

June 3, 2005

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
)
(National Enrichment Facility))
)

NRC STAFF RESPONSE TO MOTION ON BEHALF OF INTERVENORS
NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN
FOR ADMISSION OF LATE-FILED CONTENTIONS AND ADDITIONAL BASES

INTRODUCTION

Pursuant to the Board's Orders of May 18, 2005,¹ and May 24, 2005,² the Nuclear Regulatory Commission Staff ("Staff") hereby responds to the motions filed by Nuclear Information and Resource Service and Public Citizen ("NIRS/PC")³ requesting the admission of late-filed contentions and bases. As discussed below, the factors that control the admission of late-filed contentions weigh against admission of all of the proffered contentions. In addition, the supplemental bases and contentions proffered by NIRS/PC fail to raise any new issues which are admissible in this proceeding.

¹ Order (Schedule for Responses to Motions to Admit Late-Filed Contentions).

² Order (Schedule for Responses to Motion to Admit Late-Filed Contentions).

³ "Motion on Behalf of Intervenors Nuclear Information and Resource Service and Public Citizen for Admission of Late-Filed Contentions Concerning LES Disposal Strategy," May 16, 2005 ("Late-Filed Motion A"), "Motion on Behalf of Intervenors Nuclear Information and Resource Service and Public Citizen for Admission of Late-Filed Contentions Concerning Dispositioning Cost Estimates," May 16, 2005 ("Late-Filed Motion B"), and "Motion on Behalf of Intervenors Nuclear Information and Resource Service and Public Citizen for Admission of Additional Bases for Late-Filed Contentions Concerning Dispositioning Cost Estimates," May 20, 2005 ("Late-Filed Motion C").

BACKGROUND

NIRS/PC filed its petition to intervene and contentions with regard to the application by Louisiana Energy Services, L.L.P., (“LES”) to construct and operate the proposed National Enrichment Facility (“NEF”) on April 6, 2004.⁴ NIRS/PC sought admission of several contentions, one of which alleged that LES did not have a plausible strategy for disposal of the depleted uranium (“DU”) that would be produced. Other contentions proffered by NIRS/PC challenged the costs LES attributed to conversion and disposal of DU, NIRS/PC Contentions at 34-38. The Board granted NIRS/PC’s intervention petition on July 19, 2004,⁵ and admitted certain contentions as supported by the bases set forth in its decision.

The contention challenging the decommissioning costs presented by LES (EC-5/TC-2) was admitted based on the allegations that (a) the contingency factor used by LES is too low, (b) the cost of capital used by LES is too low, and (c) the costs are based on an incorrect assumption that they relate only to low-level waste. LBP-04-14, 60 NRC at 67-68, 78.

In addition, the NIRS/PC contention regarding plausible strategy (EC-3/TC-1) was admitted by the Board based on three alleged deficiencies in the Environmental Report. *Id.* Specifically, this contention was based on NIRS/PC’s claims (a) that the statement by LES that access to an exhausted uranium mine for disposal is inadequate to support a plausible disposal option, (b) that the representation that discussions had been held with Cogema regarding a private conversion facility were without substance, and (c) that the representation by LES that disposal of DU could be accomplished by transfer to DOE was not plausible.

⁴ “Petition to intervene by Nuclear Information and Resource Service and Public Citizen” and “Contentions on the Construction Permit/Operating License Application for the National Enrichment Facility Made by Nuclear Information and Resource Service and Public Citizen” (“NIRS/PC Contentions”) April 6, 2004.

⁵ *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40 (2004).

With respect to the last basis for this contention, NIRS/PC argued that under the USEC Privatization Act, DOE is only obligated to accept DU if it is classified as low-level waste and the properties of DU are such that it must be classified as greater than Class C waste, requiring disposal in a deep geological repository. NIRS/PC Contentions at 25, 27-31. Noting that this contention raised a novel issue - the classification of DU as low-level waste - the Board referred it to the Commission pursuant to 10 C.F.R. § 2.323(f). LBP-04-14, 60 NRC at 67. The Commission accepted the issue for review.⁶

Pursuant to the Board's ruling setting forth a general schedule for this proceeding,⁷ a deadline of October 20, 2004, was established for late-filed contentions, following the scheduled September, 2004, issuance of the Draft Environmental Impact Statement ("DEIS"). On October 8, 2004, during deposition discovery, NIRS/PC questioned LES witnesses concerning LES's disposal strategy and specifically asked about the disposal options of exhausted mines and the Waste Control Specialists (WCS) site. Following the depositions, LES provided NIRS/PC with documents relating to its contacts with WCS.

