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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)	)	

ANSWER OF LOUISIANA ENERGY SERVICES, L.P. TO MOTIONS ON BEHALF OF NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN FOR ADMISSION OF LATE-FILED CONTENTIONS CONCERNING LES' COMMERCIAL STRATEGY AND COST ESTIMATES FOR THE DISPOSITION OF DEPLETED URANIUM

I. INTRODUCTION

On May 16 and May 20, 2005, Nuclear Information and Resource Service and Public Citizen ("NIRS/PC" or "Intervenors") filed a total of three motions to amend certain admitted NIRS/PC contentions concerning LES's private sector strategy and associated cost estimates for the disposition of depleted uranium ("DU") byproduct.[1] Pursuant to the Atomic Safety and Licensing Board's ("Board") Orders of May 18 and May 24, 2005,[2] Louisiana Energy Services, L.P. ("LES") herein responds in opposition to all three NIRS/PC motions.

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[1] "Motion on Behalf of Intervenors [NIRS/PC] for Admission of Late-Filed Contentions Concerning LES Disposal Strategy" (May 16, 2005) ("NIRS/PC Disposal Strategy Motion"); "Motion on Behalf of Intervenors [NIRS/PC] for Admission of Late-Filed Contentions Concerning Dispositioning Cost Estimates" (May 16, 2005) ("NIRS/PC May 16 Cost Motion"); "Motion on Behalf of Intervenors [NIRS/PC] for Admission of Additional Bases for Late-Filed Contentions Concerning Dispositioning Cost Estimates" (May 20, 2005) ("NIRS/PC May 20 Cost Motion").

[2] Order (Schedule for Responses to Motions to Admit Late-Filed Contentions (May 18, 2005) (unpublished); Order (Schedule for Responses to Motion to Admit Late-Filed Contentions (May 24, 2005) (unpublished).

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II. FACTUAL BACKGROUND

A. The Pertinent NIRS/PC Contentions and Their Procedural History

On July 19, 2004, the Board admitted three NIRS/PC technical contentions relating to LES's proposed private sector strategy and associated cost estimates for the disposition of DU byproduct.[3] *See* Contentions NIRS/PC EC-3/TC-1; NIRS/PC EC-5/TC-2 – AGNM TC-i; and NIRS/PC EC-6/TC-3. NIRS/PC submitted the admitted contentions in response to information set forth in Section 4.13 ("Waste Management Impacts") of the National Enrichment Facility ("NEF") Environmental Report ("ER") and in Chapter 10 ("Decommissioning") of the NEF Safety Analysis Report ("SAR"). The proposed amendments addressed herein relate to Contentions NIRS/PC EC-3/TC-1 and EC-5/TC-2.

1. Contention NIRS/PC EC-3/TC-1 -- "Depleted Uranium Hexafluoride Storage and Disposal"

As originally admitted by the Board, Contention NIRS/PC EC-3/TC-1 alleged that LES has not presented a sound, reliable, or plausible strategy for private sector disposal of DU byproduct. Three bases were admitted by the Board in support of this contention: (a) LES's statement that ConverDyn may have access to an exhausted uranium mine for disposal of DU byproduct is inadequate to support a plausible disposal option; (b) LES's statement that it has had discussions with Cogema regarding a private conversion facility is without substance; and (c) the disposition of DU byproduct must be addressed based on the radiological hazards of this material that require that it be disposed of in a deep geological repository.

The Board, after concluding that the last basis of Contention NIRS/PC EC-3/TC-1 raised a novel legal or policy issue regarding the classification of DU byproduct as "low-level

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[3] *See Louisiana Energy Services., L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 78-80 (2004).

waste," referred that basis to the Commission pursuant to 10 C.F.R. § 2.323(f).[4] The Commission accepted this issue for review and ruled on January 18, 2005[5] 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."[6] In doing so, the Commission reversed the admission of Basis C as an improper challenge to the Department of Energy ("DOE") disposition option (*i.e.*, Section 3113).[7]

NIRS/PC first sought to amend Contention NIRS/PC EC-3/TC-1 in October 2004, proposing two amendments based on information obtained during discovery and from the DOE's final environmental impact statements ("FEISs") for the planned Paducah, Kentucky and Portsmouth, Ohio deconversion facilities discussed in the Staff's draft EIS ("DEIS") for the NEF.[8] The Board rejected one of the proposed amendments on the ground that it "raise[d] the issue of economic cost relative to the issue of whether LES has shown that it has a plausible strategy for disposal of depleted uranium."[9] The Board rejected the other proposed amendment as an impermissible challenge to the DOE disposition option.[10]

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4 LBP-04-14, 60 NRC at 67.

5 *See Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223 (2004); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-5, 61 NRC 22 (2005).

6 CLI-05-5, 61 NRC at 34-36.

7 *Id.* at 36.

8 Motion on Behalf of [NIRS/PC] to Amend and Supplement Contentions (Oct. 20, 2004), at 7-11.

9 Memorandum and Order (Ruling on Late-Filed Contentions) (Nov. 22, 2005) (unpublished), at 12 ("November 2004 Ruling on Late-Filed Contentions").

10 *Id.* at 13.

NIRS/PC again sought to modify this contention in February 2005, proposing two additional amendments.[11] First, NIRS/PC asserted that LES lacked a "reasonable or credible plan for deconversion, transportation, and disposal [of DU byproduct] that meets the Commission's standards for a 'plausible strategy.'"[12] Second, NIRS/PC asserted that the various methods of disposal of DU byproduct discussed in the ER and DEIS "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."[13]

Significantly, the Board rejected these proposed amendments on both timeliness and admissibility grounds, noting that NIRS/PC could have included those issues in their original intervention petition.[14] Moreover, the Board characterized the latter amendment as seeking "to raise or repackage matters previously rejected by the Board, such as *the disposal form of depleted uranium and DOE's conversion ability*."[15] Finally, the Board added that the issue of "whether *commercial* disposal of depleted uranium in an underground mine *or a near-surface facility* is plausible when viewed in [sic] relative to the requirements of 10 C.F.R. Part 61, has already been raised in the context of admitted paragraphs H and I to Contention NIRS/PC EC-6/TC-3."[16]

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11 Motion on Behalf of Intervenors [NIRS/PC] for Admission of Late-Filed Contentions (Feb. 2, 2005), at 7.

12 *Id.*

13 *Id.*

14 Memorandum and Order (Ruling on NIRS/PC Late-Filed Contentions and Providing Administrative Directives) (May 3, 2005) (unpublished), at 7-9 ("May 2005 Ruling on Late-Filed Contentions").

