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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

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

Docket No. 70-3103

NMED'S MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION
AND MOTION FOR RECONSIDERATION

Introduction

Pursuant to 10 C.F.R. § 2.323(e), the New Mexico Environment Department (NMED) respectfully moves for leave to file a motion for reconsideration of the Commission's Memorandum and Order, CLI-04-25, issued August 18, 2004 in this matter (Commission Order). This motion also includes NMED's motion for reconsideration.

NMED has contacted counsel for the other parties. The New Mexico Attorney General and Nuclear Resource and Information Service and Public Citizen do not oppose this motion. Louisiana Energy Services, L.P. has no position at this time. Nuclear Regulatory Commission Staff will respond to the motion in writing.

Factual and Procedural Background

On March 23, 2004, NMED filed its Request for Hearing and Petition for Leave to Intervene (Petition) in this proceeding pursuant to 10 C.F.R. § 2.309. NMED filed its Petition as the agency responsible for environmental management for the State of New Mexico and on

behalf of the Governor of the State, Bill Richardson. In the Petition, NMED alleged, among other things, Louisiana Energy Services, L.P.'s proposal to store the depleted uranium to be generated by its facility proposed over the life time of the facility was not acceptable to the State of New Mexico and that it may pose a threat to the protection of health and safety of the public. NMED Pet., p. 2. NMED alleged further that the depleted uranium "should not be stored over the life of the Facility, but should be disposed of in a timely and safe manner." *Id.* NMED alleged as well that the depleted uranium "should be categorized as a waste, and the Application should adequately provide for timely and safe disposal of the waste." *Id.* at p. 3.

LES and Nuclear Regulatory Commission (NRC) Staff complained strenuously in their answers to NMED's Petition that NMED had not complied with the requirements of 10 C.F.R. § 2.309(f) and that its contentions were not sufficiently detailed. *See generally* LES and NRC Staff Surreplies in Response to NMED Reply.

On April 22, 2004, NMED filed a motion for extension of time to file its reply. In that motion NMED acknowledged that its Petition "[did] not satisfy each of the requirements of 10 C.F.R. § 2.309(f) for each of its contentions" and that "NMED did not initially have adequate time to prepare its petition." NMED Mot. for Extension of Time to File Reply, p. 2. NMED requested until May 14, 2004 "an opportunity to make the necessary showing in order to intervene."

On April 27, 2004, the Atomic Safety and Licensing Board (Board) granted NMED's motion for extension in part and allowed NMED to file its reply by May 10, 2004.

NMED then retained two experts, Robert Alvarez and George Anastas, to assist the State in development of its contentions. Mr. Alvarez is a former senior policy advisor to the Secretary of the United States Department of Energy (DOE) and Mr. Anastas is a health physicist with

expertise in radiation safety. *See* CVs of R. Alvarez and G. Anastas, respectively, attached to Reply in Supp. of NMED Pet. (NMED Reply).

In its reply, NMED set forth additional bases for its contentions, based on the opinions of Mr. Alvarez and Mr. Anastas. NMED alleged that “LES does not put forth in its application to the NRC a plausible strategy for treatment and disposition of the DUF6 that the facility will generate.” NMED Reply, p. 2. As part of NMED’s argument that LES did not have plausible strategy for disposal, NMED argued that LES’s proposal for DOE disposition was not plausible, in part, because classification of the waste as low level radioactive waste was problematic because of its high radioactivity. *Id.* at p. 6. NMED alleged further that “storage of the DUF6 on site for up to and exceeding thirty years would be inimical to the health and safety of the public. 10 C.F.R. § 40.32(d).” *Id.* at 2.

In support of these arguments, NMED detailed the bases for why LES’s strategy for disposition of the depleted uranium was not plausible and why storage of the depleted uranium over the life of the facility was not protective of the health and safety of the public. *See* NMED Reply, pp. 3-13. NMED will not repeat those bases here.

On May 12, 2004, LES and NRC Staff moved for leave to file surreplies to NMED’s reply. NMED agreed that LES and NRC Staff should be given the opportunity to file surreplies in light of the additional detail in its reply. The Board allowed LES and NRC Staff to file surreplies by May 17, 2004.

