

May 24, 2004
DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

June 2, 2004 (10:51AM)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

SURREPLY OF LOUISIANA ENERGY SERVICES, L.P. TO
REPLY IN SUPPORT OF NMED'S PETITION TO INTERVENE

I. INTRODUCTION

In accordance with the Licensing Board's May 20, 2004 Order,¹ Louisiana Energy Services, L.P. ("LES") hereby files its surreply to the New Mexico Environment Department's ("NMED's") May 10, 2004 "Reply in Support of NMED's Petition to Intervene" ("Reply"). NMED filed a request for hearing and petition for leave to intervene on March 23, 2004, to which LES and the Nuclear Regulatory Commission ("NRC") Staff responded on April 19, 2004.² NMED subsequently requested an extension of time to file a reply in support of its

¹ Licensing Board Memorandum and Order (Granting Request to File Surreplies) (May 20, 2004) (unpublished) ("Order").

² See "Answer of Louisiana Energy Services, L.P. to the New Mexico Environment Department's Request for Hearing and Petition for Leave to Intervene" (Apr. 19, 2004) ("LES Answer to NMED Petition"); "NRC Staff's Response to the New Mexico Environment Department's Request for Hearing and Petition for Leave to Intervene" (Apr. 19, 2004) ("NRC Staff Answer to NMED Petition").

original hearing request and intervention petition on April 22, 2004.³ The Licensing Board granted NMED an extension to May 10, 2004, to “reply to the LES and Staff answers to its hearing petition.”⁴ Both LES and the NRC Staff requested leave to file a surreply to NMED’s Reply on May 12, 2004. The Licensing Board granted these requests on May 20, 2004.

In its May 10th Reply, NMED seeks to provide further support for its Proposed Contention 5a (Environmental, Technical), which pertains to onsite storage of depleted uranium hexafluoride (“DUF₆”). Specifically, NMED provides additional explication regarding its concerns about the on-site storage of DUF₆ at the proposed National Enrichment Facility (“NEF”). However, in addition to identifying specific concerns related to on-site storage of DUF₆, NMED seeks to present, for the first time, a new issue, related to the adequacy of LES’s Emergency Plan. NMED also seeks to introduce a number of bases concerning the treatment and disposal by LES of DUF₆.

II. SUMMARY OF ARGUMENT

LES did not oppose admission of Proposed Contention 5a as originally framed (*i.e.*, as it relates to on-site storage), and, with one exception, LES does not oppose the admission of the additional *storage-related* bases presented by NMED in its Reply. Indeed, LES welcomes the additional clarification of NMED’s concerns relative to on-site storage of DUF₆, as well as the opportunity to address these concerns in this proceeding. The one exception involves

³ “NMED’s Motion for Extension of Time to File Reply in Support of Petition for Leave to Intervene” (Apr. 22, 2004) at 1-2.

⁴ Licensing Board Memorandum and Order (Granting Motion for Extension of Time) (Apr. 27, 2004) (unpublished) at 2.

NMED's challenge to the Agency's regulatory requirements concerning hydrogen fluoride (HF) for exposures for members of the public, which LES opposes for the reasons discussed below.

NMED has also raised a number of concerns related to the plausibility of LES's DUF₆ treatment and disposal strategies. LES recognizes the interest of NMED and the State of New Mexico in issues related to the treatment and disposal of DUF₆. Indeed, the Governor of New Mexico has recently expressed his interest in "ensuring that the depleted uranium byproduct generated by the facility is safely disposed of."⁵ LES has consistently indicated that it is committed to working with NMED and the State, as the licensing process moves forward, to address NMED's concerns regarding the proposed NEF facility, and this commitment certainly extends to the issues identified by NMED in its Reply relative to the treatment and disposal of DUF₆.

LES agrees that certain of NMED's bases related to DUF₆ treatment and disposal may be admissible, but also believes that certain other of the bases should not be admitted, as they impermissibly challenge the Commission's Order in this proceeding of February 6, 2004.⁶ Specifically, in its Reply, NMED has raised an issue relative to whether DUF₆ is properly classified as low-level radioactive waste within the meaning of 10 C.F.R. Part 61. While LES is confident in the correctness of its proposed classification of DUF₆ as low-level radioactive waste in its Application, LES recognizes that this is an important factual matter that, in turn, is a key consideration related to one of LES's proposed plausible strategies for DUF₆ treatment and

⁵ Letter from Governor Bill Richardson to Chairman Nils Diaz (May 11, 2004).

