

RAS 8415

September 3, 2004
DOCKETED 09/07/04

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
LOUISIANA ENERGY SERVICES, L.P.)	Docket No. 70-3103-ML
)	
(National Enrichment Facility))	
)	

NRC STAFF RESPONSE TO NEW MEXICO ATTORNEY GENERAL'S
PETITION FOR RECONSIDERATION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.345(b), the Nuclear Regulatory Commission Staff ("Staff") hereby responds to the Petition for Reconsideration submitted by the New Mexico Attorney General ("NMAG") on August 24, 2004.¹ The Staff contends that the Commission correctly ruled regarding the admissibility of NMAG's contentions.² Further, contrary to NMAG's claim, the Staff believes that the Administrative Procedure Act ("APA") does not compel reconsideration of the Commission decision. Therefore, the Staff respectfully submits that the Commission deny NMAG's Petition for Reconsideration.

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 Application,³ several

¹ See "New Mexico Attorney General's Petition for Reconsideration", dated August 24, 2004.

² See *Memorandum and Order*, CLI-04-25, 60 NRC ___, August 18, 2004.

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, objecting to several of the contentions on the grounds that they lacked sufficient specificity to satisfy the NRC's contentions requirements.⁵ NMAG filed a reply to the responses of the Staff and LES, which set forth additional information regarding her contentions and, for the first time, submitted supporting affidavits.⁶ The Board granted the Staff's request for leave to file a surreply to NMAG's reply,⁷ which the Staff filed on June 3, 2004. In its surreply, the Staff argued that NMAG had exceeded the scope of a proper reply pleading by setting forth new arguments and contentions, and that, therefore, the reply could not be properly considered in determining the admissibility of NMAG's contentions.⁸

Following an initial prehearing conference on June 15, 2004, the Board, on July 19, 2004, issued a Memorandum and Order denying admission of several of NMAG's contentions on the

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).

⁴ See "The New Mexico Attorney General's Request for Hearing and Petition for Leave to Intervene" dated April 5, 2004. NMAG subsequently organized her 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.

⁸ See "NRC Staff Surreply to New Mexico Attorney General's Reply in Support of Petition for Leave to Intervene and Request for Hearing" dated June 3, 2004. ("Surreply")

ground that, as initially submitted, they did not satisfy the requirements of 10 C.F.R. § 2.309(f) because they lacked the necessary specificity and basis. The Board, in its order, did not consider the additional information and arguments first presented in NMAG's May 24, 2004 reply on the basis that the reply filings in several instances constituted untimely attempts to amend NMAG's original petitions and were not accompanied by any attempt to address the late-filing factors in section 2.309(c), (f)(2) as required by NRC regulations.⁹ However, the Board referred the issue of whether the replies could be considered to the Commission under 10 C.F.R. § 2.323(f), along with determinations on the admissibility of the affected contentions.¹⁰

On August 18, 2004, the Commission issued an order, concluding that NMAG's reply petition put forth new material which constituted an attempt to present new arguments and contentions without addressing the late-filing factors in 10 C.F.R. § 2.309(c).¹¹ Therefore, it determined that the replies could not be considered to the extent that they raised new arguments, presented new information, or set forth new contentions. On August 24, 2004, the NMAG filed a Petition for Reconsideration before the Commission, to which the Staff now responds.¹²

DISCUSSION

NMAG advances two arguments in support of her petition for reconsideration. First, NMAG contends that, in rejecting petitioner's contentions, the Commission imposed a new procedural burden on petitioner that is not supported by the Commission's rules and hinders the conduct of a fair and efficient hearing. Second, NMAG argues that the Commission violated the Administrative

⁹ See *Memorandum and Order* (Ruling on Standing, Contentions, and Procedural/Administrative Matters) LBP-04-14, 60 NRC ___, slip op. at 16, July 19, 2004.

¹⁰ *Id.* at 18, 38.

¹¹ CLI-04-25, August 18, 2004, slip op. at 2.

¹² See "New Mexico Attorney General's Petition for Reconsideration" dated August 24, 2004.

Procedure Act (“APA”) by affirming the decision of the Atomic Safety and Licensing Board (“Board”) without first permitting the NMAG to file exceptions to the Board’s initial decision and the supporting reasons for those exceptions. Because NMAG fails to meet her burden of showing compelling circumstances for reconsideration and has not obtained or requested leave of the Commission before filing her petition as required by 10 C.F.R. § 2.323(e), NMAG’s motion for reconsideration should be denied.

