

June 3, 2004

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 06/03/04

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

LOUISIANA ENERGY SERVICES, L.P.

(National Enrichment Facility)

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Docket No. 70-3103

ASLBP No. 04-826-01-ML

NRC STAFF SURREPLY TO NEW MEXICO ATTORNEY
GENERAL'S REPLY IN SUPPORT OF PETITION FOR LEAVE
TO INTERVENE AND REQUEST FOR HEARING

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's ("Board") Order of June, 1 2004,¹ the NRC Staff ("Staff") hereby responds to a reply filed by the New Mexico Attorney General ("NMAG") submitted on May 24, 2004.² The Staff contends that the reply filed by NMAG improperly seeks admission of new evidence and new legal and factual bases for its contentions and, to that extent, 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 "Memorandum and Order (Granting Motion for Leave to File Surreply; Requesting Status on Proprietary Material Disclosure) dated June 1, 2004.

² See "New Mexico Attorney General's Reply in Support of Petition for Leave to Intervene and Request for Hearing" dated May 24, 2004. ("Reply")

³ See "In the Matter of Louisiana Energy Services, L.P. (National Enrichment Facility); (continued...)"

petitioners requested leave to intervene in the proceeding, including NMAG.⁴ The Staff and LES filed responses to the NMAG Hearing Request,⁵ to which NMAG filed a reply.⁶ The Board then granted the Staff's request for leave to file a surreply to the NMAG's reply.

DISCUSSION

The proper scope of a reply such as the one filed by NMAG was previously addressed by this Board when 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.⁷ Contrary to those explicit directions, the reply submitted by NMAG attempts to raise entirely new legal and factual arguments to provide a sufficient basis for her contentions and, for the first time, introduce evidence upon which she intends to rely at hearing. This fails to comply with the long-standing requirement in Commission adjudications that a petitioner must provide a concise statement of the alleged facts or expert opinion which support the proposed contentions along with references to

³(...continued)

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) ("Hearing Notice").

⁴ See "The New Mexico Attorney General's Request for Hearing and Petition for Leave to Intervene" dated April 5, 2004. NMAG subsequently organized its contentions pursuant to a Board order in her "Supplemental Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene" dated April 23, 2004. ("Petition") The New Mexico Environmental Department, Nuclear Information and Resource Service and Public Citizen also sought intervention in the proceeding.

⁵ See "NRC Staff Response to Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene" dated April 30, 2004. ("Staff Response"); "Answer of Louisiana Energy Services, L.P. to the Requests for Hearing and Petitions for Leave to Intervene of the New Mexico Attorney General and Nuclear Information and Resource Service and Public Citizen" dated May 3, 2004. ("LES Answer").

⁶ See "New Mexico Attorney General's Reply in Support of Petition for Leave to Intervene and Request for Hearing" dated May 22, 2004.

⁷ See "Order (Granting Requests to File Surreply)" dated May 20, 2004, at 2, *citing* 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004).

those specific sources and documents on which the petitioner intends to rely at hearing *when the petition for hearing is filed*. See *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155-56 1991).⁸ As the Commission has stated, the opportunity for a reply is offered to respond to arguments raised by other parties in their responses - not as another chance to come forward with evidence to support defective contentions or to raise new contentions. See 69 Fed. Reg. 2182, 2203.

Because MNAG's filing exceeds the narrow bounds to which a reply is required to be confined, the Staff contends that the new arguments presented, the new issues raised and the new evidence presented should not be considered by the Board in ruling on the NMAG's intervention request. Thus, the Staff continues to take the position that NMAG has not proffered an admissible contention in this proceeding.⁹ Contrary to the NMAG's assertion, however, this is not to say that the Staff believes NMAG should not have any role in the proceeding. As the Staff has previously stated, it has no objection to the NMAG's participation as an interested governmental participant pursuant to 10 C.F.R. § 2.315(c).¹⁰ Participation under that provision is not insubstantial: Interested governmental participants are permitted to introduce evidence, interrogate witnesses, advise the Commission, file proposed findings, and petition for review by the Commission with respect to admitted contentions. *Id.* Further, such participation is afforded to NMAG in recognition of her

⁸ The rules governing the admissibility of contentions were amended in 1989 to raise the threshold for admission by requiring greater specificity. It was at that time that the Commission adopted the requirement that contentions contain a concise statement of supporting facts or expert opinion, 54 Fed. Reg. 33168, 33180 (August 11, 1989), *as corrected* 54 Fed. Reg. 39728 (September 28, 1989). Thus, the case law cited by NMAG which precedes that date is not relevant to the current standards for the admission of contentions. See, *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 334, 338 (1999).