⁶ 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. 5,8873 (Feb. 6, 2004) ("Hearing Order").

disposal. On this basis, LES does not object to this specific issue being admitted for consideration in this proceeding. With respect to the other bases offered by NMED relative to DUF_6 treatment and disposal, however, for the reasons discussed, below, LES believes that these bases contravene the approach established by the Commission in its Hearing Order, and is therefore opposed to admission of these bases.

Finally, NMED has raised a wholly new issue, related to the adequacy of LES's Emergency Plan, that has not previously been raised by any party in this proceeding. For the reasons set forth below, LES is opposed to the admission in this proceeding of NMED's issue concerning the Emergency Plan. Nevertheless, LES is committed to working with NMED to address any concerns that NMED might have relative to the Emergency Plan, as the licensing process goes forward.

III. DISCUSSION

A. The Scope of Proposed NMED Contention 5a

As noted above, NMED's Reply centers exclusively on Proposed Contention 5a. Citing this contention, NMED states that, "[i]n its petition to intervene in this matter, [NMED] challenges [LES's] proposal for treatment and disposal of the depleted uranium hexafluoride (DUF_6) that would be generated at its uranium enrichment facility." (Reply at 1.) As originally framed, Proposed Contention 5a raised concerns related only to the onsite storage of DUF_6 . Specifically, it states:

In its application, LES requests to be allowed to buildup or store depleted uranium (DU) in the form of uranium hexafluoride (UF_6) 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 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 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.

(NMED Petition at 2.)

LES's Answer to this proposed contention appropriately focused on the detailed DUF₆ handling and storage measures set forth in the Application.⁷ See LES Answer to NMED Petition at 5-9. LES stated its belief that "the measures proposed in its Application . . . fully address the health and safety concerns identified by NMED in this proposed contention in a manner that complies with all applicable regulatory requirements and will ensure the protection of the public health and safety and the environment." *Id.* at 5. Notwithstanding, LES did not oppose admission of this contention, in recognition of the unique and important role that NMED plays with respect to environmental matters in the State of New Mexico. See *id.* at 9.

B. Reply to Issues Raised by NMED

1. *Issues Related to On-Site Storage of Depleted Uranium Hexafluoride*

In granting NMED an extension to file its Reply, the Licensing Board emphasized that "a section 2.309(h)(2) reply 'should be *narrowly focused on the legal or logical arguments*

⁷ LES takes this opportunity to correct a typographical error contained in its April 19, 2004 discussion of the aforementioned DUF₆ storage-related commitments. The last sentence on page 7 of LES's Answer to NMED's Petition states: "This would mean that after 20 years, this bond could approach \$8800 M." The figure "\$8800 M" should be "\$800 M." LES regrets any confusion that this may have caused the parties or the Board.

presented in the applicant/licensee or NRC staff answer.”⁸ In its Reply, NMED does provide some new additional bases that bear on the issue of onsite storage of DUF₆, *i.e.*, the crux of Proposed Contention 5a. Although LES does not agree with NMED on the merits of these DUF₆ storage-related bases, to the extent they provide additional explication of Proposed Contention 5a as originally pled, LES does not, with one exception, oppose their admission in support of Contention 5a. The one exception involves the argument raised by NMED in its reply that “LES has not identified either the short term or the annual average HF limit or HF recommendation for the critical segments of the population.” (Reply at 11.) As this matter is explicitly addressed in 10 C.F.R. § 70.61, including specific regulatory limits for HF exposure,⁹ NMED’s basis constitutes an impermissible challenge to the Agency’s regulations. *See* 10 C.F.R. § 2.335. For this reason, LES opposes the admissibility of this issue as a basis for NMED’s Contention 5a.

2. *Issues Related to LES’s Plausible Strategies for the Disposition of Depleted Uranium Hexafluoride*

In its Reply, NMED argues that LES has not put forth in its Application a “plausible strategy” for the treatment and disposition of DUF₆ waste. (Reply at 2.) NMED contends that LES has not shown that it can stabilize and dispose of its depleted uranium waste through private conversion and disposal or through DOE within or beyond the 30-year timeframe it proposes. (*Id. at 9.*) In this context, NMED has raised a litigable issue, regarding whether DUF₆ is properly classified as “low-level radioactive waste” under 10 C.F.R. Part 61. LES believes that it has demonstrated in its Application that DUF₆, if it is waste, is, in fact, properly

⁸ Order Granting Motion for Extension of Time, at 2 (quoting Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004)) (emphasis added).