A. Standard for Reconsideration

In January, 2004, the NRC amended its regulations to raise the standard for a motion for reconsideration.¹³ Under 10 C.F.R. § 2.323(e), a motion for reconsideration may only be granted upon a petitioner’s showing of compelling circumstances, and may only be filed upon leave of the presiding officer or the Commission. A motion for reconsideration should only be granted where manifest injustice would occur in the absence of reconsideration, and the claim for reconsideration could not have been raised earlier.¹⁴ Reconsideration is an extraordinary remedy and should never be used as an opportunity to argue facts and rationales which were, or could have been, raised earlier.¹⁵

B. Reconsideration is Unwarranted Because the Commission Was Correct in Holding that Petitioner Did Not Conform to NRC’s Contentions Requirements

NMAG claims that the Commission should reconsider its decision because the decision “imposes a new procedural burden on a petitioner that is not sanctioned by the Commission’s rules

¹³ See 69 Fed. Reg. 2182, 2207 (January 14, 2004) (The old standard allowed for motions requesting that the presiding officer reexamine existing evidence that may have been misunderstood or overlooked, or to clarify a ruling on a matter.).

¹⁴ *Id.*

¹⁵ *Id.*

and hinders the conduct of a fair and efficient hearing,”¹⁶ in that the Commission’s ruling requires more of potential intervenors than the NRC contentions require. In essence, NMAG is arguing that her contentions, as supplemented by the reply filing, do meet the NRC’s contentions requirements under 10 C.F.R. § 2.309(f).

First, NMAG’s argument does not provide a proper basis for a petition for reconsideration. “[A] properly supported reconsideration motion is one that does not rely upon . . . previously presented arguments that have been rejected.”¹⁷ NMAG’s claim is just such an argument, as it relies on the theory, previously made and rejected,¹⁸ that the information contained in her reply brief did not amount to new or amended contentions, but only new bases that “explained and narrowed” her original contentions, which did conform to NRC’s contention requirements as found in 10 C.F.R. § 2.309(f)¹⁹.

Second, even if the grounds for NMAG’s motion are appropriate ones for reconsideration, she has not shown any “clear and material error...that renders the decision invalid” so as to justify reconsideration, as required by 10 C.F.R. § 2.323(e).²⁰ Indeed, the Commission properly identified her reply filing for what it was - an untimely and impermissible attempt to amend contentions or

¹⁶ See “Attorney General of New Mexico’s Petition for Reconsideration” at 3, dated August 24, 2004.

¹⁷ *Private Fuel Storage, L.L.C.*, Atomic Safety and Licensing Board, LBP-98-17 at 1, August 5, 1998. See also *Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980).

¹⁸ See, e.g., “New Mexico Attorney General’s Reply in Support of Petition for Leave to Intervene and Request for Hearing, dated May 27, 2004.

¹⁹ See “Attorney General of New Mexico’s Petition for Reconsideration” at 3-4, dated August 24, 2004.

²⁰ 10 C.F.R. § 2.323(e).

supply entirely new contentions without addressing the late-filing requirements in 10 C.F.R. § 2.309(c)²¹.

NRC regulations require that an intervenor come forward with specific and adequately supported contentions in its original petition.²² The regulations require that contentions identify specific points of disagreement on material safety or environmental matters and that they be accompanied by supporting documentation of the facts alleged or expert opinion that provides the bases for the contentions.²³ The requirement is intended to ensure that the adjudicatory process is used to address real, concrete specific issues that are appropriate for litigation, in order to ensure the most efficient allocation of administrative resources possible.²⁴ The Commission has specifically amended the regulations to ensure that admissible contentions are brought and supported in the original petition for intervention, and declined to allow free amendment to and addition of contentions.²⁵ Allowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements,²⁶ by permitting the intervenor to initially file vague, unsupported, and generalized allegations and simply recast,

²¹ CLI-04-25, Slip op. at 2, August 18, 2004.

²² See C.F.R. § 2.309; see also *In the Matter of the Duke Energy Corporation*, CLI-99-11, 49 N.R.C. 328, 334-35, 338 (1999); *In the Matter of Arizona Public Service Company*, CLI-91-12, 34 N.R.C. 149, 155-56 (1991);

²³ 69 Fed. Reg. 2182, 2201-02 (January 14, 2004).

²⁴ *Id.* at 2202; see also *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 N.R.C. 235, 248 n.7 (1996).

²⁵ *Id.* 2202, 2238.

