

December 17, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

December 17, 2004 (11:46am)

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))	

LOUISIANA ENERGY SERVICES, L.P.
RESPONSE IN CONNECTION WITH MATTERS
REMANDED IN CLI-04-35

I. INTRODUCTION

In its Memorandum and Order of December 8, 2004, CLI-04-35,¹ the Commission remanded to the Atomic Safety and Licensing Board ("Licensing Board") two matters involving the admissibility of late-filed contentions: (1) the argument of the New Mexico Environment Department ("NMED"), in its August 27, 2004 Motion for Reconsideration² filed with the Commission, that the matters addressed therein meet the requirements for late-filed contentions; and (2) the September 3, 2004 Motion of the New Mexico Attorney General ("AGNM"),³ also filed with the Commission, seeking admission of a

¹ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC ____ (Dec. 8, 2004) (slip op.).

² "NMED's Motion for Leave to File Motion for Reconsideration *and* Motion for Reconsideration," dated August 27, 2004 ("Reconsideration Motion").

³ "New Mexico Attorney General's Motion for Leave to File a Late-Filed Contention," dated September 3, 2004 ("AGNM Motion"). The contention itself was set forth in "New Mexico Attorney General's Brief in Response to Commission's Order on NIRS/PC Contention D and Attorney General's Late-Filed Contention," also dated September 3, 2004. In CLI-04-35 (slip op. at 9), the Commission incorrectly identified the AGNM filings as being dated September 13, 2004.

newly-proposed contention on the waste classification of depleted uranium tails under 10 C.F.R. Part 61. In accordance with the Licensing Board's scheduling Order of December 9, 2004,⁴ LES herein responds with respect to both matters, on the applicability of the late-filed contentions standards of 10 C.F.R. §§ 2.309(c) and (f)(2). LES has not previously addressed these standards for these two matters, either before the Commission or the Licensing Board.

II. DISCUSSION

A. NMED's Late-Filed Contention

NMED's August 27, 2004, Reconsideration Motion and late-filing request were associated with the matters that NMED previously sought to raise in its reply filing with the Licensing Board of May 10, 2004.⁵ NMED's specific, late-filed contention (first raised in the reply) was that LES does not set forth in its application a plausible strategy for treatment and disposition of depleted uranium hexafluoride waste (*i.e.*, depleted uranium tails) that will be generated at LES's proposed National Enrichment Facility ("NEF").

Procedurally, the Licensing Board previously declined to consider this late-filed contention when it was first raised in the reply finding, because it was beyond the permissible scope of a reply under 10 C.F.R. § 2.309(h)(2) and there was no showing that the issue would meet the NRC's criteria for late-filed contentions in 10 C.F.R. §§ 2.309(c) and (f)(2).⁶ The Commission affirmed that decision in an Order dated August 18, 2004.⁷ Following NMED's August 27, 2004, Reconsideration Motion, the Commission again affirmed the Licensing Board

⁴ "Order (Schedule for Responses in Connection with Matters Remanded in CLI-04-35)," dated November 9, 2004.

⁵ "Reply in Support of NMED's Petition to Intervene," dated May 10, 2004.

⁶ "Memorandum and Order (Rulings Regarding Standing, Contentions, and Procedural/Administrative Matters)," LBP-04-14, dated July 19, 2004, slip op at 15-17.

on December 8, 2004, in CLI-04-35. In the December decision, however, the Commission remanded NMED's late-filed contention argument to the Licensing Board.

The Commission recognized, in CLI-04-35, slip op. at 8, n. 29, that after NMED's August 27, 2004, filing with the Commission, NMED filed another motion with the Licensing Board on October 20, 2004, to add a late-filed contention.⁸ NMED, in that filing, specifically referenced the contention raised in the reply filing of May 10, 2004, and pending before the Commission in the August Reconsideration Motion. However, in remanding the late-filed contention issue to the Licensing Board, the Commission apparently did not recognize that the Licensing Board has already resolved the issue. Namely, in its Memorandum and Order of November 22, 2004,⁹ addressing the October 20, 2004, filing, the Licensing Board specifically found that NMED was seeking to raise "matters previously proffered to the Board," and that NMED had not shown good cause for failure to timely file the contention.¹⁰ The Licensing Board further observed: "At this juncture, only Commission reversal of its earlier determination that these contentions are not admissible would provide cause for the Board to consider them in this litigation."¹¹ The Commission in CLI-04-35 did not reverse its earlier determination that the new material raised in a reply filing cannot be considered.

⁷ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC ____ (Aug. 18, 2004) (slip op.).