⁹ 10 C.F.R. § 70.61 provides specific design basis limits in paragraphs (b)(4) and (c)(4) that address acute chemical exposure to workers and members of the public.

classified as “low-level radioactive waste” under 10 C.F.R. Part 61 (*See Environmental Report, section 4.13.3.1.3*). Nevertheless, as this issue is essentially a factual matter, LES does not object to its being admitted to this proceeding for resolution.

With respect to the remaining bases advanced by NMED, however, virtually all are similar, if not identical, to the bases raised by NIRS/Public Citizen and/or the AGNM. LES opposes these bases for the same reasons set forth in LES's May 3, 2004 Answer to these parties' intervention petitions, in particular because these various bases contravene the approach established by the Commission in its Hearing Order. *See* “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” (“LES Answer to NIRS and AG Petitions”).

3. *Issues Related to the LES Emergency Plan*

Through its Reply, NMED seeks the admission of a wholly new contention, taking the position that “[r]elated to the requirement that LES demonstrate that storage of the depleted uranium is not inimical to safety and health is LES’ provision for an Emergency Plan.” (Reply at 12.) Specifically, NMED claims that “[t]he description of the available offsite resources presented in the Emergency Plan is not adequate.” (*Id.* at 13.) Citing guidance contained in Sections 4.3 and 4.4 of NRC Regulatory Guide 3.67 (“Standard Format and Content for Emergency Plans for Fuel Cycle and Materials Facilities”), NMED asserts that:

- (1) The Application does not identify the number of personnel available at various times and has not shown that the responders have the requisite training to understand and manage the radioactive and hazardous materials they may come in contact with in assisting LES in the event of any emergency situation. (*Id.*)

- (2) The Application does not demonstrate that the cited police staff, given the need to cover three shifts and the time for vacations, holidays, time in court and sick leave, is adequate. (*Id.*)
- (3) The Emergency Plan should describe in detail the offsite services that support emergency response for decontamination facilities, especially decontamination from chemical and radiological exposure, and medical treatment facilities and ambulance services, especially for injuries involving hydrogen fluoride, other noxious chemicals and radioactive materials. (*Id.* at 14.)

While LES is confident that the Emergency Plan meets the applicable provisions of Regulatory Guide 3.67 as described in the license application, and intends to address these issues with NMED as part of the licensing process, LES opposes admission of this challenge to its Emergency Plan. NMED has not previously raised this issue, nor has any other participant in this proceeding. This issue goes well beyond the scope of a § 2.309(h)(2) reply, contrary to this Board's directive that NMED's reply "should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer." NMED has made no attempt to show that it has met the late-filed contention standards set forth in 10 C.F.R. § 2.309(f)(2) with respect to this new proposed contention. Accordingly, admission of this challenge to the LES Emergency Plan must be rejected.

IV. CONCLUSION

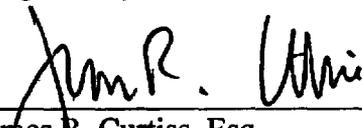
LES welcomes the additional clarification provided by NMED regarding on-site storage of DUF₆. Although LES does not agree with NMED on the merits regarding on-site storage, LES does not, with one exception, object to the admission of these additional storage-related bases for resolution in this proceeding. The one exception relates to the challenge by NMED to the adequacy of the specific regulatory limits for HF exposure. As this is a matter explicitly addressed in 10 C.F.R. § 70.61, this particular basis constitutes an impermissible

challenge to the Agency's regulations. Accordingly, LES is opposed to the admissibility of this specific basis.

With regard to the issues raised by NMED concerning LES's proposed plausible strategies for DUF₆ treatment and disposition, NMED has raised an issue regarding whether DUF₆ is properly classified as "low-level radioactive waste" under 10 C.F.R. Part 61. As this issue involves a factual question which, in turn, is central to one of the plausible strategies advanced by LES, LES does not object to the admission of this issue for resolution in this proceeding. However, the remaining bases proffered by NMED related to DUF₆ treatment and disposal raise impermissible challenges to the Commission's Order of February 6, 2004, and LES is therefore opposed to the admission of these bases.