NIRS/PC filed late contentions in accordance with the schedule deadline of October 20, 2004, and a Motion to Allow Discovery Concerning Conversion and Disposal of Depleted Uranium dated November 11, 2004. On November 22, 2004, the Board issued its order regarding NIRS/PC's late-filed contentions. The Board declined to admit any late contention relating to the issue of classification of DU due to the fact that it was pending before the Commission, but noted that it was doing so without prejudice to a renewed motion "should the

⁶ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223 (2004).

⁷ *Memorandum and Order* (Memorializing and Ruling on Matters Raised in Conjunction with August 3, 2004 Conference Call and Setting General Schedule for Proceeding), August 16, 2004.

Commission hold that the Board should hear the waste classification issue. . .⁸ With regard to EC-5/TC-2, the Board admitted an additional basis alleging that LES had failed to provide a relevant estimate for the cost of converting and disposing of DU. *Id.* at 16-17.

In the course of the Staff's review of the LES application, which is still ongoing, the Staff sent LES a request for additional information regarding the decommissioning funding plan on October 20, 2004 (ADAMS Accession number ML042600287). Among other things, the Staff requested further information to justify or adjust estimated costs that are based on estimates in a Lawrence Livermore National Laboratory ("LLNL") report. LES submitted responses on December 10, 2004 (ADAMS Accession number ML043500702) and on January 7, 2005 (ADAMS Accession number ML05013145). In its January response, LES stated that it did not believe that it was meaningful to revise historical cost estimates such as those in the LLNL report and instead provided estimates of the costs of the components of the total cost based on information from vendors. Since that time, LES has provided additional information to the Staff in response to requests for information and to document ongoing development relating to ultimate disposal of DU which will be procedural.

On January 18, 2005,⁹ the Commission issued its decision regarding the issue of classifying DU as low-level waste. In its decision, the Commission determined that DU is a form of low-level waste and, therefore, disposal by DOE pursuant to Section 3113 of the USEC Privatization Act is a plausible strategy. CLI-05-05, 61 NRC 22, 36. Accordingly, the Commission reversed the admission of this basis of NIRS/PC's contention (EC-3/TC-1) regarding plausible strategy (EC-3/TC-1). *Id.*

⁸ Licensing Board Order (Ruling on Late-Filed Contentions) (November 22, 2004) at 15 (unpublished).

⁹ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-05, 61 NRC 22 (January 18, 2005) (*Louisiana Energy Services I*).

LES provided a copy of its January 14, 2005, MOU with WCS to NIRS/PC on January 31, 2005, and to the Staff on March 3, 2005. The MOU is an agreement to negotiate for the purpose of entering into a contract under which LES could receive depleted U_3O_8 from deconversion of UF_6 produced by the NEF. On March 11, 2005, LES submitted to the docket additional pages to its Application (labeled Rev. 4) stating its current estimates were based on information from several vendors, and sent the Staff letters on March 29, 2005, and April 8, 2005, containing some documentation of its estimates. The Staff visited LES's office on April 19, 2005, to view proprietary documents from Urenco that LES relied on in its cost estimates. A memorandum dated April 29, 2005, summarizing the Staff's review.

DISCUSSION

I. Legal Standards for Admission of Late-Filed Contentions

Because the time for filing contentions in the proceeding has passed,¹⁰ the contentions proposed by NIRS/PC must meet the standard established for late filings in 10 C.F.R. § 2.309(c)(1)(i-viii). That regulation provides that non-timely contentions may be admitted based on a balancing of the following factors:

- (i) Good cause, if any, for the failure to file on time;
- (v) The availability of other means whereby petitioner's interest will be protected;
- (vi) The extent to which petitioner's interests will be represented by existing parties;
- (vii) The extent to which petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which petitioner's participation may reasonably be expected to assist in developing a sound record.

¹⁰ See, "Notice of Receipt of Application for License; Notice of Availability of Applicant's Environmental Report; Notice of Consideration of Issuance of License; and Notice of Hearing and Commission Order" CLI-04-03, 59 NRC 10 (2004), 69 Fed. Reg. 5873 (Feb.6, 2004).