⁸ "NMED's Motion to File Late-Filed Contentions," dated October 20, 2004.

⁹ "Memorandum and Order (Ruling on Late-Filed Contentions)," November 22, 2004. It seems plausible that, during the Commission drafting and affirmation process for CLI-04-35, the NMED filing of October 20, 2004 was duly noted, but the subsequent Licensing Board decision was simply missed.

¹⁰ *Id.*, slip op. at 6-7.

¹¹ *Id.*, slip op. at 7.

B. AGNM's Late-Filed Contention

AGNM filed its Motion for leave to file a late-filed contention, and the contention itself, on September 3, 2004. The late-filed contention parallels the existing contention NIRS/PC EC-3/TC-1, timely filed by Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") in their April 6, 2004 intervention petition.¹² In its December 14, 2004 filing, the AGNM purports to raise an issue that is different from that previously raised by NIRS/PC. However, in reality, the AGNM, like NIRS/PC, alleges that there is inadequate material in the LES application upon which to base a waste classification under Part 61, that there is no private disposal strategy unless there is such a Commission classification, and that classification as Greater-than-Class C ("GTCC") waste would eliminate or complicate private disposal options and acceptance by DOE under Section 3113 of the USEC Privatization Act. (It warrants mention that GTCC waste is, in fact, "low-level radioactive waste.") The late-filed contention, therefore, remains deeply intertwined with the certified question on waste classification that remains pending before the Commission.¹³ The certified question specifically relates to the admissibility of Basis C of contention NIRS/PC EC-3/TC-1.

LES did not file a response to the AGNM Motion to the Commission for leave to file a late-filed contention. To LES at the time, it appeared that the issue would be resolved by a Commission decision on the waste classification issue consistent with LES's brief on that issue. Given that a classification of the depleted uranium tails is mandated by the Commission's

¹² See "Petition to Intervene by Nuclear Information and Resource Service and Public Citizen," dated April 6, 2004, at 27-31.

¹³ AGNM also addressed "plausible strategy" disposal issues in her May 24, 2004 reply to the LES and NRC Staff answers to her initial proposed contentions. "New Mexico Attorney General's Reply in Support of Petition for Leave to Intervene and Request for Hearing," dated May 24, 2004, at 6-14. The reply, however, did not clearly raise the waste classification issue.

regulations (*i.e.*, the tails are Class A low-level waste), Basis C of contention NIRS/PC EC-3/TC-1 is not admissible as a matter of law. Likewise, the late-filed AGNM classification contention is not admissible as a matter of law.

In any event, if the Licensing Board chooses to consider whether the AGNM late-filed contention can be considered under 10 C.F.R. §§ 2.309(c) and (f)(2), LES sees no basis for such consideration given the lack of “good cause” for the late-filing. The NRC’s rules of practice require that contentions be proposed based upon information available at the time the intervention retention is to be filed, such as the application. 10 C.F.R. § 2.309(f)(2). Further, as the Licensing Board recognized in the earlier decision on late-filed amended contentions in this proceeding, the first factor in Section 2.309(c) — “good cause” for failure to file on time — is the most important.¹⁴ The Licensing Board observed that the “focal point” in determining whether there is “good cause” is the availability of new information.¹⁵ There has been no new information to establish “good cause” for the late AGNM filing.

The waste classification issue of concern to AGNM could have been raised based on the LES application. In fact, NIRS/PC was able to raise the issue and did so in their intervention petition. There has been no new application, supplement or NRC Staff review document that could credibly be linked to the issue to support a late-filed contention (either now, in August 2004 when AGNM made the Commission filing, or in May 2004 when disposal issues were addressed as part of the AGNM reply argument). AGNM suggests only that “it was not

¹⁴ “Memorandum and Order (Ruling on Late-Filed Contentions),” dated November 22, 2004, slip op. at 6 (*citing Private Fuel Storage (Independent Spent Fuel Storage Installation)*, LBP-98-29, 48 NRC 286, 293 (1998)).

¹⁵ *Id.*

clearly apparent to the Attorney General that the waste classification was litigable.”¹⁶ AGNM Motion, at 2. A lack of understanding of either the issues or the NRC’s process cannot be equated to “good cause.”

