

September 13, 2004 (12:45PM)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

Docket No. 70-3103-ML

ASLBP No. 04-826-01-ML

**NEW MEXICO ATTORNEY GENERAL'S MOTION FOR
LEAVE TO FILE A LATE-FILED CONTENTION**

Pursuant to 10 C.F.R. 2.309(c)(1)(i)-(viii) and 69 Fed. Reg. 5875, the Attorney General of New Mexico respectfully requests the opportunity to file a late-filed contention. The proposed contention and supporting basis are set forth in the "Attorney General of New Mexico's Brief in Response to Commission Order on Contention D, filed simultaneously with this Motion. The contention is set forth in the first paragraph of the Brief and the basis is in the subsequent paragraphs. Granting New Mexico's Attorney General permission to file a late-filed contention should not cause a substantial delay in this proceeding and will afford the Attorney General the opportunity to raise a substantial issue of both fact and law of great import to the State of New Mexico that was not clear could be challenged before the Commission's recent decision in CLI-04-25.

BACKGROUND

On January 30, 2004, the Nuclear Regulatory Commission ("Commission") entered a Notice of Hearing and Commission Order in the Matter of Louisiana Energy Services, L.P., in Docket No. 70-3103, in which it determined that amended and supplemental petitions to intervene "will not be entertained absent a determination by the

Commission or the Atomic Safety and Licensing Board that the petition should be granted, based upon a balancing of the factors specified in 10 C.F.R. 2.309(c)(1)(i)-(viii)." 69 Fed. Reg. 5875. The Attorney General respectfully submits that the balancing of these factors weighs strongly in favor of granting the Attorney General leave to file a late-filed contention.

ARGUMENT

Good Cause

In CLI-04-25, the Commission recognized that there had been confusion with respect to the interpretation of its original hearing notice insofar as it concerns an intervenor's ability to challenge the classification of depleted uranium hexafluoride as low-level waste. This determination, in turn, affects the possibility that the depleted uranium hexafluoride may be permitted to be transferred to the Department of Energy under the USEC Privatization Act. Moreover, this classification will also affect whether, in fact, LES has proffered a "plausible strategy" for waste disposal. In its recent order, the Commission made clear that its earlier notice "should not be understood to preclude consideration of whether petitioners' contention on appropriate waste classification amounts to an impermissible attack on NRC regulations (10 C.F.R. Part 61)."

Additionally, in CLI-04-25, the Commission has clarified what is required of a "plausible strategy," i.e., that "to include completion of all necessary contractual arrangements, it must represent more than mere speculation." The Attorney General submits that there is good cause for permitting her to file a late-filed contention with respect to waste classification because, before the Commission's clarification, it was not clearly apparent to the Attorney General that the waste classification was litigable.

Nature of Attorney General's Right to Be Made a Party

The Commission has recognized the inherent rights of a state to be involved in licensing proceedings where the proposed facility is to be located within the confines of that state. See 10 C.F.R. § 2.309(d)(2) (providing, in pertinent part, that a State "that wishes to be a party in a proceeding for a facility located within its boundaries need not address the standing requirements under this paragraph"). Moreover, the State of New Mexico has designated the Attorney General as the official to "appear before local, state and federal courts and regulatory officers, agencies and bodies, to represent and to be heard on behalf of the state when, in [her] judgment, the public interest of the state requires such action." N.M. Const. art. V, § 1; NMSA 1978, § 8-5-2(J)(1975). Indeed, neither Staff, LES, nor even the Atomic Safety and Licensing Board Panel has challenged the standing nor the nature of the Attorney General's right to be made a party to this licensing proceeding. Consequently, the Attorney General submits that this factor must balance in favor of permitting the Attorney General to file a late-filed contention.

Nature and Extent of the Attorney General's Property, Financial or other Interest in the Proceeding

The Attorney General has an almost infinite number of interests at stake in this proceeding. The Attorney General is charged with protecting New Mexico's natural resources, see NMSA 1978, § 75-7-3 (1993), the health and safety of the citizens of New Mexico, see NMSA 1978, § 24-1-21 (1983), and for enforcing all laws of this State, see NMSA 1978 § 29-3-2 (1979). Again, neither Staff, LES, nor even the Licensing Board has challenged the nature and extent of the Attorney General's interests with respect to the construction and operation of a uranium enrichment facility within the confines of the

State of New Mexico. Accordingly, this factor must also weight in favor of permitting the Attorney General to file a late-filed contention.