15 *Id.* at 9 (emphasis added).

16 *Id.* at 9 (emphasis added).

2. *Contention NIRS/PC EC-5/TC-2 -- "Decommissioning Costs"*

This contention challenges the adequacy of LES's decommissioning cost estimates. As admitted by the Board in July 2004, the contention alleged that LES (1) used a contingency factor that is too low; (2) used a cost of capital that is too low; and (3) incorrectly assumed that the costs are for low-level waste only. Importantly, these three initial bases, as described by NIRS/PC, all focused on the decommissioning of the facility, rather than the disposition of DU byproduct. In November 2004, the Board amended this contention to include an additional basis related to the disposition of DU byproduct predicated on information obtained by NIRS/PC during discovery. That basis asserts that LES lacks "any relevant estimate" of the cost of dispositioning DU byproduct, insofar as LES does not rely upon the three examples – the 1993 Claiborne Enrichment Center ("CEC") estimate, the Lawrence Livermore National Laboratory ("LLNL") Report, and the Uranium Disposition Services ("UDS") contract – cited in its license application.[17] In May 2005, the Board again amended this contention, in response to a February 2005 NIRS/PC motion, to include an additional basis. The fifth basis alleges that the updated cost estimates provided by LES in January 2005 for the deconversion, transportation, and disposal of DU byproduct are insufficient because they purportedly contain no factual bases or documented support.[18] Significantly, the Board rejected all other bases – 11 in total – proffered by NIRS/PC in their February 2005 motion. In addition to finding a lack of good cause for their late-filing, the Board concluded that the bases "suffer from the same overarching deficiency of relying on three posited 'disposal scenarios' that directly and indirectly conflict with or contradict the Commission's classification of depleted uranium as low-level waste."[19]

[17] November 2004 Ruling on Late-Filed Contentions, at 16, 21-22.

[18] May 2005 Ruling on Late-Filed Contentions, at 12-13 & App. A.

[19] *Id.* at 13.

III. APPLICABLE LEGAL STANDARDS

A. Legal Standards Governing the 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.[20] 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.[21] 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.[22] The finding of good cause for late-filing of contentions is related to the *total previous unavailability* of information.[23]

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 19, 2004 ruling in this proceeding.[24] In short, a proposed contention must contain (1) a specific

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[20] November 2004 Ruling on Late-Filed Contentions, at 5-6.

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

[22] *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).

[23] *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).

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

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 that 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. *See* 10 C.F.R. § 2.309(f)(1)(i)-(vi).

B. The "Plausible Strategy" Standard and Its Relationship to the NRC's Decommissioning Funding Requirements

In determining whether the proposed NIRS/PC amendments raise *material* issues that are *within the scope of this proceeding*, it is important to consider as a threshold matter the purpose of the "plausible strategy" standard and its relationship to the NRC's decommissioning funding requirements. At the outset of this proceeding, LES set forth its views regarding the purpose and proper application of the Commission's "plausible strategy" standard.[25] These views are informed, in large part, by the application of that standard by the Licensing Board in the *Claiborne* proceeding, and by the Board and the Commission in this proceeding. While LES will refrain from repeating the entirety of its earlier discussion, certain points warrant re-emphasis in view of the nature of the Intervenors' late-filed claims.

First, as acknowledged by the *Claiborne* Board, "[t]he NRC has *no regulatory requirement* that there must be a *concrete plan* for the disposal of the depleted uranium that the facility would generate each year, and that before a license may issue, such a disposal plan must comply with all applicable environmental laws."[26] The Commission and NRC Staff have

25 *See* "Answer of [LES] to the Requests for Hearing and Petitions for Leave to Intervene of the New Mexico Attorney General and [NIRS/PC]" (May 3, 2005), at 18-22.

26 *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 337 (1991) (emphasis added).

confirmed this much in the instant proceeding. Namely, in CLI-04-25, the Commission stated that while a "plausible strategy" for the disposition of DU "must represent more than mere speculation," it "does not mean a definite or certain strategy, to include completion of all necessary contractual arrangements."[27] The Staff, for its part, has correctly noted that the application of the standards of 10 C.F.R. Part 61 to the specific waste and site being considered "will be accomplished when a specific site and type of disposal is contemplated."[28]

Second, while the *Claiborne* Board noted that a plausible strategy "must consider the various factors that influence costs and appropriately bound the costs for a particular type of disposal," it also recognized that "a specific *licensed* site and *actual* disposal costs are *not* required."[29] To hold otherwise, the Board concluded, would "disregard" the Commission's hearing notice for that proceeding (and, by necessary implication, the hearing notice for this proceeding).[30]

Similarly, despite the asserted lack of a licensed and operating deconversion facility in the U.S., the *Claiborne* Board concluded:

> [C]ontrary to the Intervenor's assertion, the fact that there is no currently operating [deconversion] facility in the United States, or a firm commitment by COGEMA or some other entity to build such a facility

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27 CLI-04-25, 60 NRC at 226.

28 "NRC Staff Response to Motion on Behalf of Intervenors [NIRS/PC] for Admission of Late-Filed Contentions" (Mar. 3, 2005), at 11 ("March 2005 Staff Response to Late-Filed Contentions").

29 *Louisiana Energy Services., L.P.* (Claiborne Enrichment Center), Memorandum and Order (Ruling on Intervenor's Petition to Waive Certain Regulations), 1995 WL 110611 at *7 (N.R.C. Mar. 2, 1995), *petition for interlocutory review denied*, CLI-95-7, 41 NRC 383 (1995), *vacated by* CLI-98-5, 47 NRC 113 (1998).

30 *Id.*

> does not somehow make it unlikely, or unreasonable to assume, that one will be built here in the future to convert DUF_6 tails to U_3O_8.[31]

Third, as to the issue of DU disposition cost estimates, the *Claiborne* Board underscored another important point that is germane to this proceeding. Specifically, the Board explained that, "in contrast to the detailed *final* decommissioning plan that LES must submit near the end of the license term, the Applicant's Decommissioning Funding Plan is required only to provide a *reasonable* cost estimate to ensure that the Applicant sets aside adequate funds to cover, *inter alia*, the costs of tails disposal."[32] Indeed, in responding to the February 2005 contention amendments proffered by NIRS/PC in this proceeding, the NRC Staff drew a similar distinction, stating that "[a]n applicant is not required to outline its decommissioning plan when it files an application to operate and construct a facility."[33] Rather, the submission and approval of a detailed decommissioning plan for approval by the Commission occurs, in accordance with the provisions of Section 70.38(d), at the end of licensed life.[34] At that juncture – not at the time of initial license application submittal – an applicant must provide "[a]n updated detailed cost estimate for decommissioning, comparison of that estimate with present funds set aside for decommissioning, and a plan for assuring the availability of adequate funds for completion of decommissioning."[35]

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[31] *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-97-3, 45 NRC 99, 108 (1997), *vacated by* CLI-98-5, 47 NRC 113 (1998).