10 C.F.R. § 2.309(c)(1)(i-viii).¹¹

NIRS/PC, as the proponent of the admission of its late-filed contentions, bears the burden of demonstrating that a balancing of these factors weighs in favor of their admission by affirmatively addressing the lateness factors in its petition. Thus, NIRS/PC must demonstrate that a balancing of the factors warrants overlooking the lateness of their contentions. *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 n.22 (1985). Here, factors (ii) and (iii) are not relevant.

It has long been held that the first factor, good cause for lateness, carries the most weight in the balancing test. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 221 (2000); *aff'd*, CLI-04-04, 59 NRC 31 (2004). Absent a showing of good cause, a compelling showing that the remaining factors outweigh the lack of good cause for the untimely filing is necessary. See, *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986).

In making a judgment about good cause, emphasis is placed on when sufficient information was made available to the petitioner so as to make it possible for the petitioner to raise and frame the contention with reasonable specificity and basis. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 313 (1999), *citing*, *Duke Power Co.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 338 (1999). Good cause does not exist when the late-filed contentions are not based on new information arising after the original deadline and therefore could have been included in a timely petition.

¹¹ Because they relate primarily to standing to intervene, factors (ii), (iii) and (iv) are not relevant to the issue of whether an existing party's late-filed contention's should be admitted. See Memorandum and Order (Ruling on NIRS/PC Late-Filed Contentions and Providing Administrative Directives), May 3, 2005, slip op. at 5 .

In addition to demonstrating that a balancing of the late-filing criteria warrants admission, the petitioner must meet the requirements for admissible contentions in 10 C.F.R. § 2.309(f)(1). That regulation provides that a contention must include: (1) a specific statement of the issue of law or fact raised, (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 which is the subject of the proceeding, (5) a concise statement of the alleged facts or expert opinions supporting the contention and (6) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.

II. Contention EC-3/TC-1

As presently admitted, NIRS/PC's Contention EC-3/TC-1 reads as follows:

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

(A) The statement (LES Environmental Report (ER) 4.13-8) that a ConverDyn partner, General Atomics, "may have access to an exhausted uranium mine. . . where depleted U₃O₈ could be disposed" represents a grossly inadequate certitude for a "plausible strategy" determination, particularly for a radioactive and hazardous substance which has been accumulating in massive quantities in the United States for fifty-seven years without a plausible disposal program.

(B) Similarly, the statement that "discussions have recently been held with Cogema concerning a private conversion facility (ER 4.1308) is without substance.

In Late-Filed Motion A submitted on May 16, 2005, NIRS /PC seeks to amend this contention to add the following:

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

understood that the shipments were in compliance with waste acceptance criteria and that the waste did not contain non-permitted materials.

Late-Filed Motion A at 7-8.

A. Application of the Late Filing Criteria to
NIRS/PC's Supplement to Contention EC-3/TC-1

In order to establish good cause for filing this additional basis, NIRS/PC cites LES's production on January 31, 2005, of a Memorandum of Understanding ("MOU") with WCS regarding terms for disposal of DU at the WCS site. *Id.* at 4. However, it is clear from NIRS/PC's description of this supplemental material that NIRS/PC could have raised this issue much earlier. As discussed above, good cause is only established if the information on which the contention is premised was not available so that a timely filing was not possible.

In proposed Contention (C), NIRS/PC claims that "deficiencies in LES's strategy to use the WCS site for disposal could not have been raised by NIRS/PC until after LES had identified that site by producing the WCS [Memorandum of Understanding ("MOU")] and made clear to Commission Staff its reliance on WCS for disposal cost estimates. . . ." *Id.* at 4, 9-11. However, questioning the adequacy of LES's strategy to use the WCS site is not appropriate at this time because the Draft Environmental Impact Statement, NUREG 1790 (Sept. 2004) ("DEIS"), identified WCS as a possible disposal site. DEIS at 2-32. Moreover, NIRS/PC concedes that during deposition discovery on October 8, 2004, it knew that LES had discussions with WCS, and that following deposition discovery LES produced documents relating to its contacts with WCS; thus, NIRS/PC was aware that one option for LES's disposal strategy involved WCS. Late-Filed Motion A at 3. LES's production of the WCS MOU, therefore, did not raise LES's strategy regarding the WCS disposal option for the first time.