Possible Effect of Any Order on the Attorney General's Interests

An order entered with respect to the classification of the depleted uranium hexafluoride bears wide-reaching effects on the State of New Mexico's interests in this proceeding. For example, should the Commission determine that the depleted uranium hexafluoride may not be classified as low-level waste, the Department of Energy would no longer be required to accept the waste under the USEC Privatization Act. Losing one of its proffered "plausible strategies" for the disposition of the depleted uranium hexafluoride directly increases the possibility that on-site storage will be required. Moreover, the Attorney General's concerns regarding the effects of long-term, on-site storage and its attendant costs on New Mexico's natural resources and the health and safety of its citizens would be amplified. Consequently, this factor weighs strongly in favor of granting the Attorney General leave to file a late-filed contention.

Availability of Other Means whereby the Attorney General's Interests will be Protected

There are no other means by which New Mexico's interests would be protected.

The Extent to which the Attorney General's Interests will be Represented by NIRS/PC

The Attorney General respectfully submits that New Mexico's interests will not be adequately represented by NIRS/PC. NIRS/PC represents a distinct group of residents located within a close proximity to the proposed Uranium Enrichment facility in this proceeding. See Petition to Intervene by Nuclear Information and Resource Service and Public Citizen, p. 2 ("NIRS is a non-profit corporation with more than 6000 members, 48 of whom reside in New Mexico and several of whom live in southeastern New

Mexico.”)(emphasis added); see also Petition to Intervene by Nuclear Information and Resource Service and Public Citizen, p. 2 (“Public Citizen is a national non-profit consumer advocacy organization with 126,537 members nationwide, including 1628 members in New Mexico.”) (emphasis added). New Mexico’s Attorney General, on the other hand, represents the interests of *all* citizens of New Mexico in this proceeding. See, e.g., NMSA 1978, § 8-5-2(J)(1975) (“[T]he attorney general shall . . . appear before local, state and federal courts and regulatory officers, agencies and bodies, to represent and to be heard on behalf of the state when, in [her] judgment, the public interest of the state requires such action”). Consequently, the interests affected by waste classification will extend well beyond NIRS/PC cumulative 1676 members in New Mexico, and should not serve to displace the Attorney General’s role in protecting all of the citizens of New Mexico.

Additionally, the expressed goals of the Attorney General and NIRS/Public Citizen are inconsistent, which is likely to affect the manner in which briefing proceeds with respect to the issue of waste classification. In fact, NIRS has a stated mission of promoting “a non-nuclear energy policy.” See Petition to Intervene by Nuclear Information and Resource Service and Public Citizen, p. 2. This clearly is not the Attorney General’s position. The Attorney General has made it abundantly clear that “she does not wish or intend to prohibit the construction and operation of this facility, but rather seeks to ensure that the construction, operation, and decommissioning are accomplished with adequate security and protection for the citizens of New Mexico.” New Mexico Attorney General’s Reply in Support of Petition for Leave to Intervene and Request for Hearing, p. 4. Additionally, the Attorney General, unlike NIRS/PC, “seeks

to assure that the limited resources of the State of New Mexico will not need to be expended to avoid or mitigate the safety and environmental hazards that will arise should the enrichment tails be abandoned on the site without safe and complete decommissioning.” New Mexico Attorney General’s Reply in Support of Petition for Leave to Intervene and Request for Hearing, p. 4. NIRS/PC does not, nor can it, claim that it would be responsible for mitigating the potential safety and environmental hazards should the enrichment tails be abandoned on site without safe and complete decommissioning. These are distinct interests, which merit affording the Attorney General the opportunity to file a late-filed contention with respect to the classification of the depleted uranium hexafluoride.

The Extent to which the Attorney General’s Participation will Broaden the Issues or Delay the Proceeding

Permitting the Attorney General to file a late-filed contention with respect to the classification of depleted uranium hexafluoride will neither broaden the issues or delay this proceeding. The issue is distinct, i.e. whether depleted uranium hexafluoride (presumably after processing to remove the hazardous constituent) may be permitted to be classified as low-level waste and if so what class. Moreover, the Attorney General commits to working within the briefing schedule already set forth by the Commission with respect to this issue. Accordingly, the Attorney General submits that consideration of this factor weighs in favor of permitting her to file a late-filed contention with respect to waste classification.

