

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
)	

NRC STAFF SURREPLY TO REPLY OF NMED

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board’s (“Board”) Order of May 20, 2004,¹ the NRC Staff (“Staff”) hereby responds to the filing of the New Mexico Environmental Department (“NMED”) submitted on May 10, 2004.² The Staff contends that the reply filed by NMED improperly seeks admission of new evidence and contentions and, thus, should not be considered by the Board in ruling on intervention.

BACKGROUND

On December 12, 2003, Louisiana Energy Services, L.P. (“LES”) submitted an Application for an NRC license to authorize construction and operation of the National Enrichment Facility, a gas centrifuge uranium enrichment facility, to be located in Lea County, New Mexico. In response to a Notice of Receipt of Application and Notice of Hearing regarding the Application³, several

¹ See “Order (Granting Requests to File Surreply)” dated May 20, 2004. (“Order”)

² See “Reply in Support of NMED’s Petition to Intervene” dated May 10, 2004. (“Reply”)

³ See “In the Matter of Louisiana Energy Services, L.P. (National Enrichment Facility); Notice of Receipt of Application for License; Notice of Availability of Applicant’s Environmental Report; Notice of Consideration of Issuance of License; and Notice of Hearing and Commission Order,” 69 Fed. Reg. 5873 (Feb. 6, 2004).

petitioners requested leave to intervene in the proceeding, including NMED.⁴ The Staff and LES responded to the NMED Hearing Request.⁵ NMED then filed a motion requesting additional time to respond to the Staff and LES Answers to its Hearing Request.⁶ Upon granting the Motion, the Board additionally reminded NMED of the Commission guidance regarding the appropriate narrow focus of a reply.⁷ NMED filed its reply on May 10, 2004,⁸ and following the Order from the Board allowing for a surreply, the Staff now responds to the NMED reply.

DISCUSSION

When this Board granted NMED an extension of time in which to reply to the answers of the Staff and LES, it *explicitly* noted the Commission's direction that replies should be focused on the legal or logical arguments raised in the responses by the Staff and Applicant. Order at 2, *citing* 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004). Contrary to those explicit directions, the reply submitted by NMED fails to focus at all on issues raised in the Staff or LES Answers. Instead, NMED seeks to introduce entirely new information and expert opinion under the guise of a 10 C.F.R. § 2.309(h) reply. Because this filing clearly exceeds the narrow bounds to which a reply

⁴ See "The New Mexico Environment Department's Request for Hearing and Petition for Leave to Intervene" dated March 23, 2004. ("NMED's Hearing Request") The New Mexico Attorney General, Nuclear Information and Resource Service and Public Citizen also sought intervention in the proceeding.

⁵ See "NRC Staff Response to the New Mexico Environment Department's Request for Hearing and Petition for Leave to Intervene" dated April 19, 2004. (Staff's Answer); *see also*, "Answer of Louisiana Energy Services, L.P. to the New Mexico Environment Department's Request for Hearing and Petition for Leave to Intervene" dated April 19, 2004. (LES Answer).

⁶ See "NMED's Motion for Extension of Time to File Reply in Support of Petition for Leave to Intervene" dated April 22, 2004.

⁷ See "Memorandum and Order (Granting Motion for Extension of Time)" dated April 27, 2004. ("Order Granting Extension")

⁸ See *supra*, fn. 2.

is required to be confined, the Staff contends that this reply should not be considered by the Board in ruling on intervention.

Included in NMED's Request for Hearing was a contention labeled "5a" which asserted, in its entirety:

In its Application, LES requests to be allowed to buildup or store depleted uranium (DU) in the form of uranium hexafluoride (UF₆) throughout the life of the Facility. Application, § 4.13, Environmental Report, vol. 2. The life of the Facility is anticipated to be thirty years. Buildup of DU waste for thirty years is not acceptable to the State of New Mexico and is contrary to the representations made by LES to the State. Storage of such highly dangerous waste over a thirty year period may pose a threat to the protection of health and property. 10 C.F.R. § 40.32(c). Furthermore, LES's proposed plan for storage of this waste is not sufficiently detailed, and does not demonstrate that issuance of a license will not be inimical to the health and safety of the public. 10 C.F.R. § 40.32(d).

