of the 1992 Sandia National Laboratories report,

¹⁸ For example, 10 C.F.R. § 61.43 provides that operations at a land disposal facility must be conducted in compliance with the standards for radiation protection set out in Part 20 of this chapter, except for releases of radioactivity in effluents from the land disposal facility, which shall be governed by § 61.41 of this part. The relevance of EPA safe drinking water standards to disposal of depleted uranium pursuant to 10 C.F.R. Part 61 is thus unclear.

which NIRS/PC could have identified at the time it proffered those contentions, does not provide timely support for amending Contention NIRS/PC EC-3/TC-1.

f. Late-Filed Bases K Through V

Late-filed Bases K through V generally relate to the adequacy of LES's and the NRC Staff's evaluation of the potential environmental impacts of near-surface and mine disposal of depleted uranium. *See* Motion at 17-27. These late-filed bases are untimely, insofar as many of the issues could have been raised previously based on information contained in the LES license application. To the extent the bases raise issues specific to the DEIS, they also are untimely. Namely, NIRS/PC had an opportunity to amend Contention NIRS/PC EC-3/TC-1 in October 2004, *i.e.*, after the NRC Staff issued the DEIS in early September 2004. Indeed, NIRS/PC sought to amend Contention NIRS/PC EC-3/TC-1 in their October 2004 motion to amend contentions. The proposed amendments, however, were rejected by the Board.¹⁹

As explained above, given the Commission's ruling in CLI-05-5, the Board's November 22 reference to a "renewed" motion relative to Contention NIRS/PC EC-3/TC-1 provides no basis for now amending that contention. To the extent that issues related to the acceptability and cost of near surface or mine disposal of depleted uranium are to be litigated in this proceeding, they are to be litigated in connection with two other admitted contentions identified by the Commission, *i.e.*, Contentions NIRS/PC EC-5/TC-2 – AGNM TC-i and NIRS/PC EC-6/TC-3. Contrary to the intervenors' assertion, the Commission did not "remand" any issues to the Board for consideration under Contention NIRS/PC EC-3/TC-1.

Also, many of the late-filed bases at issue also are inadmissible insofar as they raise irrelevant and immaterial issues. *See* 10 C.F.R. § 2.309(f)(1). In Bases M, P, and Q, for example, NIRS/PC refer to EPA regulatory standards, *i.e.*, limits for uranium in drinking water

¹⁹ Ruling on Late-Filed Contentions, at 12-13.

and radon “emanations” from DOE facilities. *See* Motion at 18, 20-22. These limits have no demonstrated relevance to any required NRC regulatory determinations.

In late-filed Bases T, U, and V, NIRS/PC raise concerns related to the alleged need to consider, in the ER and DEIS, the “relative environmental performance” of the DUO₂ and DU₃O₈ disposal forms. NIRS/PC reason that “[a]n environmental analysis of alternative disposal methods, required under NEPA, should encompass different disposal forms in order to guarantee a high level of likelihood that the resulting strategy will be able to meet existing health and safety regulations.” *Id.* at 24. As is clear from the ER and the DEIS, LES has specifically proposed to deconvert depleted UF₆ to depleted U₃O₈ for disposal purposes. *See* ER at 4.13-8. Consideration of the environmental impacts of the UO₂ form is hence irrelevant and immaterial in view of that proposal. In any event, as reflected in the ER, DOE has evaluated the environmental impacts of both disposal forms. *See* ER at 4.13-10. To the extent that NIRS/PC object to LES’s choice of disposal form, or to LES’s and the NRC Staff’s treatment of disposal alternatives, they could have identified those concerns previously – indeed, as early as April 2004. Thus, late-filed Bases T, U, and V are also untimely raised without good cause.²⁰

g. Late-Filed Bases W, X, and Y

In these bases, NIRS/PC do nothing more than rehash previous NIRS/PC arguments regarding the plausibility of LES’s proposed strategies for dispositioning depleted uranium. Basis W baldly asserts that neither (1) use of the DOE facilities, once the government’s stockpile of DUF₆ has been deconverted, nor (2) construction of a private