In its surreply, LES did not oppose admission of NMED’s contentions related to storage, the plausibility of LES’s proposed disposition of the DUF6, or whether the depleted uranium is low level radioactive waste. *See* Surreply of LES to NMED Reply, pp. 2-3. NRC Staff generally opposed NMED’s reply as improperly supplementing its Petition.

The Board heard argument on the matter in an initial prehearing conference in Hobbs, New Mexico on June 15, 2004 and, in its July 19, 2004 Memorandum and Order, pp. 17-18, denied admission of NMED's storage, plausible strategy for disposition and low level waste contentions on the ground that NMED's Petition did not satisfy the requirements of 10 C.F.R. § 2.309(f) and that it would not consider the additional material in NMED's reply. The Board made a similar ruling with respect to contentions raised by the New Mexico Attorney General (NMAG). The Board, however, referred the issue to the Commission. Mem. and Order (July 19, 2004), p. 18.

In its August 18, 2004 order, the Commission affirmed the Board, finding that NMED and the NMAG put forth new material which constituted an attempt to amend their petitions without addressing the late-filing factors in 10 C.F.R. § 2.309(c). Comm. Order, pp. 2-3.

Standard of Review

Motions for reconsideration may be granted upon a showing of compelling circumstances. 10 C.F.R. § 2.323(3). The existence of a clear and material error in a decision, which could not have reasonably been anticipated, is one circumstance that may constitute compelling circumstances. *Id.* In NMED's view, there are compelling circumstances that justify reconsideration of the Commission's Order.

Argument

There is little or no argument from LES or NRC Staff that NMED, in its reply, met the substantive requirements of 10 C.F.R. § 2.309(f) in its storage, plausible strategy for disposition, and low level waste contentions. Indeed, LES does not oppose admission of these contentions. It is critical that there is no issue before the Commission as to whether NMED has met all requirements to intervene on its storage, plausible strategy for disposition, and low level waste

contentions.

In its motion for extension of time to file a reply, NMED acknowledged that its Petition did not fulfill each and every requirement under section 2.309(f) and specifically requested additional time to meet those requirements. The Board granted NMED additional time. NMED then expended substantial resources to retain experts in order to make the proper showing. Based on the Board's granting of NMED's motion for extension of time, NMED could not have anticipated that its additional material would not have been considered.

Moreover, there was no prejudice to LES or NRC Staff: both parties, with the concurrence of NMED, were allowed ample opportunity to file surreplies.

Furthermore, it is not accurate, as the Commission found, that the NMED's Reply put forth entirely new contentions. NMED's Petition did allege that storage of the depleted uranium did not adequately protect health and safety and that LES should put forth an adequate proposal for disposal of the waste. In its Reply, NMED detailed additional bases for these contentions. The Commission's decision in this regard is error.

Even if NMED put forth new contentions, it has met the requirements for late-filed contentions, and should be allowed to intervene on these contentions. Section 2.309(c) allows for late-filed contentions, based upon a balancing of factors:

- (1) Good cause, if any, for failure to file on time;
- (2) The nature of petitioner's right to be a party in the proceeding;
- (3) The nature of petitioner's property, financial or other interest in the proceeding;
- (4) The possible effect that any order may have on petitioner's interest;
- (5) The availability of other means by which petitioner's interest may be protected;
- (6) The extent to which petitioner's interest may be protected by other parties;

- (7) The extent to which petitioner's participation will broaden the issues or delay the proceeding;
- (8) The extent to which petitioner's participation will assist in the development of a sound record.