²⁶ See *id.* at 2202.

support, or cure them later. The filing of such vague, unsupported, and generalized contentions controverts NRC regulations and policy.²⁷

In this case, the NMAG failed to meet the contentions requirements in her initial Petition for Intervention.²⁸ The Staff noted this in its response to the Petition.²⁹ Then, in her reply, the NMAG exceeded the proper scope of a reply pleading by presenting new arguments, and in some cases, entirely new contentions.³⁰ As the Commission stressed in its affirmation of the Board's order, NRC's contention admissibility and timeliness requirements "demand a level of discipline and preparedness on the part of petitioners, who must examine the publicly available material and set forth their claims and the support for their claims at the outset."³¹

Furthermore, NMAG claimed that it did not have time or resources to meet NRC's contentions requirements.³² However, as the Commission noted, if circumstances made it impossible for NMAG to produce admissible contentions within the required time, NMAG could have requested an extension of time.³³ Alternatively, NMAG could have submitted supplemental arguments, information and contentions accompanied by information addressing the NRC's late-

²⁷ See, e.g., *Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), 48 N.R.C. 132 (1998); 10 C.F.R. § 2.309(f).

²⁸ See, e.g. Board Memorandum and Order, *In the Matter of Louisiana Energy Services, L.P.*, at 20-25, ASLBP No. 04-826-01-ML, July 19, 2004.

²⁹ See "NRC Staff Response to Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene at 12, dated April 30, 2004.

³⁰ See Commission Memorandum and Order, *In the Matter of Louisiana Energy Services, L.P.*, at 2, CLI-04-25, August 18, 2004.

³¹ *Id.* At 2. (Internal citation omitted).

³² See NMAG's Motion for Extension of Time (May 5, 2004) at 4.

³³ See Commission Memorandum and Order, *In the Matter of Louisiana Energy Services L.P.*, at 3, CLI-04-25, August 18, 2004. (noting that NMAG requested and was granted an extension of time in filing her reply).

filing requirements, found in 10 C.F.R. § 2.309(c). NMAG, however, did not do either, but instead attempted to circumvent the late-filing requirements by amending and adding new contentions in her reply filing.³⁴ The Board and Commission were, therefore, correct in not considering the additional contentions and additional information first submitted as part of a reply pleading.³⁵ Accordingly, NMAG has failed to establish any compelling circumstances that might warrant reconsideration by the Commission of its decision.

C. The Administrative Procedure Act Does Not Compel Reconsideration by the Commission

Next, NMAG contends that the Commission violated the APA by failing to provide the NMAG with the opportunity to file exceptions and supporting rationales with the Commission before the Commission determined that NMAG's reply could not be considered and several of her contentions were therefore inadmissible.

In support of her argument, petitioner cites *Klinestiver v. Drug Enforcement Administration*,³⁶ for the proposition that “an agency conducting a formal adjudication is required to provide an opportunity to file exceptions with the [agency head], even though petitioner had an opportunity to present proposed findings of fact to the [presiding officer],”³⁷ and that section 557(c) of the APA is intended to permit parties' input at each level of the administrative decisional process.³⁸ The

³⁴ See *In the Matter of Private Fuel Storage, L.L.C.*, ASLBP No. 97-732-02-ISFSI, Sept. 25, 2000 (explaining that new contentions that did not address the late-filing factors could not be considered as admissible late-filed contentions).

³⁵ *Id.* at 2.

³⁶ 606 F.2d 1128 (D.C. Cir. 1979).

³⁷ See “New Mexico Attorney General's Petition for Reconsideration” at 3, dated August 24, 2004.

³⁸ *Klinestiver*, 606 F.2d at 1130.

NMAG contends that because it was permitted input only at the Board level and not at the Commission level, her procedural rights under the APA were violated.³⁹

The APA does not compel reconsideration by the Commission in this case. Under 10 C.F.R. § 2.323(f), a presiding officer may refer a matter to the Commission when it is necessary to prevent detriment to the public interest or unusual delay or expense, or if the presiding officer determines that the ruling involves a novel issue that merits Commission review at the earliest opportunity. The matter referred in accordance with this regulation does not, however, equate with a full decision on the merits of the proceeding. Accordingly, this circumstance is distinguishable from one in which the Commission is rendering an appellate decision on a ruling issued by the Board. Indeed, the Commission's regulations do not allow for appeals of Board decisions which deny only certain contentions. See 10 C.F.R. § 2.311; *Gulf States Utility Co.* (River Bend Station, Units Land 2) ALAB-329, 3 NRC 607, 610 (1976). Petitioner will have the opportunity to appeal the final agency action, and at that time will, by regulation, have the opportunity to present arguments before the Commission. Thus, while the APA may require that an agency provide the opportunity to submit exceptions when reaching or reviewing a tentative, recommended, or final decision of subordinate employees,⁴⁰ the referral of a ruling to the Commission under 10 C.F.R. § 2.323(f), does not constitute such a recommended, tentative, or final decision and therefore, there is no need, in such circumstance, to afford an opportunity to file exceptions.

