

June 3, 2004 (9:22AM)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Paul B. Abramson
Dr. Charles N. Kelber

_____)
In the Matter of)
)
LOUISIANA ENERGY SERVICES, L.P.)
)
(National Enrichment Facility))
_____)

Docket No. 70-3103-ML

ASLBP No. 04-826-01-ML

RESPONSE OF THE NEW MEXICO ATTORNEY GENERAL
TO NRC STAFF'S REQUEST FOR LEAVE TO FILE SURREPLIES TO
REPLY OF THE NEW MEXICO ATTORNEY GENERAL

Pursuant to her reservation of the opportunity to file a response to the Nuclear Regulatory Commission Staff's ("Staff") Request for Leave to File a Surreply to the Reply of the New Mexico Attorney General at 3 (May 26, 2004), the New Mexico Attorney General hereby files her response. The Attorney General respectfully opposes Staff's Motion for Leave to File a Surreply on four grounds. First, the regulations promulgated by the Nuclear Regulatory Commission clearly envision an end to briefing, with the party bearing the burden of proof to proffer an admissible contention having the last word. 10 C.F.R. § 2.309(h)(3). Second, while the Board explicitly invited Requests for Leave to File Surreplies to NMED's Reply because of its observation, and the expressed concerns of NRC Staff, that NMED sought an extension of time to "ask[] for another opportunity to provide sufficient evidentiary support for its proposed

contentions” and “to provide additional support for the contentions previously propounded,” there was no similar concern expressed with respect to the Attorney General’s Motion for Extension of Time. NRC Staff Response to NMED’s Motion for Extension of Time to File Reply in Support of Petition for Leave to Intervene at 3 (April 26, 2004). Third, given the fact that the Attorney General has yet to reply in full to LES’s and Staff’s responses to Technical Contention ii given its inability to obtain the requested proprietary information, Staff’s motion for leave to file a surreply is premature. Finally, as recognized by the New Mexico Environment Department by objecting to Staff’s request, the Attorney General has not proffered new evidence and new issues but rather, given the expansive responses of LES and Staff (135 pages combined), simply has replied to portions of these responses in greater detail than Staff would have liked.

Commission’s Regulations Preclude Staff’s Filing of a Response in this Instance

In promulgating 10 C.F.R. § 2.309, the Commission made an explicit policy determination that, at some point, briefing must end. While this Board, pursuant to 10 C.F.R. § 2.309(h) certainly has discretion to provide the NRC Staff with the opportunity to file a surreply to the Reply of the New Mexico Attorney General, its exercise of that discretion should be informed by both the recognition that the Commission has contemplated that the party bearing the burden of proof to demonstrate that it has advanced an admissible contention files the last pleading with respect to requests for hearings or petitions for leave to intervene, see 10 C.F.R. § 2.309(h)(3), and that the Staff will have an additional opportunity, at the Prehearing Conference in Hobbs on June 15-16, 2004, to clearly articulate its concerns regarding the Attorney General’s participation

in this proceeding. The Attorney General identifies 10 C.F.R. § 2.309 (h) as the controlling section with respect to this issue. This section provides

Unless otherwise specified by the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene - -

(1) The applicant/licensee, the NRC Staff, and any other party to a proceeding may file an answer to a request for a hearing, a petition to intervene and/or proffered contentions within twenty-five (25) days after service of the request for hearing, petition and/or contentions. Answers should address, at a minimum, the factors set forth in paragraphs (a) through (g) of this section insofar as these sections apply to the filing that is the subject of the answer.

(2) The requestor/petitioner may file a reply to any answer within[] seven (7) days after service of that answer.

(3) No other written answers or replies will be entertained.

10 C.F.R. § 2.309 (h). This section makes plain that “[u]nless otherwise specified by . . . the Atomic Safety and Licensing Board,” Staff will not have the opportunity to file a surreply. 10 C.F.R. § 2.309 (h). The Licensing Board has not specified that it will entertain additional replies with respect to the Attorney General’s Reply in Support of her Petition for Leave to Intervene and Request for Hearing. Accordingly, Staff should not have the opportunity to file a surreply.

Staff cannot be permitted to choose, in this proceeding, which sections of the Commission’s regulations merit a liberal interpretation by this Board and which merit strict construction. Nor has Staff identified, for the benefit of this Board, that section 2.309 (h)(3) prohibits its filing of a surreply. Accordingly, the Attorney General submits that, in accordance with 10 C.F.R. 2.309(h) prohibiting the entertaining of “other written answers or replies,” Staff be relegated to clearly articulating its concerns regarding the Attorney General’s contentions at the Prehearing Conference.