There is good cause for NMED's failure to put forth in sufficient detail the bases for its contentions (or its new contentions). As NMED set forth in its motion for extension of time to file a reply, it did not have adequate time to prepare its Petition. While NMED acknowledges that it had sixty days from the date of notice of the application to prepare a petition, counsel for NMED did not receive actual notice of the proceeding until approximately thirty days prior to the filing date. Furthermore, in virtually all legal proceedings in which NMED is involved, NMED uses expertise within the agency to develop its technical positions. In this proceeding, however, NMED has no in-house expertise on the storage, plausible strategy for disposition, and low level waste issues. (NMED does have in-house expertise on the adequacy of the radiation protection program, a contention of NMED's that has been admitted.) Furthermore, NMED has not been involved in any of the prior LES proceedings, and had no familiarity with the issues. Given the novelty and complexity of the issues, NMED did not have adequate time to put forth all details in support of its contentions in its Petition. NMED, however, was able to do so with additional time and the aid of outside consultants.

NMED's right to be a party is without question: NMED has standing as a party pursuant to 10 C.F.R. § 2.309(d)(2)(i) and has been admitted as a party for purposes of its radiation protection program contention.

NMED's interest in this proceeding is unique and compelling: NMED represents the State of New Mexico, through the Governor, and is the state agency responsible for protecting

the State's environment. NMED's contention – that LES has no plausible strategy for disposition of the depleted uranium it will generate – represents a genuine and real concern for the citizens of New Mexico and our environment. As outlined in NMED's Reply, proper disposition of depleted uranium at the DOE facilities in the United States has proven to be a critical problem for decades. Indeed, the United States currently stores the largest quantity of depleted uranium in the world, approximately 732,000 metric tons. NMED Reply, p. 3. The State of New Mexico has a keen interest in not being added to the list of states with tons of depleted uranium for which there is no firm disposal pathway.

This proceedings provides the most direct means by which the State of New Mexico can address the long term storage and disposition issues raised by location of the LES facility in the State.

There are no other parties that can adequately protect the interests of the State of New Mexico. While Nuclear Resource and Information Service (NIRS) and Public Citizen (PC) also are concerned with the disposition of the depleted uranium, they do not represent the interests of the entire State, but of their members and, at present, the NMAG has not been permitted to put forth her contentions regarding disposition of the waste.¹

NMED's participation will not significantly broaden the issues or delay this proceeding: NIRS/PC's contention on plausible strategy for disposition has already been admitted and it has already put into play the low level waste issue.

NMED's participation will assist in the development of a sound record because the State of New Mexico's interests will be fully represented and because NMED has retained credible experts to pursue critical issues in this proceeding.

¹ As both NMED and the NMAG have pointed out, each represents separately elected officials, both of which have constitutional authority to represent the State in this proceeding.

On balance, therefore, NMED should be allowed to intervene on its contentions, even if they were late-filed.

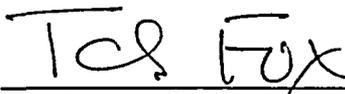
Significantly, there would be no prejudice to any party if NMED is allowed to intervene on its contentions. LES, as stated, did not object to NMED's intervention. The plausible strategy issue is already before the Commission through NIRS/PC. The hearing on NMED's contentions is not scheduled until November 2005. There is no prejudice by allowing issues set forth in a May 2004 pleading to be heard in a trial set for November 2005.

Conclusion

In sum, NMED has shown compelling circumstances that warrant reconsideration of the Commission Order. NMED has, in substance, met the requirements of 10 C.F.R. § 2.309(f). NMED contends that the new material in NMED's Reply represents additional bases for contentions set forth in its Petition. And, even if the new material represents new contentions, NMED meets the requirements for late-filed contentions. There is no prejudice to any party or to the proceeding by permitting NMED to maintain its contentions. LES did not object to admission of the contentions; both LES and NRC Staff had an opportunity to file surreplies. Trial on NMED's proposed contentions is not scheduled until November 2005. Most importantly, NMED, as representative of the Governor of the State of New Mexico and as steward of the State's environment, occupies a unique position in this proceeding, and should be allowed to participate fully. NMED, therefore, respectfully requests the Commission to reconsider its August 18, 2004 order, and admit NMED's contentions regarding storage, plausible strategy for disposition, low level waste contentions or, alternatively, permit the Board to consider the new material in NMED's Reply regarding these contentions.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing pleading was served by mail and, as indicated by an asterisk (*), by electronic mail on this 27th day of August, 2004.

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