[32] *Id.* at 118 (emphasis added).

[33] March 2005 Staff Response to Late-Filed Contentions, at 10.

[34] *See id.*

[35] 10 C.F.R. § 70.38(g)(4)(v). Furthermore, 10 C.F.R. § 70.25(e) requires an applicant to adjust cost estimates and associated funding levels at least every three (3) years. These triennial updates may account for "changing disposal prices and other factors" and "are intended to capture changes in estimated costs *regardless of cause*, and to help ensure that the level of financial assurance required of each licensee is appropriate." Final Rule, "Financial

Fourth, as manifested in relevant NRC guidance, a concept of "reasonableness" is embedded in the Commission's decommissioning funding requirements. NUREG-1520, for example, states that an applicant's overview of its proposed decommissioning activities and cost estimate methodology "must contain sufficient detail to enable the reviewer to determine whether the decommissioning cost estimate is *reasonably* accurate."[36] Similarly, NUREG 1757 states that the purpose of the Staff's review of the decommissioning cost estimate is to:

> . . . ensure that the licensee or responsible party has developed a cost estimate for decommissioning the facility based on *documented and reasonable assumptions* and that the estimated cost is sufficient to allow an independent third party to assume responsibility for decommissioning the facility if the licensee or responsible party is unable to complete the decommissioning.[37]

As such, the cost estimate is intended to represent "the licensee's *best approximation* of all direct and indirect costs of decommissioning its facilities under routine facility conditions."[38] In short, the NRC's decommissioning funding regulations afford applicants and licensees some flexibility in view of the uncertainties inevitably associated with the process of forecasting costs.

IV. ANALYSIS OF NIRS/PC LATE-FILED CONTENTION AMENDMENTS

Against the foregoing factual and legal backdrop, LES now responds to the late-filed contention amendments of NIRS/PC. For the reasons set forth below, LES opposes the admission of the proposed amendments.

Assurance for Materials Licensees," 68 Fed. Reg. 57,327, 57,332 col. 1 (Oct. 3, 2003) (emphasis added).

36 NUREG-1520, "Standard Review Plan for the Review of a License Application for a Fuel Cycle Facility" (Mar. 2002), at 10-1 (emphasis added).

37 NUREG-1757, "Consolidated NMSS Decommissioning Guidance" (Sept. 2003), Vol. 3 at 4-9 (emphasis added).

38 NUREG-1757, Vol. 3, App. A at A-26 (emphasis added).

A. Proposed Amendments to Contention NIRS/PC EC-3/TC-1

NIRS/PC set forth their proposed amendments to this contention in one of their May 16, 2005 motions. Specifically, NIRS/PC seek to add the following basis to Contention NIRS/PC EC-3/TC-1:

> (C) The disclosure by LES that it now apparently plans to dispose of depleted U_3O_8 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 low-level radioactive waste does not consider the disposal of bulk DU_3O_8, 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.

NIRS/PC Disposal Strategy Motion at 7-8. NIRS/PC aver that "in light of LES's interest in WCS, NIRS/PC are investigating the nature and the probable performance of WCS's planned disposal site." *Id.* at 4. As discussed below, LES opposes the proposed amendment on both timeliness and admissibility grounds.

1. Timeliness Considerations

The proposed amendment is untimely filed without good cause in at least two respects. First, the proposed amendment is another iteration (albeit a more particularized one insofar as it focuses on the WCS site) of the NIRS/PC claim that the radiological properties of depleted uranium make it unsuitable for near-surface disposal. As both the Board and Commission have recognized, this issue has been raised in the context of Contention NIRS/PC EC-6/TC-3.[39] Accordingly, NIRS/PC have not raised a new or materially different issue.

[39] *See* CLI-05-5, 61 NRC at 35 n.64; May 2005 Ruling on Late-Filed Contentions, at 9.

Putting that fact aside, NIRS/PC could have raised the issues contained in the proposed amendment earlier in the proceeding. Indeed, as part of its September 2004 mandatory disclosures, LES produced documentation that clearly reflected its interest in WCS as a potential provider of DU disposition services, as well as its preliminary discussions with WCS representatives.[40] Further, during his deposition of October 8, 2004, LES witness Rod Krich confirmed that "[t]here have been commercial discussions between LES and WCS," though he had "not been directly involved in the discussions."[41]

Shortly thereafter, on October 15, 2004, LES produced a number of documents to NIRS/PC (including portions of the WCS license application), and disclosed the existence of certain privileged documents, which the cover letter described as "documents relevant to the possible disposal of NEF depleted uranium at the [WCS] site in Texas."[42] Finally, on January 31, 2005, counsel for LES disclosed to NIRS/PC LES's proprietary January 14, 2005 Memorandum of Agreement ("MOA") with WCS.[43] Pursuant to the MOA, LES and WCS agreed "to enter into mutual discussions for the purpose of developing and eventually entering into a definitive contract under which LES can utilize the WCS facility for the receipt and

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40 *See, e.g.*, "Waste Control Specialists, LLC" (June 4, 2003) [Bates nos. LES-01833 to LES-01834] (containing 2-page narrative that summarizes early discussions between LES and WCS representatives); Letter from L. Ericksson, Gram, Inc. to G. Dials, LES (Apr. 25, 2003), "Re: Trip Report – April 2003 Visit to Waste control Specialists' (WCS) Low-Level Radioactive Waste (LLW) Storage Site, Andrews, TX" [Bates nos. LES-02023 to LES-02063] (documenting visit by LES representatives to WCS site as part of LES-sponsored DU disposition study).

41 Krich Dep. Tr. 49-50 (Oct. 8, 2004).

42 *See* Letter from J. Curtiss, LES, to L. Lovejoy, NIRS/PC (Oct. 15, 2004) (forwarding, among other documents, LES-04669 to LES-04894 and an updated privilege log reflecting clear LES interest in the WCS site). Copies of this letter were sent to Staff counsel (with enclosures) and to the Board (without enclosures).