Additionally, the DU waste could become a stockpile of legacy waste and, in the event of a default by LES, could become an above ground waste storage complex, for which adequate financial assurance is not provided. See Paragraph 5(c) below.

The DU waste should not be stored over the life of the Facility, but should be disposed of in a timely and safe manner.

See NMED's Hearing Request at 2. The Staff, in its Answer to NMED's Hearing Request, argued that NMED failed to provide the level of detail necessary to support admission of this contention. LES, in its Answer to the NMED Hearing Request, asserted that the LES application fully addressed the health and safety concerns identified by NMED in its proposed contention 5a, but welcomed the opportunity to demonstrate this to the State of New Mexico and in this proceeding. LES Answer, pg. 5-6.

NMED, after being given an extension of time in which to do so, then filed its reply to the Staff and LES Answers pursuant to 10 C.F.R. § 2.309(h). However, in this instance, the scope of the NMED reply is improper. As the Commission explained in promulgating the recent changes to the adjudicatory process regulations, and as the Board highlighted in its Memorandum and Order granting NMED's request for extension of time, "[a]ny reply should be narrowly focused on the legal

or logical arguments presented in the applicant/licensee or NRC Staff answer...” Order Granting Extension at 2-3, *citing* 69 Fed. Reg. 2182, 2203. The Commission clearly did not intend for a reply to be used as a vehicle to introduce new arguments in support of proposed contentions, or as a back door method of introducing entirely new contentions. Instead, a reply is intended to provide the petitioner with the opportunity to explain any disagreement it might have with the Applicant or Staff Answers. In this instance, rather than directing the Board’s attention to any disagreement with the Staff regarding the Staff’s claim of a lack of specificity in NMED contention 5a, NMED, in its reply to the Staff’s Answer, instead chose to re-frame its contention 5a. In doing so, NMED has essentially attempted to introduce new information in support of its original contention regarding storage of the depleted uranium, and to introduce two new contentions not raised in NMED’s original contention 5a. The Staff contends that both efforts are impermissible under the Commission’s regulations and explicit directions.

I. NMED Should Not Be Allowed to Provide New Bases for its Contention 5a in the Form of a Reply

NMED’s original contention 5a contained vague and unsupported allegations that the applicant failed to demonstrate that storage of the waste onsite would not be inimical to the health and safety of the public. Because the Commission’s regulations are specifically designed to protect the public health and safety, NMED was required to do more than simply assert such an unsupported proposition. See Staff’s Answer at 4-6. Thus, the Staff submitted that NMED’s contention 5a was inadmissible. *Id.* at 6. Although NMED now wishes to offer additional support for this contention, the Commission clearly did not intend the reply mechanism afforded in 10 C.F.R. § 2.309(h)(2) to be used as a vehicle for NMED to attempt to cure this error. As the Commission explained in the Statement of Considerations accompanying the final rule on the revised 10 C.F.R. Part 2 procedural provisions that are applicable to this proceeding, a section 2.309(h)(2) reply “should be narrowly focused on the legal or logical arguments presented

in the applicant/licensee or NRC staff answer.” 69 Fed. Reg. 2182, 2203. Thus, NMED was instructed to focus its reply on responding directly to the Answers filed by LES and the Staff. See Order Granting Extension at 2. Instead, NMED presents what amounts to additional bases to support admission of the contention as originally framed, including allegations that the Applicant failed to adequately demonstrate the integrity of the storage cylinders, and thus, failed to consider potential releases which could affect the public and occupational workers. NMED Reply at 7 - 12. However, none of these claims were included in NMED’s original contention. Therefore, NMED’s Reply improperly contains new information in support of its contention regarding onsite storage of the depleted uranium at the proposed LES site, and because such additional information clearly exceeds the narrow grounds upon which a reply may be based, the Board should not consider this additional information when ruling upon the admissibility of the contention.

Furthermore, even if NMED were allowed to provide new information regarding its proposed contentions in the form of a reply, NMED has again failed to note any specific issue with the LES application that would support the admission of this contention. In its Reply, NMED supports its concerns regarding the safety of the storage cylinders proposed by LES to store the material on site by citing to a DOE Defense Nuclear Facilities Board report referencing inadequacies in DOE’s management program for storage of DUF6, which subsequently led to cylinder breach issues. NMED Reply at 8. NMED then continues by asserting that cylinder breaches could be potentially harmful to the general public as well as to the workers on-site. *Id.* at 8-11. Finally, NMED provides information on accidents related to cylinder releases at Honeywell, and the release incidents at Almelo. *Id.* at 11-12.