⁹ In addition, as discussed below, the Staff submits that even if the new arguments and evidence are considered, the NMAG has not advanced an admissible contention regarding the absence of a current, operating conversion facility within the United States (Argument I).

¹⁰ See, "NRC Staff Response to Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene" at 2-3, footnote 3.

unique position as a representative of the state in which the proposed facility will be sited regardless of whether or not her contentions are admitted for litigation.

Thus, the NMAG has the right to participate in this proceeding if she chooses. She may not, however, choose not to follow the NRC rules of procedure, even if she finds them burdensome. Like any other participant, she must adhere to the Commission's requirement that a petition to intervene must advance any contentions sought to be litigated, and those contentions must raise material issues of fact or law and must be accompanied by supporting facts and evidence in order to be admissible. Once the time for filing an intervention petition has passed, the Commission's regulations provide that non-timely filings may be considered only upon a determination by the Board that the late-filing criteria in 10 C.F.R. § 2.309(c) have been satisfied. The NMAG's attempt to bypass this requirement by reframing her contentions in a reply is impermissible. Reply pleadings are for the limited purpose of allowing participants the opportunity to respond to the arguments in opposition to the intervention petition, not to introduce new arguments or evidence to support admission.

For these reasons, the Staff submits that the NMAG's reply should not be considered by the Board in ruling on intervention to the extent that it raises new arguments, new issues and new evidence in this proceeding.¹¹ The Staff addresses the additional arguments and evidence advanced by NMAG in her reply below, in the order presented by the NMAG.

¹¹ NMAG's reply violates the Commission's rules of procedure and undermines those rules. If the improper content of NMAG's reply is not disregarded, its consideration will only serve to encourage further failures by the parties to adhere to the rules. Failure to adhere to the rules also contributes to unnecessary delay in the proceeding and unnecessary effort by other parties and the Board, who have to divert resources from proper matters to address violations of the rules.

- I. Lack of an Operating Disposal Facility That Will Accept LES's Depleted Uranium Tails - Environmental Contention iii and Miscellaneous Contention i.

The NMAG combines these two contentions and presents a new argument concerning what it terms the "Waste Confidence" decisions issued by the NRC with respect to waste generated by nuclear reactors. Arguing that the logic of those decisions should be applied to depleted uranium tails, NMAG contends that LES should be required to prove (1) the technology for safe treatment and disposal is available, (2) that a program is in place for applying that technology and for development of the treatment and disposal facility, (3) when disposal will become available, (4) that the tails can and will be safely stored until disposed of, and (5) the estimated costs for storage after cessation of operations, treatment and disposal of tails must be included in decommissioning financial assurance. Reply at 12.

Further, NMAG argues that these requirements should be read into the Commission's Hearing Notice because, otherwise, the Commission's order would represent "an entirely new, unexplained, and unjustified standard applicable only to LES in violation of both the Atomic Energy Act and the federal Administrative Procedure Act." Reply at 13. Specifically, the NMAG argues that these elements must be proven even in the event that LES proposes to transfer the tails to the Department of Energy ("DOE") for disposal, arguing that, "[a]t best, section 3113 [of the USEC Privatization Act] constitutes a plausible strategy or framework for doing the evaluation and planning that would be necessary for satisfying the needs of Waste Confidence and the NRC's regulations." *Id.*

These new arguments explain the definition that the NMAG wishes to assign to the term "plausible strategy," the subject she stated she wished to pursue in her Miscellaneous Contention i. Petition at 9. However, the NMAG has still failed to explain with any specificity inadequacies in the license application. In fact, the application contains estimates of costs of disposal costs which are based, in part, on contracts to build conversion facilities to be located in Paducah, Kentucky and

Portsmouth, Ohio,¹² and explicitly states that there will not be any long-term disposal or long-term storage beyond the life of the plant.¹³ The manner in which the depleted UF₆ will be stored pending disposition is also explained in the application.¹⁴ The NMAG, however, does not argue that those representations are inaccurate or incomplete. 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). Under that standard, the NMAG's new arguments still fail to present an admissible contention.