²⁰ When NIRS/PC repeatedly attempted to raise the DUO₂ disposal form issue in prefiled testimony on Contention NIRS/PC EC-4, the Board uniformly rejected those attempts. Notably, the Board characterized one such attempt as “another improper attempt to use expert testimony to amend an existing contention or introduce what is *essentially a new contention outlining an additional alternative for consideration.*” Memorandum and Order (Ruling on In Limine Motions and Providing Administrative Directives (unpublished) (Jan. 21, 2005), at 7 (emphasis added).

deconversion plant to handle the volume of DUF₆ from the NEF, can be considered a plausible strategy. Motion at 27. Basis X alleges that “even a formal commitment by DOE to take the [depleted uranium] from the NEF would not be meaningful or credible, given DOE’s poor track record.” *Id.* Finally, Basis Y asserts that no private sector strategy for depleted uranium management can be considered plausible until: (a) a firm and binding deconversion contract is executed; (b) a location for the deconversion plant is selected and the licensing process is commenced; (c) a design of the deconversion plant that corresponds to a firm disposal strategy is approved by the NRC at the Commission level; and (d) a specific, firm location for a disposal site that has a certified characterization and licensing process is selected.²¹ *Id.* at 28-29.

Each of these issues has been raised previously by NIRS/PC in some form, and thus, Bases W, X, and Y are untimely raised without good cause. Moreover, each of these bases raises inadmissible issues. Bases W and X improperly challenge the Commission’s recent determination that “pursuant to Section 3113 of the USEC Privatization Act, disposal of the LES depleted uranium at a DOE facility represents a ‘plausible strategy’ for the disposition of the tails.”²² Insofar as it refers to DOE’s “track record,” Basis X also revisits issues that were previously rejected by the Board.²³ Finally, in asserting that LES must have absolute certitude with respect to its commercial tails disposition strategy (*i.e.*, an executed contract for deconversion services, a specific deconversion facility design and site location, actual commencement of the licensing process, and selection of a specific disposal site), Basis Y

²¹ In Basis Y, NIRS/PC assert that “there is also a need to consider the track record of private parties,” and specifically identify Cogema and BNFL. Plainly, this issue is outside the scope of this NRC licensing proceeding.

²² CLI-05-5, 61 NRC __ (slip op. Jan. 18, 2005), at 17.

²³ *See* LBP-04-14, 60 NRC 40 (2004).

impermissibly challenges the Commission's application of the "plausible strategy" standard in this proceeding.²⁴

3. *Contention NIRS/PC EC-5/TC-2 – AGNM TC-i – "Decommissioning Costs"*

NIRS/PC request that this contention be amended to read as follows:

Contention: LES has presented additional estimates for the costs of deconversion, transportation, and disposal of depleted uranium 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 and contain no factual bases or documented support. The amounts of the 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, are greatly inadequate to achieve safe management and disposal of DU and cannot be the basis for financial assurance.

Motion at 30. LES does not dispute that the January 7 RAI response provides updated cost figures, as requested by the Staff. However, the issue raised by NIRS/PC – the basis for, and sufficiency of, LES's tails disposition cost estimate – is encompassed by previously admitted contentions. See Contentions AGNM TC-ii, NIRS/PC EC-5/TC-2 – AGNM TC-i, and NIRS/PC EC-6/TC-3. Indeed, Basis (4) of Contention NIRS/PC EC-5/TC-2 – AGNM TC-i alleges "the lack of any relevant estimate of the cost of converting and disposing of depleted uranium."