Despite NMED’s attempts to have these additional bases render the original contention 5a admissible, the bases do not provide the necessary information to support the contention’s admission. Most notably, NMED appears to disregard the fact that the application currently under consideration was submitted by *LES*, not by DOE. LES, in its application, has proposed its own

management program to ensure that the cylinders are properly maintained and inspected to prevent the sort of degradation, and subsequent cylinder breach issues, referred to in the DOE reports. LES Environmental Report (“ER”), 4.13.3.1.1, 4.13.3.1.2. Moreover, LES devotes an entire section of its Environmental Report to Public and Occupational Health Impacts. LES ER 4.12. NMED has, however, failed to point to any inadequacies or omissions in LES’s proposed management plan that would raise public health and safety concerns about the cylinders. Nor has NMED pointed to any specific provision of LES’ analysis regarding public and occupational health impacts that is allegedly in error or incomplete. Although NMED requests additional information regarding the Almelo incidents, NMED has failed to offer any argument why additional information is necessary in light of the actual, and minimal, release levels surrounding the incidents provided in the Application and recited by NMED. *Id.* at 11-12. Where, as here, the application addresses an issue which a petitioner wishes to contest in a hearing, Commission regulations require the petitioner to examine the application, identify the specific deficiencies it wishes to address, and provide support for its contention that the application is deficient. *Baltimore Gas and Electric Company* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-19, 48 NRC 132, 134 (1998); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 333 (1999). While NMED raises additional general concerns regarding the issue of on-site storage of the depleted uranium, NMED has failed to cite to any specific failure of LES to adequately deal with these issues in its application. Therefore, the additional bases offered to support the original contention 5a regarding on-site storage of the depleted uranium, should not be considered in the Board’s intervention decision.

II. NMED Should Not Be Allowed to Introduce New Contentions in the Form of a Reply

NMED, in its Reply, improperly seeks the introduction of two new contentions regarding plausible strategies and emergency planning by arguing that the new contentions were subsumed

within its original contention 5a. To support this claim, NMED rephrases its contention 5a to capture much more than the issue of onsite storage of depleted uranium - the issue originally raised in NMED contention 5a. Specifically, NMED asserts in its reply that contention 5a challenged “whether LES has put forth a plausible strategy for treatment and disposal of the DU.” NMED Reply at 1. However, the issue of plausible strategy was not contained in NMED’s original contention 5a. Instead contention 5a was, as quoted in its entirety above, specifically about the storage of the depleted uranium *onsite* and did not involve the issue of disposal of the material *off-site*. Likewise, NMED’s assertion that the issue of emergency planning is “related to the requirement that LES demonstrate that storage of the depleted uranium is not inimical to safety and health” is also disingenuous. NMED Reply at 12. *Nothing* in NMED’s original contention 5a even hinted at the issue of emergency planning. NMED cannot now seek the introduction of new contentions under the guise of a 10 C.F.R. § 2.309(h)(2) reply.

To the extent NMED wishes to seek the introduction of new contentions into this proceeding, it should be required to meet the regulatory requirements for successful introduction of late-filed contentions. See 10 C.F.R. § 2.309(c). The Commission has provided the necessary regulatory framework for the consideration of such untimely filings and provides petitioners the opportunity to submit untimely petitions and contentions based upon the balancing of several factors. See 10 C.F.R. § 2.309(c)(1)(i)-(viii). NMED is required to affirmatively address these factors in any filing supporting the admission of late-filed contentions. See 10 C.F.R. § 2.309(c)(2); *see also Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 n.22 (1985). NMED’s reply, however, which attempts to include two new contentions by broadly re-framing the original contention, is not the proper avenue to seek admission of late-filed contentions.

CONCLUSION

For the reasons stated above, the Staff submits that NMED's reply is improper and should not be considered by the Board in its ruling on intervention.

Respectfully submitted,

/RA/

Angela B. Coggins
Counsel for NRC Staff

Dated at Rockville, Maryland
this 24th day of May, 2004

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF SURREPLY TO REPLY OF NMED" 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 24th day of May, 2004.

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