II. Attendant Concerns Regarding Cost of Disposition of Depleted Uranium Tails and Proper Disposal Security - Technical Contentions i & ii, Environmental Contention iv.

In her reply, the NMAG initially responds to arguments presented by the Staff and LES. Reply at 14-17. However, she then raises two entirely new issues. First, she argues that LES used an improper contingency factor (10%), when NRC guidance calls for a factor of 25%. Reply at 17.¹⁵ Then, she raises new arguments regarding the adequacy of the decommissioning costs estimated by LES based on statements of the expert first identified in this reply. These include arguments concerning the costs of storage, maintenance and security costs required for long-term

¹² National Enrichment Facility Safety Analysis Report ("NEF SAR") at 10.3 and Table 10.3-1.

¹³ National Enrichment Facility Environmental Report ("NEF ER") at 4.13.3.1.3.

¹⁴ NEF ER at 4.13.1.3.

¹⁵ While this argument is new to the NMAG, it was previously raised by Nuclear Information and Resource Service and Public Citizen ("NIRS/PC"). See, "Petition to Intervene By Nuclear Information and Resource Service and Public Citizen" dated April 6, 2004, at 33 (Contention 3.1, Basis B). Thus, if this issue is admitted pursuant to the NIRS/PC contention, the NMAG could have the opportunity to participate in the litigation of this issue.

storage of Depleted UF₆ and costs relating to non-conforming cylinders, none of which were referenced in NMAG's original contentions or supporting bases. These are, of course, not responses to arguments by the Staff or LES but new bases to support NMAG's allegation that the cost estimate provided by LES is suspect. See Petition at 3-4 (Technical Contention Aii). Thus, these arguments clearly exceed the narrow grounds upon which a reply may be based, and should not be considered when ruling on the admissibility of the contention.

III. Storage Considerations - Environmental Contention ii

Here, NMAG for the first time makes the allegation that the LES facility is within the range of a state-listed threatened species, the sand dune lizard, and cites this as an instance of "ignored impacts that indefinite storage of depleted uranium hexafluoride on concrete pads outside of the facility may have on the environment, public health, and safety in the region." Reply at 21-22. NMAG states that LES has also ignored the impacts of moving a carbon dioxide transmission pipeline on mammals, amphibians and reptiles in the area. *Id.* Again, this is an entirely new argument in this proceeding, of which there is no mention in the NMAG's initial contentions. The NMAG's reference to a statement in the Staff response to the effect that the application addresses environmental impacts of DU storage, Reply at 21, as an attempt to make this new argument appear responsive to the Staff's arguments, is clearly inappropriate. The Staff made no response regarding the impact of the facility on wildlife in the region. See Staff Response at 9-12.

NMAG also relies on the expert identified for the first time in this filing to make additional arguments regarding the validity of LES's decommissioning cost estimate. Reply at 22-24. These arguments are entirely new and, once again, an attempt by NMAG to bring in new bases to support her contentions. In this instance, her arguments are not even related to the original contention she cites, which stated "[t]he storage of large amounts of depleted uranium tails in steel cylinders, which would remain in outdoor storage and on concrete pads for 'a few years' poses a distinct environmental risk to New Mexico." Further, the NMAG has not even made an argument that these

new grounds for her contention relate to any response by the Staff or LES. Clearly, the new arguments raised by the NMAG are well outside the proper scope of a reply and should not be considered by this Board.

CONCLUSION

For the reasons stated above, the Staff submits that NMAG's reply is improper because it raises new arguments, new issues and new evidence and, to that extent, should not be considered by the Board in its ruling on intervention.

Respectfully submitted,

/RA/

Lisa B. Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
this 3rd day of June, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF SURREPLY TO NEW MEXICO ATTORNEY GENERAL'S REPLY IN SUPPORT OF PETITION FOR LEAVE TO INTERVENE AND REQUEST A HEARING" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 3rd day of June, 2004.

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