The proposed contention amendment is thus not warranted. Indeed, the updated cost estimate of \$5.85 per kgU does not differ markedly from the prior estimate of \$5.62 per kgU (\$5.50 escalated to 2004 dollars). As the proposed amendment reflects, NIRS/PC are ultimately concerned with the "amounts of the current LES estimates," and maintain that the estimate should be much larger than \$5.62 or \$5.85 per kgU. Further, LES previously provided NIRS/PC with the information underlying its updated cost estimate through supplemental discovery

²⁴ See generally, CLI-04-3, 59 NRC 10, 22 (2004) (hearing order); CLI-04-25, 60 NRC 223, 226 (2004) (stating that "a 'plausible strategy' for private conversion of the tails does not mean a definite or certain strategy, to include completion of all necessary contractual arrangements"); CLI-05-5, 61 NRC ___ (slip op. Jan. 18, 2005) (holding that disposal of the LES depleted uranium tails at a DOE facility represents a "plausible strategy").

disclosures.²⁵ Finally, as set forth below, LES opposes the admission of the 11 “bases” for intervenors’ proposed amended contention to the extent they are untimely, fail to provide adequate factual support, would expand the scope of the contention, and/or would re-introduce issues previously found to be inadmissible.

a. Late-Filed Basis A

Basis A, in effect, merely restates the proposed contention amendment, asserting that LES has provided no documentation to support the “additional” cost estimates contained in its January 7, 2005 RAI response. Motion at 30-31. As such, it provides no independent support for admission of the proposed contention amendment.

b. Late-Filed Bases B through K

In these late-filed bases, NIRS/PC purport to “ascertain the actual costs of deconverting and disposing of [depleted uranium]” by considering “three alternate deconversion and disposal scenarios” (which posit deconversion of DUF_6 to DUO_2 , instead of the DU_3O_8 form specifically proposed in the NEF application) and developing “contingency cost estimates for foreseeable and unforeseeable uncertainties” for each scenario. See Motion at 31-32. According to NIRS/PC, these “uncertainties” include: (1) the production of anhydrous hydrofluoric acid (“AHF”) instead of aqueous HF (Basis C);²⁶ (2) the effect of the “scale” of any proposed commercial deconversion plant and disposal facility on LES’s cost estimates (Basis D); (3) the added cost of deconversion of DUF_6 to DUO_2 (Basis E); (4) exchange rate uncertainties (Basis

²⁵ See Letter from James Curtiss, LES, to Lindsay Lovejoy, Jr., NIRS/PC, dated November 1, 2004 (forwarding mostly proprietary information related to deconversion costs) [bates numbers LES-04895 to -04896; LES-PRO-00583 to -00671]; Letter from James Curtiss, LES, to Lindsay Lovejoy, Jr., NIRS/PC, dated January 31, 2005 (specifically Attachments 3 and 4) [bates numbers LES-PRO-00755 to -00760].

²⁶ As LES witness Rod Krich testified in connection with Contention NIRS/PC EC-4 on February 8, 2005, any commercial deconversion facility that is built to process depleted uranium from the NEF will not use a process that generates AHF. Therefore, Basis C raises an irrelevant issue.

F); (5) the potential for a decline in the dollar to lead to higher interest rates in the United States (Basis G); (6) uncertainties associated with “emerging” uranium-related health risks, as reflected in ICRP and EPA guidance and current research (Basis H); (7) uncertainties inherent in the process of licensing a nuclear facility (in this case, deconversion and mine disposal facilities) (Basis I); and other “unforeseen circumstances,” as evidenced by the NRC’s recommended application of a 25 percent contingency factor (Basis J). *Id.* at 32-41. Basis K (inadvertently labeled Basis J by NIRS/PC) presents the intervenors’ own depleted uranium deconversion and disposal cost estimates. *Id.* at 41-46.

Late-filed Bases B through K are all, at a minimum, untimely. None of the issues raised in these late-filed bases is based on previously unavailable information. Each of the issues (including the “alternatives” argument that LES should deconvert DUF_6 to DUO_2 as opposed to DU_3O_8) could have been raised by NIRS/PC in their original intervention petition based on information contained in the NEF license application. In fact, all of the instant late-filed bases were raised by NIRS/PC *prior* to the availability of the RAI response.²⁷ As with other late-filed bases proffered by NIRS/PC, these bases were essentially “cut and pasted” from the November 24, 2004 expert report of NIRS/PC witness Arjun Makhijani. Their formulation, therefore, was in no way contingent upon the emergence of updated cost information provided by LES in January 2005. Accordingly, late-filed Bases B through K are untimely filed without good cause and do not support any amendment to Contention NIRS/PC EC-5/TC-2 – AGNM TC-i. To the extent these matters are germane to the previous admitted contention, LES will address them as part of its evidentiary presentation on the merits.