Finally, LES is opposed to the admission of a wholly new issue involving the adequacy of LES's Emergency Plan.

Respectfully submitted,



James R. Curtiss, Esq.
David A. Repka, Esq.
WINSTON & STRAWN LLP
1400 L Street, N.W.
Washington, DC 20005-3502
(202) 371-5700

John W. Lawrence, Esq.
LOUISIANA ENERGY SERVICES, L.P.
2600 Virginia Avenue, N.W.
Suite 610
Washington, DC 20037

Dated at Washington, District of Columbia
this 24th day of May 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

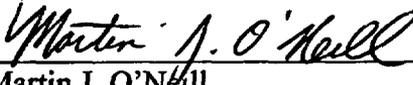
BEFORE THE COMMISSION

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

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

Name:	Martin J. O'Neill
Address:	Winston & Strawn LLP 1400 L Street, N.W. Washington, D.C. 20005-3502
E-Mail:	moneill@winston.com
Telephone Number:	(202)371-5797
Facsimile Number:	(202)371-5950
Admissions:	District of Columbia Court of Appeals Supreme Court of Texas
Name of Party:	Louisiana Energy Services, L.P.



Martin J. O'Neill
Winston & Strawn LLP
Counsel for Louisiana Energy Services, L.P.

Dated at Washington, District of Columbia
this 24th day of May, 2004

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-ML
) ASLBP No. 04-826-01-ML
)
(National Enrichment Facility))

CERTIFICATE OF SERVICE

I hereby certify that copies of the "SURREPLY OF LOUISIANA ENERGY SERVICES, L.P. TO REPLY IN SUPPORT OF NMED'S PETITION TO INTERVENE" and "NOTICE OF APPEARANCE OF MARTIN J. O'NEILL" in the captioned proceeding have been served on the following by e-mail service, designated by **, on May 24, 2004 as shown below. Additional service has been made by deposit in the United States mail, first class, this 24th day of May 2004.

Chairman Nils J. Diaz
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Commissioner Edward McGaffigan, Jr.
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Commissioner Jeffrey S. Merrifield
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Office of the Secretary**
Attn: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-16C1
Washington, DC 20555-0001
(original + two copies)
e-mail: HEARINGDOCKET@nrc.gov

Office of Commission Appellate
Adjudication
Mail Stop O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the General Counsel**
Attn: Associate General Counsel for
Hearings, Enforcement and
Administration
Lisa B. Clark, Esq.**
Angela B. Coggins, Esq.**
Mail Stop O-15D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
e-mail: OGCMailCenter@nrc.gov
e-mail: lbc@nrc.gov
e-mail: abc1@nrc.gov

Ron Curry, Esq.
Clay Clarke, Esq.**
Tannis L. Fox, Esq.
New Mexico Environment Department
1190 St. Francis Drive
Santa Fe, NM 87502-6110
e-mail: clay_clarke@nmenv.state.nm.us

Administrative Judge
G. Paul Bollwerk, III, Chair**
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
e-mail: gpb@nrc.gov

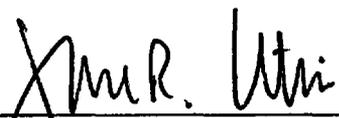
David M. Pato, Esq.**
Stephen R. Farris, Esq.**
Glenn R. Smith, Esq.**
Office of the New Mexico Attorney General
P.O. Box Drawer 1508
Santa Fe, NM 87504-1508
e-mail: dpato@ago.state.nm.us
e-mail: sfarris@ago.state.nm.us
e-mail: gsmith@ago.state.nm.us

Lisa A. Campagna**
Assistant General Counsel
Westinghouse Electric Co., LLC
P.O. Box 355
Pittsburgh, PA 15230-0355
e-mail: campagla@westinghouse.com

Administrative Judge
Paul B. Abramson**
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
e-mail: pba@nrc.gov

Administrative Judge
Charles N. Kelber**
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
e-mail: cnk@nrc.gov

Lindsay A. Lovejoy, Jr.**
618 Pasco de Peralta, Unit B
Santa Fe, NM 87501
e-mail: lindsay@lindsaylovejoy.com



James R. Curtiss
Counsel for Louisiana Energy Services, L.P.