43 *See* Letter from J. Curtiss, LES, to L. Lovejoy, NIRS/PC (Jan. 31, 2005) (cc: w/enclosures to Staff counsel; cc: w/out enclosures to the Board). The proprietary MOA between LES and WCS was bates numbered LES-PRO-00755 to LES-PRO-00759.

disposal of the depleted U_3O_8 generated from a planned deconversion plant, which would de-convert the depleted UF_6 produced from the NEF."[44]

Notwithstanding, NIRS/PC waited until May 2005 to contest LES's potential use of WCS disposition services. In seeking to show good cause for this delay, counsel for NIRS/PC tacitly recognizes that this issue could have been raised earlier, stating only that: "The Board will also appreciate that NIRS/PC counsel and expert consultants have been occupied in hearings before the Board during the February 2005 and in submitting opening and reply proposed findings of fact and conclusions of a law, a process that concluded only on April 4, 2005."[45] However, "the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations."[46] In short, NIRS/PC have not shown good cause for the late filing of this proposed amendment.

2. *Admissibility Considerations*

In any event, the proposed amendment to Contention NIRS/PC EC-6/TC-3 is inadmissible because it raises issues that are immaterial and beyond the scope of this proceeding. To begin with, the proposed amendment is based on the specious premise that LES must select – and has selected in WCS – a specific disposal site. In fact, NIRS/PC suggest without any regulatory basis that LES must "amend[] its Application to state that LES has decided to use the

44 "Memorandum of Agreement Between [LES] and [WCS]" (Jan. 14. 2005), at 2.

45 Counsel neglects to mention, however, that NIRS/PC did find the time to submit a 47-page motion for the admission of late-filed contentions (which included plausible strategy and cost-related issues) on February 2, 2005, in the midst of the parties' preparation for the February 5-9 evidentiary hearings. LES and the Staff nonetheless responded to this motion on March 3, 2005.

46 *Texas Utils. Generating Co.* (Comanche Peak Steam Electric Station Units 1 and 2), LBP-82-18, 15 NRC 598, 599 (1982) (quoting CLI-81-8, 13 NRC 452, 454 (1981)).

WCS site for disposal of DU." NIRS/PC Disposal Strategy Motion at 4. The proposed amendment also is based on a factual error. Namely, NIRS/PC admit that "from the very recent exchanges disclosed in the Hearing File, NIRS/PC *infer* that LES has selected WCS as the basis for its disposal strategy." *Id.* at 11 (emphasis added). In reality, LES obtained disposal cost estimates from WCS – estimates that were confirmed by Envirocare as reasonable – to support the disposal component of its cost estimate for its commercial DU disposition strategy. At this juncture, LES has not selected a specific disposal site, nor is it required to select one.

Without question, the proposed amendment goes beyond what is required under the "plausible strategy" standard, as construed by the Commission in this proceeding. As explained above, LES need not select a specific disposal site, as a plausible strategy "does not mean a definite or certain strategy."[47] The selection of a specific site, such as WCS, simply is not necessary to the Staff's granting or denial of the NEF license application. In addition, it is well-established that all contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board.[48] The Commission's hearing for this proceeding indicates that LES need only identify "a plausible strategy" for the dispositioning of depleted uranium byproduct, not select a specific disposal site.

The bases presented by NIRS/PC to support the proposed amendment further underscore the fact that the proposed amendment far exceeds the scope of this proceeding. Most of the supporting bases are aimed at alleged deficiencies in the application submitted by WCS to

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47 CLI-04-25, 60 NRC at 226.

48 *See, e.g., Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); *Portland General Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979) (stating that any contention that falls outside the specified scope of the proceeding must be rejected).

the Texas Commission on Environmental Quality ("TCEQ") for a license to authorize near-surface land disposal of low-level radioactive waste. *See* NIRS/PC Disposal Strategy Motion at 11-17. Indeed, NIRS/PC acknowledge that "[t]he present amendments essentially involve *the suitability of the WCS disposal site.*" *Id.* at 5 (emphasis added). NIRS/PC assert that the WCS application contains erroneous inventory tables for uranium isotopes, and that these erroneous data will invalidate the WCS performance assessments. *Id.* at 14-17. NIRS/PC take this argument one step further, claiming that these purported deficiencies "cast great doubt upon WCS as a prospective manager of large quantities of DU waste." *Id.* at 16.

Clearly, the technical adequacy of the WCS license application (including the ability of WCS ultimately to accept DU byproduct for disposal) is a matter within the purview of the TCEQ – pursuant to its own statutory and regulatory authorities – *not* the NRC. As the Commission has aptly observed, Congress "gave our agency no roving mandate to determine other agencies' permit authority," and that the Commission should "show due respect to our sister agencies' responsibilities" and "not add to our own regulatory jurisdiction."[49] Accordingly, in assessing the admissibility of proposed contentions, "the Presiding Officer should *narrowly construe* their scope to avoid where possible the litigation of issues that are the primary responsibility of other agencies and whose resolution is not necessary to meet our statutory responsibilities."[50] The proposed amendment at issue here is no exception. Thus, the Board should eschew, as part of *this* adjudicatory proceeding, the conduct of a *de facto* licensing review of the WCS application.

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[49] *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 121 (1998).

[50] *Id.* at 122 (emphasis added).

Likewise, the technical qualifications and management capabilities of WCS – a non-NRC licensee – are issues that fall beyond the scope of this proceeding.[51] It appears from their motion, however, that NIRS/PC would have the Board engage impermissibly in a free-ranging inquiry into "the capabilities of WCS or its management personnel." Disposal Strategy Motion at 11, 16. This request likewise should be rejected.

In sum, the proposed amendment to Contention NIRS/PC EC-3/TC-1 should be rejected as inadmissible. It raises concerns that are immaterial to the Staff's ultimate licensing judgment and beyond the scope of this proceeding. *See* 10 C.F.R. § 2.309(f)(1)(iii)-(iv).

B. Proposed Amendment to Contention NIRS/PC EC-5/TC-2 – AGNM TC-i

NIRS/PC have proffered an amendment to this contention in two separate motions. The first motion, dated May 16, 2005, sets forth the proposed amendment and its initial supporting bases. The second motion, dated May 20, 2005, presents an additional set of supporting bases. Although all of the bases presented relate to a single proposed amendment to Contention NIRS/PC EC-5/TC-2 – AGNM TC-i, LES addresses the two motions separately below.