NIRS/PC further asserts that LES “selected WCS as the basis for its disposal strategy” based on the WCS MOU that LES produced on January 31, 2005, along with other supplemental cost estimate documents, which rely on information provided by WCS, that LES submitted in March and April of 2005. The WCS MOU, however, is not a binding agreement but merely contains negotiating terms and thus does not indicate that LES selected WCS as its disposal site. Throughout March and April, LES produced documents containing information from several disposal options, such as Envirocare, Urenco, and WCS. LES produced the documents to supplement its cost estimates in order to develop its strategy, not change its preferred strategy. In fact, LES’s strategy has never changed. Based on the above discussions, LES always considered WCS as a disposal option in its disposal strategy; therefore, any challenges to the WCS disposal option could and should have been raised upon the issuance of the DEIS or the conclusion of deposition discovery.

Moreover, even if this contention were premised only on the MOU, NIRS/PC delayed submitting its filing on this issue without good cause. NIRS/PC submitted its late-filing three and one half months after the WCS MOU it relies on was provided. NIRS/PC claims that from February through April 4, 2005, it was occupied with hearings and submittals to the Board, and thus had good cause for filing late. Hearings and submittals are the nature of litigation, however, and do not constitute good cause for filing late. Further, NIRS/PC fails to explain its delay after April 4, 2005, resulting in its late-filing contention being submitted almost a month and one half later on May 16, 2005.

With regard to the impact of the Board’s decision on whether to admit this additional issue on the interests of NIRS/PC, it is significant that it relates to a contention already submitted. Thus, NIRS/PC will have the opportunity to participate as a party on the primary subject of each contention regardless of whether the additional information is admitted. Accordingly, the interests of NIRS/PC will be protected through other means in this proceeding,

and factors (v) and (vi) generally weigh against admission.

With respect to factor (viii) - the extent to which a petitioner's participation will assist in the development of a sound record - the Board looks to whether the petitioner has set out with specificity the issue it plans to cover, identified its prospective witnesses and summarized their testimony. *Private Fuel Storage, supra*, 52 NRC at 224. As discussed below, NIRS/PC fails to raise an issue based on new information, preferring to manipulate LES's act of providing supplemental information into a declaration by LES that it selected a basis for its disposal strategy.

Finally, the only factor to weigh in favor of admission is factor (vii). Admission of this issue would not delay the proceeding since the evidentiary hearing on Contention EC-3 has not been completed and the evidentiary record on that issue has not closed. Upon balancing the factors, NIRS/PC clearly has not shown that the factors outweigh the lateness of its contention.

B. Admissibility of NIRS/PC's Supplement to EC-3/TC-1

In proposed Contention (C), NIRS/PC asserts that by selecting the WCS site LES has not provided a plausible waste disposal strategy because WCS's license application is inadequate. Late-Filed Motion A at 7. This contention, as such, fails to advance an admissible issue. Fundamentally, whether WCS's license application¹² to dispose of low-level radioactive waste at its Andrews, Texas facility **is inadequate** cannot be litigated before the Board, which lacks the authority to determine the appropriateness of an application before a State.

NIRS/PC argues that WCS's license application is inadequate because WCS failed to "analyze the performance of the WCS site in disposing of a large amount of DU [depleted uranium] in the form proposed to be generated by the [NEF]" in its license application. *Id.* at 12.

¹² Waste Control Specialists LLC. "Application for License to Authorize Near-Surface Land Disposal of Low-Level Radioactive Waste." August 2, 2004.

In support of its basis for its contention that LES's disposal strategy is not plausible, NIRS/PC misrepresents WCS's license application in asserting that WCS and LES have entered into binding agreements that WCS will dispose of the proposed NEF's DU and WCS is currently applying to the NRC for a license to dispose of low-level radioactive waste. WCS, which has not entered into any binding agreement with LES, is applying to the State of Texas in its capacity as an Agreement State, and not the NRC, for a license to dispose of low-level radioactive waste.

NIRS/PC argues that the Board must find that WCS's application is inadequate and WCS cannot properly dispose of DU. *Id.* at 11-17. All of the determinations that NIRS/PC requests the Board to make pertaining to the adequacy of WCS's application and the disposal of LES's DU at WCS, see Late-Filed Motion A at 17, are outside the Board's jurisdiction, however, because WCS is located in Texas. Due to Texas's Agreement State status, WCS filed its application with the State of Texas, as opposed to the NRC, and Texas has sole jurisdiction over the review of the application and the determination of its adequacy.

While it is not known whether the State of Texas will grant WCS a license to dispose of low-level waste, uncertainty related to a disposal option is not a deficiency in LES's application; LES is required merely to provide a "plausible strategy" as opposed to a strategy with absolute certainties. See *Louisiana Energy Services, L.P.* (National Enrichment Facility), 60 NRC 223, 226, CLI-04-25 (Aug. 18, 2004) (explaining that ". . . a 'plausible strategy' for private conversion of the tails does not mean a definite or certain strategy. . .").