The Extent to which the Attorney General’s Participation may Reasonably be Expected to Assist in Developing a Sound Record

As stated before, New Mexico's interests in the resolution of this issue, represented by the Attorney General of New Mexico, are distinct from that of NIRS/PC. While NIRS has a stated mission of promoting "a non-nuclear energy policy," see Petition to Intervene by Nuclear Information and Resource Service and Public Citizen, p. 2, the Attorney General seeks to ensure that this waste is properly classified so as to ensure for the protection of the health and safety of the citizens of New Mexico. Additionally, while the applicant's concern regarding the classification of the waste would stem from the proprietary benefits to be reaped from this project, the Attorney General's are for the benefit of the citizens of New Mexico and to protect New Mexico's natural and financial resources. Accordingly, the Attorney General submits that permitting her the opportunity to file a late-filed contention would assist in developing a full and sound record. Consequently, the Attorney General submits that this factor, too, weighs in favor of permitting the filing of a late-filed contention.

CONCLUSION

For the reasons set forth above, the Attorney General respectfully requests the admission of the contention described above in order both to protect the interests of the citizens of New Mexico and to assist the Commission in its efforts to make an appropriate waste classification for the depleted uranium hexafluoride.

Respectfully submitted,

PATRICIA A. MADRID
Attorney General



Glenn R. Smith
Deputy Attorney General
Christopher D. Coppin

Special Counsel
Stephen R. Farris
David M. Pato
Assistant Attorneys General
P. O. Drawer 1508
Santa Fe, NM 87504
Telephone: (505) 827-6021
Facsimile: (505) 827-4440

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NUCLEAR REGULATORY COMMISSION

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In the Matter of)	
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CERTIFICATE OF SERVICE

I hereby certify that copies of the NEW MEXICO ATTORNEY GENERAL'S MOTION FOR LEAVE TO FILE A LATE-FILED CONTENTION have been served upon the following persons by electronic mail, facsimile, and/or first class U.S. mail this 3rd day of September, 2004:

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Paul B. Abramson
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: pba@nrc.gov

Dennis C. Dambly, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: dcd@nrc.gov

James R. Curtiss, Esq.
Winston & Strawn LLP
1400 L Street
Washington, DC 20005-3502
E-mail: jcurtiss@winston.com

Administrative Judge
G. Paul Bollwerk, III, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: gpb@nrc.gov

Administrative Judge
Charles N. Kelber
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: cnk@nrc.gov

Tannis Fox, Esq.
Clay Clarke, Esq.
Assistant General Counsel
State of New Mexico Environment Dep't

1190 St. Francis Drive
Santa Fe, NM 87502-6110
E-mail: clay_clarke@nmenv.state.nm.us

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Attn: Rulemaking & Adjudications
Staff
Washington, DC 20555-0001
Facsimile: (301) 415-1101
E-mail: hearingdocket@nrc.gov

Office of General Counsel
U.S. Nuclear Regulatory Commission
Attn: Assoc. Gen. Counsel for Hearings,
Enforcement & Administration
Washington, DC 20555-0001
Facsimile: (301) 415-3725

Lisa Cook, Esq.
Angela Coggins, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mails: lbc@nrc.gov
ABC1@nrc.gov

Lindsay A. Lovejoy, Jr., Esq.
618 Paseo de Peralta, Unit B
Santa Fe, NM 87501
E-mail: lindsay@lindsaylovejoy.com

Chairman Nils J. Diaz, Ph.D.
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


David M. Pato
Assistant Attorney General



Attorney General of New Mexico

PATRICIA A. MADRID
Attorney General

STUART M. BLUESTONE
Chief Deputy Attorney General

GLENN R. SMITH
Deputy Attorney General

September 3, 2004

Secretary of the Commission
United States Nuclear Regulatory Commission
Attn: Rulemaking and Adjudications Staff
Washington, D.C. 20555-0001
Facsimile: (301) 415-1101

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

Dear Rulemaking and Adjudications Staff:

Enclosed is the original and three copies of the New Mexico Attorney General's Motion for Leave to File a Late-Filed Contention 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 cursive script that reads "David M. Pato".

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

Enclosures