²⁷ Indeed, at least two of these issues appear to have been previously admitted by the Board. These include the “scaling” issue, as it pertains to a commercial deconversion facility (NIRS/PC did not, however, previously raise the “scaling” issue with respect to a commercial *disposal* facility), as well as the contingency factor issue. *See* Contentions NIRS/PC EC-6/TC-3 (Basis G) and EC-5/TC-2 – AGNM TC-i (Basis 1).

D. Application of the Other Pertinent Factors in 10 C.F.R. § 2.309(c)(1)

As set forth above, the issues raised by the NIRS/PC motion for admission of late-filed contentions are not based on previously unavailable information and could have been raised at an earlier stage of this proceeding. In fact, many of the issues were raised before by NIRS/PC and either admitted or rejected by the Board. In this regard, NIRS/PC have failed to demonstrate good cause for the late filing of those issues.

NIRS/PC have not made the requisite “compelling showing” with respect to the remaining late-filing factors, *i.e.*, those factors do not weigh in favor of admitting the proposed contention amendments. The requested contention *amendments* (significantly, NIRS/PC have not sought the admission of any entirely new contentions) all relate to the plausibility of, and costs associated with, LES’s proposed private sector strategy for the disposition of depleted uranium hexafluoride. These issues are already before the Board in the form of several admitted contentions, two of which may involve the participation of the Attorney General of New Mexico. Accordingly, there clearly are other means whereby the interests of NIRS/PC will be protected, including the ability of the intervenors to litigate “plausibility” and cost-related issues within the framework provided by the existing contentions. This same ability also will allow NIRS/PC to contribute to the development of a sound record on these issues, even if the Board rejects – as it should – the instant request of NIRS/PC to amend three of their contentions.

To the extent the requested contention amendments truly involve issues that are already admitted in this proceeding, their admission arguably would not broaden the scope of the proceeding or occasion delay. As demonstrated above, however, a number of the “bases” presented by NIRS/PC involve issues that are irrelevant and immaterial (*e.g.*, references to certain EPA and other non-NRC guidance), and that, in some cases, have been rejected by the Board and Commission as such (*e.g.*, the plausibility of the DOE disposition option, DOE’s

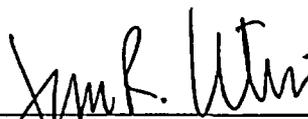
performance history, the use of an alternative disposal form (DUO₂), and the alleged need for “certitude” with respect to plausible tails disposition strategies). The admission of such issues to this proceeding (particularly with respect to Contention NIRS/PC EC-4, on which the record is closed) would broaden the scope of the proceeding and cause delay.

In sum, NIRS/PC have not overcome the lack of good cause for their untimely contention amendment requests by making a “compelling showing” with respect to the other Section 2.309(c)(1) late-filing criteria.

III. CONCLUSION

For the foregoing reasons, the contention amendments requested by NIRS/PC fail to meet the standards for admission of late-filed contentions and should be rejected.

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Dated at Washington, District of Columbia
this 3rd day of March 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	Docket No. 70-3103-ML
)	
Louisiana Energy Services, L.P.)	ASLBP No. 04-826-01-ML
)	
(National Enrichment Facility))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "ANSWER OF LOUISIANA ENERGY SERVICES, L.P. TO MOTION ON BEHALF OF NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN FOR ADMISSION OF LATE-FILED CONTENTIONS" in the captioned proceeding have been served on the following by e-mail service, designated by **, on March 3, 2005 as shown below. Additional service has been made by deposit in the United States mail, first class, this 3rd day of March 2005.

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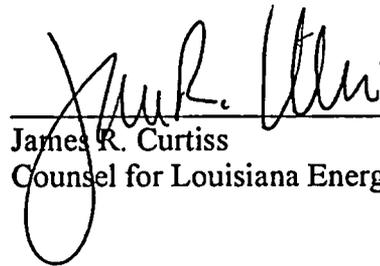
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