1. The May 16th Proposed Contention Amendment and Initial Supporting Bases

In their May 16 Motion, NIRS/PC request that the Board amend Contention NIRS/PC EC-5/TC-2 to include the following additional paragraph:

> 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

[51] *Cf. Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365 (2001) (citation omitted) (stating that "[f]or management 'character' to be an appropriate issue for adjudication in a licensing proceeding, 'there must be some direct and obvious relationship between the character issues and the licensing action in dispute") (citation omitted).

> 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.

NIRS/PC May 16 Cost Motion at 8. As discussed below, LES opposes the proposed amendment on the grounds that it is untimely filed without good cause and lacks adequate factual or expert opinion support. Indeed, the "supporting" bases rely heavily on inadmissible arguments.

a. Timeliness Considerations

In the proposed amendment, NIRS/PC claim that LES "must account for several factors" in estimating the cost of dispositioning DU byproduct. In doing so, NIRS/PC simply replow old ground, raising five issues that the Board has previously admitted or rejected in this proceeding. Specifically, the suitability of DU byproduct for near-surface disposal and the issue of cost "scaling" relative to a potential deconversion facility[52] are issues previously admitted by the Board in Contention NIRS/PC EC-6/TC-3.[53] Conversely, the Board recently rejected the other three issues raised by NIRS/PC – "exchange rate uncertainties, emerging scientific information on potential uranium risks, and licensing delays" – as both untimely and

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52 As LES made clear in its March 3, 2005 response to the February 2005 late-filed contentions of NIRS/PC, the issue of cost "scaling" relative potential commercial *disposal* facilities is an issue that NIRS/PC could have raised, but did not raise, at the outset of this proceeding. Therefore, to the extent intervenors' reference to "facilities" is intended to encompass potential disposal facilities, it is untimely in this regard as well.

53 *See* LBP-04-14, 60 NRC at 78-80 (App. A); May 2005 Ruling on Late-Filed Contentions, at 9, 13 n.13.

inadmissible.[54] In short, NIRS/PC fail to show how the proposed amendment is based specifically on the "new" information to which NIRS/PC refer in their motion.[55]

b. Admissibility Considerations

The proposed amendment to Contention NIRS/PC EC-5/TC-2 also fails to pass muster under the Commission's contention admissibility standards. First and foremost, NIRS/PC continue to misconstrue the Commission's "plausible strategy" standard and decommissioning funding requirements. Several of the intervenors' supporting bases illustrate this fact. In Basis E, for example, NIRS/PC note that "[t]he AREVA MOU states only that the parties will conduct discussions toward a contract concerning a deconversion contract, but it *does not commit any party to make such a contract*, nor to take the important steps toward a contract." NIRS/PC May 16 Cost Motion at 15 (emphasis added). NIRS/PC add that "[t]here are no estimates of conversion costs in the AREVA MOU." *Id.* Similarly, in other bases, NIRS/PC contend that TLI has made no commitment to transport DU "in any form," and that neither Envirocare nor WCS has committed to accept DU byproduct from the NEF for disposal at a specific price. *See* NIRS/PC May 16 Cost Motion at 15-18 (specifically proposed Bases F, G, and J).

LES, however, is not required to obtain commitments of the type deemed necessary by NIRS/PC. The Commission made this abundantly clear in CLI-04-25, when it

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54 *See* May 2005 Ruling on Late-Filed Contentions, at 12-13 [rejecting, *inter alia*, proposed Basis F (regarding exchange rate uncertainties), Basis G (regarding "emerging" uranium health risks, and Basis I (regarding licensing-related uncertainties)].

55 In this regard, the five bases that coincide specifically with the five discrete issues raised by NIRS/PC in their proposed amendment – Bases Q, R, S, T, and U – are likewise untimely. *See* NIRS/PC May 16 Cost Motion at 21-23. Indeed, in each case, NIRS/PC cite the November 24 expert report of witness Arjun Makhijani, further reinforcing the fact that NIRS/PC are revisiting, and perhaps seeking to litigate prematurely, issues that they have raised previously in this proceeding.

stated that a plausible strategy "does not mean a definite or certain strategy, to include completion of all necessary contractual arrangements."[56] As discussed above, the *Claiborne* Board's treatment of this issue is also illustrative. *See* Section III.B *infra,* at 7-9. To the extent NIRS/PC persist in making claims of this type, they are misapplying the "plausible strategy" standard and raising issues that fall beyond the well-defined scope of this proceeding.

Similarly, NIRS/PC overlook the applicable NRC requirements and standards discussed above relative to decommissioning funding. For instance, in Bases C and G, respectively, NIRS/PC assert that Envirocare has indicated that "costs are subject to change," and that it "makes no commitment to a disposal price in the thirty-year future when the NEF would generate DU." NIRS/PC May 16 Cost Motion at 10, 16. In Basis J, NIRS/PC likewise aver that "WCS makes no commitment to accept any specific quantity of waste for disposal" at any specific price.[57] *Id.* at 18. Finally, with respect to the DU byproduct dispositioning cost estimate recently provided by the DOE, NIRS/PC state in Basis I that "DOE gave no assurance that conversion or disposal would be available at the costs stated." *Id.* at 17.

As set forth above, however, neither LES nor its respective vendors are required to predict with certainty the future costs of particular DU byproduct disposition services. Such an approach is inconsistent with the reasonableness standard inherent in the Commission's decommissioning funding regulations. *See* Section III.B. *infra,* at 10. It also ignores the fact that such estimates are to be updated on a triennial basis (to account for, among other factors, "changing disposal prices").[58] Thus, NIRS/PC seek a level of certainty relative to LES's DU

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[56] CLI-04-25, 60 NRC at 226.

[57] Contrary to Intervenors' suggestion, the fact that the Texas Compact Commission will set the exact prices at which WCS provides disposal services does not preclude WCS from providing a good faith cost estimate based on its commercial experience to date.

