UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:
Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffery S. Merrifield

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

CLI-04-03

THE NEW MEXICO ATTORNEY GENERAL'S
REQUEST FOR HEARING AND PETITION FOR LEAVE TO INTERVENE

Pursuant to 10 C.F.R. § 2.309, the New Mexico Attorney General ("Attorney General") hereby requests the Nuclear Regulatory Commission to conduct a full public hearing and to grant the Attorney General permission to intervene in this matter. The following grounds support the Attorney General's request for hearing and petition for leave to intervene:

1. Louisiana Energy Services, L.P. ("LES") proposes in its Application ("Application") to construct and operate a national uranium enrichment facility ("Facility") within the boundaries of the State of New Mexico. LES Application, 1.0-1 to –3.

2. The Federal Register provides that "[w]here a State's constitution provides that both the Governor and another State official or State governmental body may represent the interests of the State in a proceeding, the Governor and the other State official/government body will be considered separate potential parties." 69 Fed. Reg. at

2222. The position of the Attorney General was constitutionally established by Article V, Section 1 of the New Mexico Constitution. See N.M. Const. art. V, § I ("The executive department shall consist of a . . . attorney general . . . who shall, unless otherwise provided in the constitution of New Mexico, be elected for terms of four years beginning on the first day of January next after their election."). The Attorney General is statutorily required to "appear before local, state and federal courts and regulatory officers, agencies and bodies, to represent and to be heard on behalf of the state when, in [her] judgment, the public interest of the state requires such action." NMSA 1978, § 8-5-2(J)(1975).

3. The Attorney General, as the statutorily designated representative of the State in which LES's proposed Facility is to be located, has standing as a party in this matter pursuant to 10 C.F.R. § 2.309(d)(2)(i). See 10 C.F.R. § 2.309(d)(2)(i) (providing, in pertinent part, that a State "that wishes to be a party in a proceeding for a facility located within its boundaries need not address the standing requirements under this paragraph"); see also NMSA 1978, § 8-5-2(J)(1975).

4. The contentions that the Attorney General seeks to have litigated in a hearing in this matter include the following. Each of these contentions is within the scope of this proceeding and material to the Commission's findings to support issuance of a license to LES.

a. On December 15, 2003, Louisiana Energy Services (LES), a partnership comprised of Urenco, a European nuclear consortium (70.5% ownership), Westinghouse, which is now owned by British Nuclear Fuels Ltd. (19.5% ownership), and three U.S. utilities (Exelon, Entergy, and Duke Power), filed its application with the Nuclear

Regulatory Commission (NRC) for licensing under the Atomic Energy Act of a uranium enrichment facility to be located near Eunice, in southeastern New Mexico. LES Application, 1.0-1 to –3. Ultimately, if the plant is not economically viable, the 90% majority owners, which are foreign entities, may simply abandon their investment. In such case the problems of cleanup and dismantlement might fall upon New Mexico.

b. An enrichment plant generates enriched uranium hexafluoride (UF6) as its principal output, LES Application, 1.2-1, and depleted UF6, known as "tails," as a byproduct. LES Application, 3.12-15. The LES facility is intended to operate for 30 years and would generate significant quantities of tails, i.e., a maximum of 234,000 metric tons of depleted UF6 over 30 years. LES Application, 3.12-15. Other enrichment facilities in the United States (e.g., Oak Ridge, Paducah, and Portsmouth), originally built for nuclear weapons production and therefore not licensed by NRC, have generated large amounts of depleted uranium tails, stored in steel cylinders, which have remained in outdoor storage on concrete pads for decades. Such storage, in this instance, would pose a distinct environmental risk to New Mexico.

c. NRC, as regulator, has stated that it will require LES to demonstrate a "plausible strategy" for disposal of its waste. The term "plausible strategy" appears in a NRC order referring to a determination by an Atomic Safety and Licensing Board (ASLB) that deep-mine disposal is a "plausible strategy for handling depleted uranium waste." Order in LES proceeding regarding the Claiborne Enrichment Center (Sept. 19, 1997). The term does not appear in any regulation or statute, and New Mexico is extremely concerned about the potential for future adverse consequences resulting from this ambiguity.

d. In its current application LES has identified two "plausible" approaches for waste disposal: (1) a plan under which other private investors would construct a "deconversion" plant to change the depleted UF6 into U3O8, whereupon the U3O8 would be buried in an exhausted uranium mine, LES Application, 4.13-7 to –8, and (2) a plan under which, pursuant to Sec. 3113 of the U.S. Enrichment Corporation (USEC) Privatization Act, LES would require the Department of Energy (DOE) to accept for conversion and to dispose of the depleted UF6 as low-level radioactive waste at a price determined by DOE. LES Application, 4.13-7 to -8. Further, NRC's scheduling order dated February 6, 2004 states that a plan to transfer depleted tails to DOE for disposal tails pursuant to Sec. 3113 of the USEC Privatization Act constitutes a "plausible strategy" for dispositioning such waste. 69 Fed. Reg. at 5877.