Based on the above discussions, NIRS/PC's proposed contention is not admissible because it relies on a basis that cannot be litigated before the Board and fails to meet the Commission's contention requirements - the issue lacks a basis and does not allege a deficiency in LES's application that requires the NRC to deny the application. 10 C.F.R. § 2.309(f)(ii) and (vi)

III. Contention EC-5/TC-2

As presently admitted, NIRS/PC's Contention EC-5/TC-2 reads as follows:

Petitioners contend that Louisiana Energy Services, L.P., (LES) has presented estimates of the costs of decommissioning and funding plan as required by 42 U.S.C. 2243 and 10 C.F.R. 30.35, 40.36, and 70.25 to be included in a license application. See Safety Analysis Report 10.- through 10.3; ER 4.13.1. Petitioners specifically contest the sufficiency of such presentations as based on (1) a contingency factor that is too low; (2) a low estimate of the cost of capital; (3) an incorrect assumption that the costs are for low-level waste only; and (4) the lack of any relevant estimate of the cost of converting and disposing of depleted uranium, given it does not rely upon the three examples – the 1993 CEC estimate, the LLNL report, and UDS contract – cited in its application.

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

In Late-Filed Motion B, NIRS /PC seeks to amend this contention to add the following:

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

Late-Filed Motion B at 8.

A. Application of the Late Filing Criteria to
NIRS/PC's Supplement to Contention EC-5/TC-2

In its proposed contention, NIRS/PC claims that “. . . deficiencies in LES's early-2005 submissions about DU dispositioning costs could not have been asserted by NIRS/PC until LES made those submissions[,]” which “. . . continued through April 8, 2005.” *Id.* at 5. However, the sufficiency of LES's dispositioning costs is already a subject of this hearing by virtue of the fact

that the Board has admitted NIRS/PC's contention regarding the lack of support for LES's cost estimates. May 2005 Board Order at 12-13. In bringing Late-Filed Motion B, NIRS/PC threatens to slow down the licensing process by filing contentions challenging the sufficiency of every new document supplementing LES's RAI response in order to establish that LES's cost estimate remains unsupported. Because the contention challenging the support for LES's cost estimates has been admitted, the Board will decide at the hearing whether "the Applicant's cost estimates for the components of the plan are reasonable," *Louisiana Enrichment Services, L.P.* (Claiborne Enrichment Center), LBP-97-3, 45 NRC 99, 105 (1997) (*Louisiana Energy Services II*); therefore, it is unnecessary for NIRS/PC to file contentions regarding the lack of support for the cost estimates each time LES supplements its RAI response. As discussed in Section I, good cause is only established if the information on which the contention is premised was not available so that a timely filing was not possible. Here, the proposed supplement does not add to the contention, but merely rephrases a contention previously admitted.

Regardless, NIRS/PC delayed its filing of this additional contention. NIRS/PC submitted its late-filing three and one half months after the documents it relies on were submitted to the Staff in response to an RAI. NIRS/PC claims that from February through April 4, 2005, it was occupied with hearings and submittals to the Board, and thus had good cause for filing three and one half months after the document was produced. Hearings and submittals are the nature of litigation, however, and do not constitute good cause for filing late.

Moreover, NIRS/PC fails to explain its delay after April 4, 2005, resulting in its late-filing contention being submitted almost a month and one half later on May 16, 2005. Even if NIRS/PC has shown good cause through April 4, 2005, the Staff asserts that NIRS/PC has not shown good cause for expending forty-two days to submit its late-filing.

Concerning the remaining factors to be considered in determining whether to admit an additional contention challenging the sufficiency of the cost estimates, it is significant that the

proposed material rephrases a contention already admitted. Thus, NIRS/PC will have the opportunity to participate as a party on this issue. Accordingly, the interest of NIRS/PC will be protected through other means in this proceeding, and factors (v), (vi), (vii), and (viii) weigh against admission.

When the substance of the supplemental material is considered, along with the documents relied on, it is clear that NIRS/PC does not have good cause for filing at this time in the proceeding. The remaining discussion by NIRS/PC once again delves into unrelated issues, which NIRS/PC does not even assert are based on new information and which have been previously rejected by this Board. Specifically, NIRS/PC's attempts to resurrect the arguments regarding the nature of the risk to humans from uranium and exchange rate uncertainties should be rejected. Late-Filed Motion B at 8. Overall, the late filing criteria weigh against admission of this contention.