[58] *See* 68 Fed. Reg. at 57,332 col. 1.

byproduct disposition strategy and associated cost estimate that is more akin to that required at the end of facility life, when an applicant must submit a final decommissioning plan for NRC approval. Even then, the decommissioning plan need not "predict the future with precision," nor provide funding cost estimates that are "ironclad."[59] Accordingly, the supporting bases cited above constitute improper challenges to the Commission's regulatory process and seek information that is not necessary to the Staff's granting or denial of the application.[60]

In regard to the cost estimate recently furnished by DOE, NIRS/PC raise another inadmissible issue, *i.e.*, DOE's performance history. *See* NIRS/PC May 16 Cost Motion at 17 (citing, in Basis I, "the notorious history of delays, technical problems, and cost overruns for previous DOE programs"). The Board has rejected such claims – which are inconsistent with the Commission's ruling that Section 3113 is a plausible strategy – as inadmissible on more than one occasion.[61] Additionally, NIRS/PC claim that the DOE estimate lacks any relevance to LES's "preferred alternative," *i.e.*, private deconversion and disposal. NIRS/PC May 16 Cost Motion at 17. NIRS/PC, however, ignore the fact that the DOE estimate is directly relevant to the "DOE option," one of the two plausible strategies set forth in LES's application.

On a different note, the supporting bases proffered by NIRS/PC fail to provide adequate factual or expert opinion support for the *repeated general complaint* that LES has not

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59 *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 257, 262 (1996) (stating that "[a] decommissioning plan by its very nature deals with a myriad of uncertainties, and our regulations cannot be construed to require the plan to do the impossible, *i.e.*, predict the future with precision").

60 *See* 10 C.F.R. § 2.335(a); *International Uranium (USA) Corp.* (Receipt of Material from Tonawanda, New York), LBP-98-21, 48 NRC 137, 143 n.9 (1998) (citing *Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974)); 10 C.F.R. § 2.309(f)(1)(iv).

61 *See* May 2005 Ruling on Late-Filed Contentions, at 9.

provided an adequate basis for its current cost estimates.[62] *See* 10 C.F.R. § 2.309(f)(1)(v)-(vi). As set forth in NUREG-1757 (Vol. 3 at 4-9), an applicant is required to provide "a cost estimate for decommissioning the facility based on documented and reasonable assumptions." LES's updated cost estimate, in fact, comes directly or indirectly from qualified vendors with *actual commercial experience* – and hence "real-world" data – in providing the types of services at issue. Moreover, through the Staff RAI process, LES has provided adequate documentation to the NRC, as evidenced by the Staff's recent acknowledgment that "the additional basis provided by LES would be sufficient in completing the decommissioning funding plan review."[63]

As summarized in Basis O, however, the gist of the NIRS/PC argument is that "the bases for the cost estimates are not disclosed by the materials presented by LES." NIRS/PC Cost Motion at 20. In particular, NIRS/PC state that there are "no data" underlying the transportation and disposal cost estimates, and "only unexplained round numbers . . . in support of the deconversion estimate." *Id.* at 20-21. These bald assertions, however, add nothing of substance to Contention NIRS/PC EC-5/TC-2, which, as amended in May 2005, already alleges

62 *See, e.g.*, Basis D (stating that "[t]he subsequent materials [provided by LES since January 7, 2005] add nothing of substance, and that "[t]he dispositioning strategy remains at the level of speculation."); Basis F (stating that "basis and derivation" of the transportation cost figures stated in the TLI e-mail of December 2, 2004 is not stated); Basis I (stating that the March 1, 2005 letter from DOE "does not explain the derivation of the costs except to say that DOE assumed conversion, storage and disposal consistent with operation of the Portsmouth and Paducah deconversion plants"); Basis J (stating that the TLI e-mail "merely contains unexplained and unsupported ranges of estimates"); Basis K (stating that the March 11 revised application pages submitted by LES "contain no new information to support the cost estimates or the availability of deconversion or disposal services"); Basis L (stating that a narrative discussion of deconversion cost estimates developed from information from Urenco and AREVA contains only "conclusory statements [that] tell nothing about the actual assumptions underlying the estimates" and no "breakdown of any of the elements of the estimate").

63 Internal NRC Staff Memorandum from T. Johnson to J. Clifford, "Subject: April 19, 2005, In-Office Review Summary: Louisiana Energy Services Decommissioning Funding" (Apr. 29, 2005) (ADAMS Accession No. ML051190243).

a lack of "factual or documented bases" for LES's commercial cost estimate. It is well-established that "a petitioner must do more than submit 'bald or conclusory' allegations of a dispute with the applicant."[64] Rather, a petitioner must "come forward with reasonably precise claims rooted in fact, documents, or expert opinion in order to proceed past the initial stage and toward a hearing."[65]

NIRS/PC, by contrast, set forth no new and meaningful explanation as to why LES's reliance on the *vendor-supplied* cost estimates is unreasonable, or why those estimates are inadequate for purposes of complying with the NRC's decommissioning funding requirements.[66] At bottom, the NIRS/PC assertion that "the supplemental material [provided by LES] fails to explain or support the cost estimates offered by LES" is an empty, unsupported claim and should be rejected as such. NIRS/PC themselves make no affirmative showing.

This failure of NIRS/PC is particularly acute in view of the materiality standard that applies in the decommissioning funding context, a standard which this Board acknowledged in its initial ruling on contention admissibility.[67] Specifically, the Commission has noted that "not all actual or alleged errors in a decommissioning plan are of equal significance."[68]

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64 *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 216 (2003) (citation omitted).

65 *Yankee Atomic*, CLI-96-7, 43 NRC at 262.

66 For example, NIRS/PC provide no comparative cost information or expert opinion to suggest that the estimates or data provided by WCS, Envirocare, TLI, and Urenco/Areva are unreasonable or inadequate. The only information offered by NIRS/PC relates to issues that have been previously admitted or rejected by the Board (*i.e.*, suitability of DU for near-surface disposal, scaling considerations, exchange rate fluctuations, emerging scientific information on uranium health risks, and licensing delays).

67 *See* LBP-04-14, 60 NRC at 56 (citing *Yankee Atomic*, CLI-96-1, 43 NRC at 9) (stating that "to gain admission of a contention alleging an error in the estimate, the petitioner must also show that there exists no reasonable assurance that the amount in question will be paid by the applicant").

68 *Yankee Atomic*, CLI-96-7, 43 NRC at 259.

Accordingly, "to be significant enough to be 'material,' within the meaning of the contention rule, there needs to be some indication that an alleged flaw in a plan will result in a shortfall of the funds actually needed for decommissioning."[69] Despite having LES's specific vendor-supplied cost figures in hand, NIRS/PC make no attempt to make such a showing via factual or expert opinion support (*e.g.*, NIRS/PC make no attempt to explain why an estimated transportation cost of $0.85 per kg DU based on information from an experienced vendor is unreasonable and will contribute to a decommissioning funding shortfall).[70]

In sum, the bases proffered by NIRS/PC in their May 16 motion fail to support the admission of the proposed amendment to Contention NIRS/PC EC-5/TC-2.