Both of these alternative strategies, however, present large practical difficulties: No deconversion plant exists within the United States, and the necessary licenses to bury U3O8 in an abandoned mine may be hard to obtain. As for the DOE option, when tendered depleted tails, DOE must recover "an amount equal to the Secretary's costs, including a pro rata share of any capital costs." USEC Privatization Act, Pub. L. 102-486, Sec. 3113(a)(30). DOE may be unable to estimate its actual costs of disposal, and it may be unable to accomplish disposal as required. DOE would undoubtedly give higher priority to the 704,000 metric tons of existing tails from the DOE, and former DOE, plants, which DOE is required to dispose of, in preference to waste from LES. The actual obstacles to disposal are suggested by the January 15, 2004 letter to NRC from Governor Taft of Ohio, who stated that waste from a New Mexico plant would not be allowed in Ohio. Albuquerque Journal, January 17, 2004. In sum, LES may postulate "plausible"

strategies, but executing a specific disposal plan may be extremely difficult and costly, which increases the likelihood that the burden will fall upon New Mexico to achieve proper disposal.

e. In its application, LES has requested permission to build a storage pad that will hold 30 years of waste output. LES Application, 4.13-3 to –5. It is clear that, if the waste is accumulated during operations, the disposal cost must be paid at the time of decommissioning. Such a cost is exposed to all the risks of other shutdown costs: On shutdown, customers have paid their bills, and the only entity that may be asked to bear these costs is the owner, which foresees no further revenue from the plant and is, in fact, a foreign owner with no attachment to the locality. The situation begs for a determination that security for disposal costs must be provided.

f. How the disposal security will be calculated is not at all clear. LES states that "LES will provide decommissioning funding assurance for disposition of depleted tails at a rate in proportion to the amount of accumulated tails onsite up to the maximum amount of the tails as described in Section 10.3, Tails Disposition." LES Application, 10.2-1. LES states also: "The surety method adopted by LES will provide an ultimate guarantee that decommissioning costs will be paid in the event LES is unable to meet its decommissioning obligations at the time of decommissioning." LES Application, 10.2-1. From these statements it seems that (1) funding would apply only to the tails accumulated onsite, even if other tails are in process of storage offsite and have not been disposed of, (2) funding would be based on the average cost of disposal of maximum production, even though unit disposal costs will probably be higher if production is lower, (3) funding would apply only at the time of decommissioning, even though the need to dispose of

tails exists throughout the operating life, and (4) decommissioning the plant before the end of its 30-year operating life could leave tails disposal underfunded because funding had met only the present value of a disposal obligation 30 years in the future. The State seeks the opportunity to present these shortcomings.

g. The bases for LES's cost estimates are suspect and the actual cost of disposing of tails will exceed the $5.50 per kgU estimated by LES. LES presents four sources of cost estimates: (1) a 1997 study by Lawrence Livermore National Laboratory (LLNL), (2) the 2002 Uranium Disposition Services (UDS) contract with DOE to provide deconversion services, (3) information from Urenco, an LES partner, and (4) costs submitted by LES to NRC in connection with the Louisiana license application. LES Application, 10.3-1 to 10.3-3 and Table 10.3-1. It should be noted that data from two of the four sources, UDS and Urenco, are withheld as proprietary; LES gives only DOE's estimate of the costs under the UDS contract. LES Application, 10.3-2. The DOE, however, has previously been directed by Congress to carry out nuclear waste disposal and has failed to perform as directed (e.g., commercial spent fuel disposal under the Nuclear Waste Policy Act of 1982). Additionally, the DOE has consistently failed to estimate the costs of disposal and related activities with any accuracy. With respect to the potential for deconversion and burial of the waste, no deconversion plant exists in the United States, the cost estimates for its construction are likely inaccurate, the time and cost of using a closed uranium mine for disposal are seriously underestimated, and the legality of burying low level waste in such a mine is uncertain. Finally, the LLNL estimates were based on a much higher production rate than planned by LES and do not represent actual market prices. LES Application, 10.3-2. Notably, the data presented by

LES itself to the NRC concerning the LES Louisiana project shows a total cost of $6.74 per kg.U, not $5.50. Nevertheless, LES concludes that it would be "prudent" to project waste disposal costs of $5.50 per kg.U. LES Application, 10.3-3.

h. Financial qualification of LES must include contractual commitments that will pay for decommissioning and waste disposal, which requires the NRC to determine the actual costs of waste disposal and how it could be adequately financed. NRC regulations require that "[w]here the nature of the proposed activities is such as to require consideration by the Commission, that the applicant appears to be financially qualified to engage in the proposed activities in accordance with the regulations in this part." 10 C.F.R. § 70.23(a)(5). Previously, in connection with LES's Louisiana project, NRC explained the application of this test. NRC Decision (Dec. 18, 1997). At that time LES stated that it would not undertake the project unless it had funding commitments from equity and debt investors, which commitments in turn would require the existence of long-term enrichment contracts with prices sufficient to cover both construction and operating costs, including a return on investment, incurred during the term of the contract. NRC ruled that any license would be conditioned on the existence of such funding commitments and contracts. In its February 6, 2004 order, NRC gave guidance for the forthcoming proceeding, stating that the license condition previously approved "is one way to satisfy the requirements of part 70." 69 Fed. Reg. at 5878.

One difficulty with such a license condition is that it postpones satisfaction of an important requirement until after the proceeding is concluded and leaves in an uncertain state the regulatory determination whether the condition is met. Further, the condition is vaguely stated and inadequate. LES officials have claimed that they have contractual

commitments for approximately 50% of the facility's output in the first ten years of production. Meeting with James Ferland and Rod Krich (Feb. 9, 2004). However, LES has declined to make its contracts public so that the existence of conditions upon the obligation to pay for enrichment services could be determined, and it is not known how many of such contracts are with affiliates (i.e., LES partners).

i. Under the National Environmental Policy Act (NEPA), issuance of a license requires an Environmental Impact Statement (EIS), and the EIS must contain a description of the need for the proposed action. LES's application includes the required Environmental Report, which describes the projected need for additional enrichment services. LES Application, 1.1-1. There is a significant question whether the United States market for enrichment services in the next three decades is large enough to support the proposed facility, given other planned additions to supply.

Based on the foregoing, the Attorney General respectfully requests the Commission to hold a hearing in this matter and to grant leave to the Attorney General to intervene as a party in this matter.

Respectfully submitted,

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Certificate of Service

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