There is also no compelling argument to support the late-filed contention on the other relevant criteria. The waste classification issue will not, of course, greatly broaden the proceeding because it has already been raised by NIRS/PC. However, AGNM has not demonstrated how it will assist in developing a sound record on the issue. AGNM offers only a general assessment of the Attorney General’s unique interests. *Id.* at 7. However, there is a stronger argument that the AGNM’s interest in this issue will be protected by other means and other parties. AGNM has already submitted its views on proper waste classification to the Commission, and those will no doubt be considered by the Commission in due course. Before the Licensing Board, NIRS/PC will no doubt pursue the issue as well, to the extent this issue is allowed by the Commission to be considered at all. AGNM’s argument that its generalized interests and its mission are distinct from NIRS/PC may be true, but unpersuasive as to whether the AGNM’s interests in the waste classification issue will be represented, whether its mission will be served, and whether its potential contribution on the issue would be significantly different. In sum, LES does not believe that there is an adequate showing to support

¹⁶ Specifically, the AGNM suggests that, 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 waste classification of depleted uranium as low-level waste.” AGNM Motion, at 2. This statement, however, reflects a misreading of CLI-04-25. In actuality, the Commission stated that its notice did *not* preclude a challenge to the existing NIRS/PC contention on the appropriate waste classification of depleted uranium as an impermissible challenge to 10 C.F.R. Part 61. The AGNM also misinterprets CLI-04-25 to require that LES complete “all necessary contractual arrangements” to demonstrate that it has a “plausible strategy” for commercial deconversion of depleted uranium. It is clear, however, that the Commission intended precisely the opposite.

consideration of a late-filed contention that, in practical effect, merely adopts an issue raised by another party.¹⁷

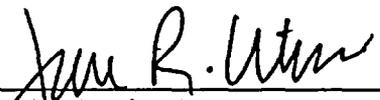
To the extent that the Licensing Board concludes otherwise, and would further consider admissibility of the late-filed AGNM contention against the standard criteria for admissibility of contentions (10 C.F.R. § 2.309(f)(1)), LES believes that the Licensing Board should hold that determination in abeyance. The Commission will eventually take action on the waste classification issue in the context of the certified question. Commission action is very likely to set a precedent that would resolve the question of whether AGNM has identified a genuine dispute on a material issue of fact or law that would be admissible in this proceeding. Therefore, it would foster judicial economy to defer an ultimate admissibility decision until the Commission acts.

¹⁷ AGNM attempted again to address the late-filed contention criteria in a supplemental filing of December 14, 2004. "New Mexico Attorney General's Supplemental Motion for Leave to File a Late-Filed Contention," dated December 14, 2004. That filing, however, does not materially advance the AGNM cause. It merely summarizes point previously made and attempts to draw a distinction between the AGNM's position and that of NIRS/PC which does not, in fact, exist.

III. CONCLUSION

As discussed above, the Licensing Board has already ruled on the issue of the admissibility of NMED's late-filed waste disposal contention. Further, for the reasons discussed above, applying the Commission's criteria for considering late-filed contentions, the AGNM late-filed waste classification contention should not be entertained. However, to the extent the Licensing Board chooses to overlook the untimeliness of the contention, a further ruling on admissibility should be deferred pending a Commission decision on the certified waste classification question.

Respectfully submitted,



James R. Curtiss, Esq.
David A. Repka, Esq.
Martin J. O'Neill, 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.
100 Sun Avenue, NE
Suite 204
Albuquerque, NM 87109

Dated at Washington, District of Columbia
this 17th day of December 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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 "LOUISIANA ENERGY SERVICES, L.P. RESPONSE IN CONNECTION WITH MATTERS REMANDED IN CLI-04-35" in the captioned proceeding have been served on the following by e-mail service, designated by **, on December 17, 2004 as shown below. Additional service has been made by deposit in the United States mail, first class, this 17th day of December 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.**
Darani M. Reddick**
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
e-mail: dmr1@nrc.gov

Ron Curry
Tannis L. Fox, Esq.**
New Mexico Environment Department
1190 St. Francis Drive
Santa Fe, NM 87502-6110
e-mail: tannis_fox@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

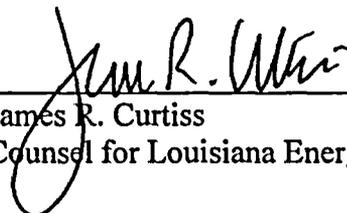
Christopher D. Coppin, Esq.**
David M. Pato, Esq.**
Stephen R. Farris, Esq.**
Glenn R. Smith, Esq.**
Office of the New Mexico Attorney General
P.O. Box Drawer 1508
Santa Fe, NM 87504-1508
e-mail: ccoppin@ago.state.nm.us
e-mail: dpato@ago.state.nm.us
e-mail: sfarris@ago.state.nm.us
e-mail: gsmith@ago.state.nm.us

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.