Staff did not Receive an Invitation from the Board to Request Leave to File a Surreply

The Atomic Safety and Licensing Board, in its Memorandum and Order (Granting Motion for Extension of Time) (April 27, 2004) at 2-3, observed that “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,’” and invited staff and any other participant to seek permission to file a surreply if warranted by the New Mexico Environment Department’s (“NMED”) Reply. There is not, nor is Staff able to identify, a similar invitation issued by this Board with respect to Surreplies to the Attorney General’s Reply. Absent such an invitation, Staff should not be permitted to file a surreply. See 10 C.F.R. 2.309(h)(making clear that “[u]nless otherwise specified by . . . the Atomic Safety and Licensing Board,” “[n]o other written answers or replies will be entertained”).

The Attorney General has yet to Fully Reply to Technical Contentions ii

In the second footnote of her Reply in Support of her Petition to Intervene and Request for Hearing, and pursuant to the Licensing Board’s Memorandum and Order (Ruling on Request for Access to Proprietary Information) (May 12, 2004), the Attorney General reserved the opportunity to discuss in greater detail her reply to Technical Contention ii. See New Mexico Attorney General’s Reply in Support of her Petition for Leave to Intervene and Request for Hearing at 14-15 n.2 (May 24, 2004); Memorandum and Order (Ruling on Request for Access to Proprietary Information) at 2-3 (May 12, 2004) (“Once the Board has issued the protective order, AGNM shall have seven days from date upon which the material becomes available to it to file its reply relative to TC-ii.”) (emphasis in original). The Attorney General has yet to receive the propriety

information from LES, and therefore has not been able to complete her Reply to Technical Contention ii. Allowing Staff, at this juncture, to file a surreply to the Attorney General's likely invites a request from Staff for yet additional briefing on the Attorney General's reply in support of Technical Contention ii. There must, however, be some point at which briefing ends, and the Commission has clearly contemplated this point as being after "[t]he requestor/petitioner [] file[s] a reply to any answer." 10 C.F.R. 2.309(h)(2); see 10 C.F.R. 2.309(h)(3) ("No other written answers or replies will be entertained."). Again, Staff directs this Board to no section or order, of either this Board of the Commission, that would provide it the opportunity to request leave to file a surreply.

Even if Surreplies had been Contemplated in this Proceeding, Staff fails to Demonstrate Adequate Grounds for Seeking to File a Surreply

In its Request for Leave to File Surreply to New Mexico Attorney General's Reply in Support of Petition for Leave to Intervene and Request for Hearing, Staff once again cites 60 Fed. Reg. 2182, 2203 (January 14, 2004), requiring that "any reply should be narrowly focused on the legal and logical arguments presented in the applicant/licensee or the NRC staff answer." NRC Staff Request for Leave to File Surreply to New Mexico Attorney General's Reply in Support of Petition for Leave to Intervene and Request for Hearing at 2 (May 26, 2004). Staff asserts that

the NMAG has attempted to use the opportunity to reply to cure the original defects in her contentions by proffering supporting evidence for the first time and citing that evidence as the basis for her contentions. In addition, the NMAG has raised issues which were not encompassed in her original contentions or supporting bases.

NRC Staff Request for Leave to File Surreply to New Mexico Attorney General's Reply in Support of Petition for Leave to Intervene and Request for Hearing at 2 (May 26, 2004). In support of its assertion that the Attorney General "has raised issues which were not encompassed in her original contentions or supporting bases," Staff, in a footnote, provides "[f]or example, the NMAG in her reply alleges that the license application fails to identify whether the location of [sic] facility is within the range of a threatened species, the sand dune lizard." Staff ignores the Attorney General's clearly stated purpose in including the information relating to the sand dune lizard in an attempt to establish grounds for this Board granting its request for leave to file a surreply.