B. Admissibility of NIRS/PC's Supplement to EC-5/TC-2

To the extent that NIRS/PC has alleged that the supplemental information fails to support the cost estimates, NIRS/PC has not specified a new issue. The contention the Board admitted on May 3, 2005, regarding the insufficiency of LES's cost estimates due to the lack of documented supporting material and factual bases, *id.*, will be litigated on the basis of all the factual information in the supplemental material provided. This is not a new contention but simply a recitation of the fact that NIRS/PC continues to challenge LES's cost estimates notwithstanding the fact that additional information on that subject has been provided.

The remaining arguments presented by NIRS/PC are inadmissible because they are unrelated to the contention, raise issues that have been disposed of by the Commission, and impose standards that are inconsistent with NRC regulations. *Id.* at 21-23. In particular, NIRS/PC again attempts to claim that DU should be converted to DUO₂, put into a ceramic form, and placed in a deep geological repository by asserting that the cost estimates must

reflect this option. This argument, which is premised on NIRS/PC's argument that DU cannot be low-level waste, has been disposed of by the Commission. *Louisiana Energy Services I, supra*, 61 NRC at 36. Additionally, NIRS/PC's claim that NRC regulations fail to properly account for newly identified risks, such as the uranium functioning in the body as a radioactive lead resulting in neurological damage, is an impermissible attack on the Commission's regulations. These attempts by NIRS/PC to resurrect claims that have previously been rejected by the Board or to impose standards that are inconsistent with NRC regulations should be rejected.

IV. Additional Bases to the Late-Filed Contention in EC-5/TC-2

In Late-Filed Motion C, NIRS /PC seeks to amend the above pending contention to add the following bases:

- A. On April 19, 2005, Commission Staff met with LES personnel to review LES's estimates of decommissioning funding. (Commission Staff file memo, April 29, 2005, listed in Hearing File index dated May 11, 2005). Commission Staff then stated that the April 8, 2005 submission concerning deconversion costs was an insufficient basis for accepting LES's deconversion cost estimate and, in addition sought clarification of LES's disposal cost estimate. LES stated that the deconversion cost estimate was based upon a proprietary Urenco business study, which was in turn based upon a submission by Cogema in response to a Urenco request for proposal. LES explained that it had modified the Cogema information to reflect increased operating, capital, and licensing costs and costs associated with "Americanizing" the design. LES said that it had also (a) accounted for the fact that aqueous hydrofluoric acid ("HF") would not be sold, (b) accounted for costs of neutralization of HF, and (c) eliminated storage costs. Further, concerning LES's disposal cost estimate, LES justified its reliance on the lowest point on the range quoted by Waste Control Specialist ("WCS"), stating that the WCS figure was "similar" to a figure quoted by Envirocare, Inc. for disposal of certain decommissioning waste. According to Commission Staff's memorandum, Staff accepted these explanations as sufficient.
- B. This additional information is clearly inadequate to justify reliance on LES's cost estimates. The deconversion costs are said to be based upon a submission by Cogema and additional proprietary studies by Urenco. None of these materials, nor the details concerning calculations carried out by LES starting from these reports, have been further identified, produced, or provided for the docket so that the validity of the estimates

as they relate to this case can be assessed. Nothing of substance has been added to LES's inadequate submission of April 8, 2005. There is no basis upon which the Commission could evaluate the adequacy of the treatment of such fundamental matters involving LES's estimate of deconversion costs as:

1. Capital cost estimates
2. Licensing cost estimates
3. Engineering cost estimates
4. Estimates of operating and maintenance costs
5. Decontamination and decommissioning costs
6. Adjustments involving storage and resale of HF
7. Adjustments involving neutralization of HF
8. Adjustments involving the scale and lifetime of the deconversion facility
9. Adjustments involved in "Americanizing" the project
10. Currency exchange adjustments
11. Adjustments involving construction costs in a rural location

For example, LES "indicated that they believe that neutralization would have no effect on the overall deconversion costs because those costs would be balanced by the elimination of costs for equipment for storing HF prior to commercial sale." However, this claim stands in contrast with the conclusions of the 1997 Lawrence Livermore National Laboratory ("LLNL") cost analysis for the deconversion of DOE depleted uranium hexafluoride. For the DU_3O_8 deconversion option, the LLNL analysis found that neutralization and disposal of calcium fluoride added 27 to more than 100 percent to the total deconversion cost relative to the production and sale of anhydrous HF. While this analysis did not consider the sale of aqueous HF, it highlights the serious questions that remain surrounding the claimed basis for the LES cost estimates as they currently stand. These are, of course, just a few of the questions that arise without having seen the underlying documents. Other questions will probably arise when the materials are made available.