Klinestiver, which dealt with a DEA regulatory scheme in which an administrative law judge reached a recommended decision on the merits and then the DEA issued a final opinion, does not apply. The Board's order is clear on its face with respect to the nature of its action. It is solely a determination of the right of various petitioners to participate as parties in this proceeding, and is

³⁹See "Attorney General of New Mexico's Petition for Reconsideration" at 3, dated August 24, 2004.

⁴⁰ 5 U.S.C. § 557(c).

not a substantive determination of the merits of any regulatory matter in controversy.⁴¹ Furthermore, the Board was clear that while it was rejecting certain contentions others were being referred to the Commission for consideration because they presented the novel issue of whether supporting information presented for the first time in a reply could be considered in determining admissibility. Therefore, when the Board issued its order, it was reaching a decision on the admissibility of some of the issues and contentions presented for adjudicatory consideration in the future, but was referring other determinations to the Commission under section 2.323(f), because they were fundamentally predicated on the novel issue of whether petitioner's reply pleadings could be considered.

And it is also important to note that with respect to the issue decided by the Commission, whether the reply filings could be considered, petitioner did have an opportunity to fully articulate its views in the papers submitted to the Board. In these circumstances, therefore, petitioner's APA rights were not violated.

CONCLUSION

For the foregoing reasons, the Staff respectfully requests that the Commission deny NMAG's Petition for Reconsideration.

Respectfully submitted,

/RA/

Lisa B. Clark
Angela B. Coggins
Counsel for NRC Staff

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

⁴¹ Note that although the Board issued an order, that order evidenced a decision with respect to admitting certain contentions of each of the parties, not a decision on the issue it referred to the Commission - whether the information contained in the replies could be considered or not.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO NEW MEXICO ATTORNEY GENERAL'S PETITION FOR RECONSIDERATION" 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 September, 2004.

Administrative Judge * **
Paul Bollwerk
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
E-Mail: gpb@nrc.gov

Administrative Judge * **
Charles Kelber
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
E-Mail: cnk@nrc.gov

Administrative Judge * **
Paul Abramson
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
E-Mail: pba@nrc.gov

Ron Curry, Secretary
Clay Clarke, Assistant General Counsel **
Tannis L. Fox, Attorney **
Melissa Y. Mascarenas, Legal Assistant
New Mexico Environmental Department
1190 St. Francis Drive
Santa Fe, NM 87502-6110
E-mail: clay_clarke@nmenv.state.nm.us
tannis_fox@nmenv.state.nm.us

Office of the Secretary * **
ATTN: Rulemakings and Adjudication Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
E-mail: HEARINGDOCKET@nrc.gov

Patricia A. Madrid, N.M. Attorney General
Glenn Smith, Deputy Attorney General **
David M. Pato, Asst. Attorney General **
Stephen R. Farris, Asst. Attorney General **
Christopher D. Coppin **
P.O. Box 1508
Santa Fe, NM 87504-1508
E-Mail: gsmith@ago.state.nm.us
dpato@ago.state.nm.us
sfarris@ago.state.nm.us
ccoppin@ago.state.nm.us

Office of Commission Appellate Adjudication*
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555

Mr. Rod Krich, Vice President
Licensing, Safety and Nuclear Engineering
Louisiana Energy Services
2600 Virginia Avenue NW.
Suite 610
Washington, D.C. 20037

Lindsay A. Lovejoy, Jr. **
Nuclear Information and Resource Service
1424 16th Street, NW.
Suite 404
Washington, D.C. 20036
E-mail: lindsay@lindsaylovejoy.com
llovejoy@cybermesa.com

James. R. Curtis, Esq. **
Dave Repka, Esq. **
Martin O'Neill, Esq. **
Winston & Strawn
1400 L Street, N.W.
Washington, D.C. 20005
E-mail: jcurtiss@winston.com
drepka@winston.com
moneill@winston.com

/RA/

Angela B. Coggins
Counsel for NRC Staff