In her Reply in Support of her Petition for Leave to Intervene and Request for Hearing, the Attorney General makes crystal clear that she is using the example of the sand dune lizard as "one instance of the 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." New Mexico Attorney General's Reply in Support of her Petition for Leave to Intervene and Request for Hearing at 21-22 (May 24, 2004). The Attorney General neither expressed the desire nor the intention of adding the sand dune lizard as an additional basis for a contention or injecting the potential harm to the sand dune lizard into this proceeding as an additional contention. Cf. NRC Staff Request for Leave to File Surreply to New Mexico Attorney General's Reply in Support of Petition for Leave to Intervene and Request for Hearing at 2 (May 26, 2004) (citing the failure to identify the danger to the sand dune lizard as the only support for its assertion that "the NMAG has raised issues which were not encompassed in her original contentions or supporting bases.>"). The Attorney General was simply

replying to “the legal and logical arguments presented in . . . the NRC staff answer,” in which Staff noted that “the application describes the environmental, health and safety aspects of storing DU in uranium byproduct cylinders in open air storage yards[,] NEFER Vol.2, 4.13.3.1.1-4.13.3.1.5.” NRC Staff Response to Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene at 11(April 30, 2004). In reply to Staff’s answer, the Attorney General was simply acknowledging, as she had earlier in her Petition for Leave to Intervene and Request for Hearing, that while the application may describe the environmental, health and safety aspects of storing DU in uranium byproduct cylinders in open air storage yards, “the storage of large amounts of depleted uranium tails in steel cylinders, which would remain in outdoor storage on concrete pads for ‘a few years’ poses a distinct environmental risk to New Mexico.” Supplemental Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene at 5 (April 29, 2004). The Attorney General submits that she should not be limited in her reply to the exact words used in her Supplemental Petition for Leave to Intervene and Request for Hearing, but rather should be afforded the opportunity to reply to the legal and logical arguments presented by Staff and LES in their responses. See 60 Fed. Reg. 2182, 2203 (January 14, 2004) (providing that “any reply should be narrowly focused on the legal and logical arguments presented in the applicant/licensee or the NRC staff answer”).

Staff, in essence, seeks to define the scope as to what should fall within the province of a reply brief. In doing so, Staff poses a direct challenge to the Commission’s regulations that permit a reply that is “narrowly focused on the legal and logical arguments presented in the applicant/licensee or the NRC staff answer.” “It has long

been established that NRC adjudications are not the proper forum for challenging applicable requirements or the basic structure of the agency's regulatory process." NRC Staff Response to Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene at 5-6 (April 30, 2004) (citing Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1988) and Philadelphia Elec. Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, aff'd in part on other grounds, CLI-74-32, 8 AEC 217 (1974)).

Accordingly, because Staff has failed to demonstrate or provide one single instance in which "the NMAG has attempted to use the opportunity to reply to cure the original defects in her contentions by proffering supporting evidence for the first time and citing that evidence as the basis for her contentions" or even that there were "original defects in her contentions," or one single instance in which "the NMAG has raised issues which were not encompassed in her original contentions or support bases," and because Staff launches an improper attack on the Commission's regulations in this forum, the Attorney General requests that this Board deny NRC Staff's Request for Leave to File a Surreply.

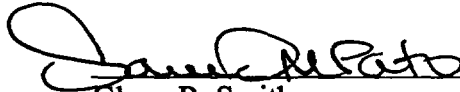
Conclusion

Having failed to identify any instance in which "the NMAG has attempted to use the opportunity to reply to cure the original defects in her contentions by proffering supporting evidence for the first time and citing that evidence as the basis for her contentions," or any instance in which "the NMAG has raised issues which were not encompassed in her original contentions or support bases," or even identified any regulation, order of this Board, or order of the Commission that would enable it to file a

surreply in this matter, the Attorney General respectfully requests that this Board deny Staff's invitation to contravene 10 C.F.R. 2.309 (h)(3).

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
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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 RESPONSE OF THE NEW MEXICO ATTORNEY GENERAL TO NRC STAFF'S REQUEST FOR LEAVE TO FILE SURREPLIES TO REPLY OF THE NEW MEXICO ATTORNEY GENERAL have been served upon the following persons by electronic mail, facsimile, and/or first class U.S. mail this 26th day of May, 2004:

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May 26, 2004

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Re: **In the Matter of Louisiana Energy Services, L.P. (National
Enrichment Facility)**
Docket No. 70-3103
ASLBP No. 04-826-01-ML

Dear Rulemaking and Adjudications Staff:

Enclosed is the original and three copies of the **RESPONSE OF THE NEW MEXICO ATTORNEY GENERAL TO NRC STAFF'S REQUEST FOR LEAVE TO FILE SURREPLIES TO REPLY OF THE NEW MEXICO ATTORNEY GENERAL** for filing in the above matter. The New Mexico Attorney General would appreciate it if you would kindly file, endorse and return a copy in the enclosed self-addressed, stamped envelope provided herewith.

Thank you for your assistance.

Sincerely,

A handwritten signature in black ink that reads "David M. Pato".

David M. Pato
Assistant Attorney General
New Mexico Attorney General's Office

Enclosures