- C. LES's statement that it has adopted, as its disposal cost estimate, the lowest point on WCS's range of estimates, because Envirocare has quoted a similar cost for disposal of decommissioning waste, adds nothing to the validity of LES's disposal cost estimate. There is no showing that the Envirocare estimate involves material that presents similar risks to DU from the NEF. There is no showing that the waste for which Envirocare quoted a disposal cost is similar to DU from the NEF in any aspect relevant to its disposal, such as:

1. The concentration of radionuclides in the waste
2. The radionuclides' half-lives
3. The radionuclides' environmental mobility
4. The health risks associated with the radionuclides, such as potential risk indicated by recent research on uranium
5. The radionuclides' suitability for near-surface disposal in general, after

consideration of risks of release, and the likely need for deep disposal in a geologic repository

6. The need for using an engineered waste form for disposal such as grouting or ceramic containment of DUO₂

The Commission could not accept a cost estimate for disposal of DU from the NEF without investigating and considering such factors. Deep disposal of depleted uranium in a repository, which is likely to be required to meet 10 CFR Part 61 Commission release limits, would cost well in excess of the amounts quoted by LES and could not be done at the Envirocare or proposed WCS facilities. For a discussion of these points, see Makhijani and Smith, Costs and Risks of Management and Disposal of Depleted Uranium from the National Enrichment Facility Proposed to be Built in Lea County New Mexico by LES, filed in this proceeding on November 24, 2004, at 3-29, 40-42, 47-51, and NIRS/PC Petition for leave to Intervene, at 28-31, 34-38, April 6, 2004.

- D. There is no analysis presented underlying the cost quotation attributed to Envirocare. Since Envirocare has made no offer or commitment to accept and dispose of waste generated during the operating life of the NEF at the price quoted, but has only suggested the number as a guideline, and since LES apparently intends to dispose of the waste at a different facility, in a different state, with a different design, and a different company as the operator, the quotation cannot be used as the basis for determining a plausible disposal strategy in a licensing action without explanation of the capital and operating costs underlying the estimate, to provide some assurance that the estimate is likely to correspond to the proposed option.
- E. There is no analysis presented underlying the cost quotation attributed to WCS. WCS has made no commitment to accept and dispose of waste generated during the operating life of the NEF at the price quoted, Therefore, the disposal cost estimate in issue here - the disposal of depleted uranium by WCS - requires a cost analysis based upon WCS's capital and operating costs, and other factors that would go to the determination of disposal charges by the Texas Compact Commission, which is the body that sets rates for waste disposal by WCS. No such analyses have been prevented, and the Board cannot accept LES's unfounded and unexplained estimate, particularly when there is the likelihood that near-surface disposal will not be appropriate and that disposal in a deep geologic repository will ultimately be required.
- F. With the latest statements by LES, it remains a fact that LES has still not provided the factual bases or documentary support needed for its estimates of dispositioning costs. LES's disposal strategy remains in the realm of speculation, supported by no valid estimates and no contractual commitments.

A. Application of the Late Filing Criteria to NIRS/PC's Supplement to the Late-Filed Contention in EC-5/TC-2

Rather than restating its argument regarding NIRS/PC's lack of good cause for failure to file on time - set forth above in response to NIRS/PC's pending motion to amend Contention EC-5/TC-2 - , the Staff herein incorporates the discussion and turns its focus to the additional grounds NIRS/PC asserts in Late-Filed Motion C.

B. Admissibility of NIRS/PC's Supplement to the Late-Filed Contention in EC-5/TC-2

In Basis (A), NIRS/PC fails to allege an admissible issue. Instead, NIRS/PC merely relates circumstances regarding Staff review of LES documents, and fails to allege any deficiencies supporting its contention nor provides additional information in support. See *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 338-339 (1991) (holding that a petitioner may base a contention on the Staff's request for additional information; rather, the petitioner must provide an adequate explanation of how alleged deficiencies support its contention and provide additional information).