2. *The May 20 Additional Bases to the Proposed Contention Amendment*

In their motion of May 20, 2005, NIRS/PC proffer "additional bases" for their May 16 proposed amendment to Contention NIRS/PC EC-5/TC-2. According to NIRS/PC, these additional bases were submitted in response to an internal NRC Staff memorandum dated April 29, 2005 (*see* n.63 *supra*), which documented the results of an April 19, 2005 in-office review conducted at the LES offices in Washington, D.C. As described in that memorandum, the purpose of the meeting was "to discuss LES's approach for documenting the costs of deconversion of depleted uranium hexafluoride in the decommissioning funding plan." During the meeting, the Staff also sought "clarification on the overall U_3O_8 disposal cost estimate." For the reasons set forth below, LES submits that the additional bases provided by NIRS/PC in their

69 *Id.*

70 While NIRS/PC state in their May 20 motion (discussed below) that "deep disposal of depleted uranium in a repository . . . would cost well in excess of the amounts quoted by LES," the asserted need for such deep disposal and its attendant cost implications are issues that NIRS/PC have raised previously.

May 20 filing fail to support the admission of the May 16 proposed amendment to Contention NIRS/PC EC-5/TC-2 – AGNM TC-i.

a. Timeliness Considerations

LES does not dispute that additional documentation reflecting the refinement of its cost estimates has emerged since January 2005. However, as this Board recently emphasized, "in evaluating the question of whether good cause exists for late filing, the focus is often on whether new information has recently become available *that serves as the basis for the contention*."[71] In their May 16, 2005 motion, NIRS/PC assert that "the deficiencies in LES's early-2005 submissions about DU dispositioning costs could not have been asserted by NIRS/PC until LES made those submissions." However, as closer scrutiny reveals, the asserted "deficiencies" are of a type that NIRS/PC could have raised – and, in many cases, did raise – prior to LES's "early-2005 submissions." In other words, the "supplemental material" cited by NIRS/PC does not serve as the basis for the issues upon which NIRS/PC focus in their proposed contention amendment.

Specifically, after summarizing the contents of the Staff's April 29 memorandum in Basis A of their May 20 motion,[72] NIRS/PC proceed to claim, in Basis B, that the additional information reflected in the Staff memorandum "is clearly inadequate to justify reliance on LES's cost estimates." NIRS/PC May 20 Cost Motion at 6. NIRS/PC further state that there is no basis upon which the Commission could evaluate the adequacy of the treatment of a broad range of "fundamental matters" involving LES's estimated deconversion costs. *Id.*[73]

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[71] May 2005 Ruling on Late-Filed Contentions, at 7 (emphasis added).

[72] Hence, Basis A provides background information and does not purport to raise a genuine dispute on a material issue of law or fact.

[73] These "fundamental matters" include: (1) capital cost estimates; (2) licensing cost estimates; (3) engineering cost estimates; (4) estimates of operating and maintenance costs; (5)

Notwithstanding LES's recent updating of its cost estimate to reflect current information from commercial vendors, the foregoing issues could have been raised in connection with LES's original license application. Indeed, the Board has already admitted contentions that raise concerns relative to, *inter alia*, LES's estimated costs of capital; the NEF decommissioning contingency factor (which is intended to account for a variety of potential unanticipated costs); the costs associated with the disposal of CaF_2 produced from the neutralization of HF; and the cost implications of "scaling" a deconversion facility to meet LES's "timing and throughput requirements."[74] Additionally, NIRS/PC have sought unsuccessfully to introduce issues related to "exchange rate uncertainties."[75] Accordingly, the ability of NIRS/PC to raise the sweeping list of "fundamental matters" set forth in Basis B was in no way contingent upon LES's recent updating of its cost estimate for the commercial disposition of DU byproduct.

Furthermore, as NIRS/PC correctly note, the April 29 memorandum indicates that "the [LES] cost estimates used a proprietary Urenco business study of a proposed 3500 Metric Tons (MT) U/year deconversion plant for the Capenhurst site," and that "[t]he study was based on a Cogema response to a Urenco request for proposal." NIRS/PC, however, incorrectly claim that "[n]one 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 the validity of the estimates as they relate to the case can be assessed." NIRS/PC May 20 Cost

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; and (11) adjustments involving construction costs in a rural location. NIRS/PC May 20 Motion at 6.

[74] *See* Contentions NIRS/PC EC-5/TC-2 – AGNM TC-I and NIRS/PC EC-6/TC-3.

[75] *See* May 2005 Ruling on Late-Filed Contentions, at 13 (rejecting, among other bases, Basis F of Intervenors' February 2005 proposed amendment to Contention NIRS/PC EC-5/TC-2).

Motion at 6. To the contrary, those materials, and all other materials relied upon by the Staff in its review of LES's cost estimate, have been produced through supplemental disclosures and updates to the Hearing File.[76] This fact also casts doubt on the timeliness of Intervenors' alleged need to evaluate a host of "fundamental matters" associated with LES's updated cost estimate.

NIRS/PC likewise fail to show good cause with respect to the remaining additional bases set forth in the May 20 motion (*i.e.*, Bases C through F). Although Basis C seeks to contest the adequacy of cost information supplied by Envirocare, it is based on the *previously asserted* need for "[d]eep disposal of depleted uranium in a repository." NIRS/PC May 20 Cost Motion at 8. This issue is not a new one, as evidenced by prior NIRS/PC submissions and the admitted contentions themselves. Furthermore, it appears that NIRS/PC seek to expand the scope of the relevant admitted bases by introducing new issues, including the need to consider the environmental mobility of radionuclides; the potential health risks associated with radionuclides, as indicated by recent research on uranium; and the need for an "engineered waste form" for disposal (such as grouting or ceramic containment of UO_2). *Id.* at 8-9. Clearly, identification of these issues was not contingent upon the cost-related information provided by Envirocare. Indeed, in its May 3, 2005 ruling on late-filed contentions, the Board rejected proposed bases involving the "health risks" of depleted uranium and engineered waste disposal forms.[77]

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76 For example, LES produced the Cogema response to the Urenco request for proposal [LES-PRO-00605 to LES-PRO-00621] and the relevant portions of the Urenco business study [LES-PRO-00631 to LES-PRO-00646], among other deconversion-related documents [*e.g.*, LES-PRO-00593 to LES-PRO-00594] on November 1, 2004. *See* Letter from J. Curtiss, LES, to L. Lovejoy, NIRS/PC (Nov. 1, 2004) (cc: w/enclosures to L. Clark, Counsel for NRC Staff). These documents contain detailed and specific technical and cost information.

77 *See* May 2005 Ruling on Late-Filed Contentions, at 13 & n.13 (stating, in part, that Intervenors' claims regarding DU "health risks" appear to impermissibly challenge the Commission's Part 20 dose regulations).

While Bases D and E take aim at the cost estimates provided by Envirocare and WCS, respectively, their late-filing also lacks good cause. In short, both bases ultimately are predicated on the notion that, absent a "commitment" by Envirocare and/or WCS to accept DU from the NEF at a specific price, LES and the NRC Staff must undertake a detailed analysis of the capital and operating costs of those prospective disposal vendors. *See* NIRS/PC May 20 Cost Motion at 8-9. Again, the purported need for such commitments (including contracts) from prospective vendors of DU byproduct disposition services is a claim that NIRS/PC have articulated previously, and to no avail, in this proceeding.

Finally, Basis F simply states that "LES has still not provided the factual bases or documentary support needed for its estimates of dispositioning costs." *Id.* at 9. This statement simply reiterates the crux of the most recently admitted basis to Contention NIRS/PC EC-5/TC-2 – AGNM TC-i. Therefore, standing alone, this basis does not timely raise a new issue.

b. Admissibility Considerations

Even if the additional bases presented by NIRS/PC in their May 20 motion are not barred by their late-filing, they are nonetheless inadmissible as new issues. Specifically, they raise matters that are beyond the scope of this proceeding, are immaterial to the Staff's decommissioning funding review, are unsupported by adequate factual information or expert opinion, and/or raise matters that are already at issue. In short, the bases suffer from some of the same deficiencies discussed above relative to the bases set forth in the Intervenors' May 16 motion.

Basis A, as noted above, purports to describe the contents of the Staff's April 29, 2005 memorandum. As such, the basis does not by itself raise a litigable dispute.

Basis B, to the extent it raises issues not already admitted in this proceeding, lacks adequate factual or expert opinion support. Specifically, it asserts a lack of "substance"

without contesting any specific portion of the proprietary Urenco/Cogema information that – contrary to the claims of NIRS/PC – LES previously disclosed to NIRS/PC on November 1, 2005. Fundamentally, this basis does nothing more than echo the previously admitted NIRS/PC complaint that LES has failed to provide adequate "factual bases or documented support" for its updated commercial cost estimate.

To the extent Basis C (which focuses on the previously asserted need for "deep disposal") raises issues not previously admitted by the Board, it should be rejected for failing to provide any admissible support. Neither Contention NIRS/PC EC-5/TC-2 nor EC-6/TC-3 is concerned with the "environmental mobility" and "health risks" of radionuclides, or alternative waste disposal forms (*e.g.*, DUO_2). Accordingly, these are issues not currently in the proceeding. Moreover, there is no specificity or support provided. Finally, these are matters that exceed the scope of this proceeding on "plausible strategy."

Bases D and E similarly raise issues that are beyond the scope of this proceeding. As noted above, these bases essentially assert that unless LES obtains firm commitments from prospective vendors (Envirocare and WCS) to accept and dispose of NEF-generated DU byproduct at a specific prices, LES must undertake detailed analyses of the capital and operating costs underlying any estimates from those vendors. Plainly, imposing such conditions or requirements on LES would be at odds with both the "plausible strategy" standard and the reasonableness standard inherent in the Commission's decommissioning funding regulations.[78]

Finally, as noted above, Basis F does not provide any additional support for the proposed contention amendment. Rather, it restates the admitted NIRS/PC claim that LES has

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78 Indeed, as evidenced by the conclusion reached by the Staff in its April 29 memorandum (*i.e.*, that LES has provided a sufficient basis for its decommissioning cost estimate), the Staff does not view such commitments or analyses as necessary.

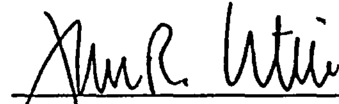
not provided adequate factual bases or documented support for its updated cost estimate for the commercial disposition of DU byproduct.

V. CONCLUSION

For the reasons set forth above, the proposed amendments to Contentions NIRS/PC EC-3/TC-1 and EC-5/TC-2 – AGNM TC-i should be rejected. In summary, irrespective of its lack of timeliness, the proposed amendment to Contention NIRS/PC EC-3/TC-1 rests on (1) the factually incorrect assumption that LES has selected WCS as the ultimate disposal site for DU byproduct, and (2) the legally incorrect assertion that LES is required to select a specific disposal site to comply with the Commission's "plausible strategy" standard. For these reasons alone, the proposed amendment should be rejected. The proposed amendment to Contention EC-5/TC-2 centers on whether LES has provided adequate explanation or support for its updated cost estimate for the commercial disposition of DU byproduct. This issue was previously admitted by the Board in the form a May 2005 contention amendment which alleges that LES's updated cost figures contain "no factual bases or documented support." While NIRS/PC now seek to amend this claim to encompass the "supplemental materials" disclosed since January 7, 2005, NIRS/PC, for the most part, only rehash previous arguments, a number of

which have been rejected by the Board. Moreover, NIRS/PC fail to contest, with any specificity and substance, the cost information set forth in the supplemental materials at issue. Contrary to their claims, NIRS/PC has had access to these "underlying documents."

Respectfully submitted,



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Dated at Washington, District of Columbia
this 3rd day of June 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 MOTIONS ON BEHALF OF NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN FOR ADMISSION OF LATE-FILED CONTENTIONS CONCERNING LES' COMMERCIAL STRATEGY AND COST ESTIMATES FOR THE DISPOSITION OF DEPLETED URANIUM" in the captioned proceeding have been served on the following by e-mail service, designated by **, on June 3, 2005 as shown below. Additional service has been made by deposit in the United States mail, first class, this 3rd day of June 2005.

Chairman Nils J. Diaz
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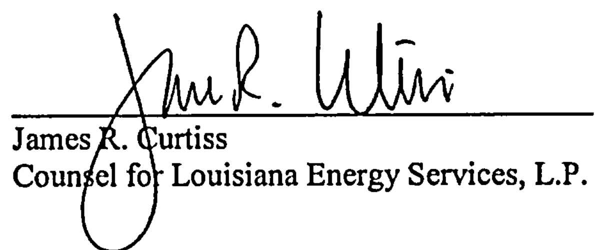

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