NIRS/PC states in Basis (B) that LES's cost estimates cannot be relied on because they are based upon information in Basis (A) that has not been provided to the parties for an assessment of its validity. NIRS/PC concludes that "[t]here is no basis upon which the Commission could evaluate the adequacy of the treatment of [eleven] fundamental matters involving LES's estimates of deconversion costs." Late-Filed Motion C at 6-7. First, if NIRS/PC wishes to assess the validity of the information, the proper means to obtain the information is through discovery, not the filing of contentions. Second, to the extent that NIRS/PC takes issue with the cost estimate and the supplements that LES has and will provide, this is already the subject of the contention the Board admitted on May 3, 2005. It is for the Board to determine the adequacy of the information LES provided and to decide whether "the Applicant's cost estimates for the components of the plan are reasonable." *Louisiana Enrichment Services II*,

supra, 45 NRC at 105. If the Board cannot evaluate the adequacy of LES's cost estimates because sufficient information has not been provided, it will reject LES's application.

As to Basis (C), NIRS/PC claims that LES's disposal cost estimate is not validated by the fact that LES adopted the lowest point on WCS's range of estimates because Envirocare quoted a similar cost. *Id.* at 7. Again, it is for the Board to determine the adequacy of the information LES provided and to decide whether "the Applicant's cost estimates for the components of the plan are reasonable." *Louisiana Enrichment Services II, supra*, 45 NRC at 105. The remaining discussion by NIRS/PC once again delves into unrelated issues, many of which are impermissible challenges to the Commission's regulations. Specifically, NIRS/PC asserts that Envirocare's cost estimate must account for the concentration of radionuclides in the in the proposed NEF's waste, as well as the radionuclides' half-lives, the radionuclides' environmental mobility, and the health risks associated with the radionuclides. Late-Filed Motion C at 7. Other issues, such as the radionuclides' suitability for near surface disposal and the use of grouting or ceramic containment, are premised on NIRS/PC's argument that DU cannot be low-level waste, which has been disposed of by the Commission. *Id.* at 8.

In Bases (D) and (E), NIRS/PC argues that the cost estimates from Envirocare and WCS cannot be used as bases for a plausible disposal strategy because LES has failed to provide an analysis of the costs attributed to either option and neither site has entered into an agreement with LES to dispose of the DU. *Id.* at 8-9. These bases, as such, fail to advance an admissible issue because they are premised upon a fundamental misapplication of the Commission's requirements. The purpose of accounting for decommissioning activities at the time the license application is submitted is to estimate potential costs for the purpose of setting aside funding before operation begins. See, 10 CFR § 70.25(e). In order to provide a meaningful estimate, LES must set forth a reasonable and creditable plan for disposing of the DU generated by the enrichment process. This is the "plausible strategy" contemplated by the

Board in the previous licensing proceeding and addressed by LES in its application and the Staff in the DEIS. See *Louisiana Energy Services II, supra*, LBP-97-3, 45 NRC at 105. It is not, however, intended to be a complete and detailed plan with binding commitments entered into with a specific disposal site. To the extent that LES has not included all the costs that are unique or could be associated with disposal is, thus, not a reflection of a flaw in the application, but merely a reflection of the reality that the ultimate disposal cost cannot be known with certainty until the time when it is accomplished. In Basis E, NIRS/PC's argument that the cost associated with disposal in a geologic repository should be included in a cost estimate for WCS is premised on NIRS/PC's argument that DU cannot be low-level waste, which has been disposed of by the Commission. *Louisiana Energy Services I, supra*, 61 NRC at 36.

Finally, in Basis F NIRS/PC's argument that LES's cost estimate lacks factual bases and documentary support has already been admitted as a contention by the Board on May 3, 2005. Whether LES has a plausible strategy is for the Board to determine. May 3, 2005 Board Order, slip op. at 12-13.

CONCLUSION

For the reasons stated above, the factors that control the admission of late-filed contentions weigh against admission of all of the proffered contentions and bases. In addition, the supplemental bases and contentions proffered by NIRS/PC do not raise any new admissible issues in this proceeding. Accordingly, the late-filed contentions and bases should be rejected.

Respectfully submitted,

/RA/

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/RA/

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Dated at Rockville, Maryland
this 3rd day of June, 2005

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
)	
(National Enrichment Facility))	ASLBP No. 04-826-01-ML
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO MOTION ON BEHALF OF INTERVENORS NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN FOR ADMISSION OF LATE-FILED CONTENTIONS AND ADDITIONAL BASES" 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 (*), and by electronic mail as indicated by a double asterisk (**) on this 3rd day of June, 2005.

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