July 5, 2005

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

NRC STAFF RESPONSE TO JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT

INTRODUCTION

Pursuant to the Board's Order of June 27, 2005,[1] the Nuclear Regulatory Commission Staff ("Staff") hereby responds to the joint motion filed by Louisiana Energy Services ("LES"), the New Mexico Attorney General ("NMAG") and the New Mexico Environment Department ("NMED") requesting that the Board approve a settlement agreement reached between those parties.[2] The Staff was not a participant in the negotiations and was not advised of the terms of the agreement until after the negotiations were completed and the agreement was final. Accordingly, the Staff presents its objections before the Board and requests that the agreement not be approved.

DISCUSSION

The Commission has a longstanding policy of encouraging settlements that lessen or avoid the need for costly and time-consuming litigation. *See* 10 C.F.R. § 2.338; *In the Matter of Sequoyah Fuels Corp*. (Gore, Oklahoma Site Decontamination and Decommissioning Funding),

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[1] Order (Schedule for Responses to Joint Motion to Approve Settlement).

[2] "Joint Motion for Approval of Settlement Agreement," June 23, 2005. With the motion, the parties submitted the draft Settlement Agreement and a proposed Order (Approving Settlement Agreement).

CLI-97-13, 46 N.R.C. 195, 205 (1997). Once notice of a hearing has been issued in a proceeding, any settlement agreement between the parties must be approved by the presiding officer - in this case the Board - in order to become binding in the proceeding. *See* 10 C.F.R. § 2.338(l). The Board may decline to approve the settlement agreement and order the adjudication of issues to dispose of the proceeding when such action is required by the public interest. *Id.*

The Commission addressed the question of how to determine whether a settlement serves the public interest and, therefore, should be approved in *Sequoyah Fuels Corp*., 46 N.R.C. at 199, 209. In that case, the Commission set forth the following four part inquiry: (1) whether, in view of the agency's original order and the risks and benefits of further litigation, the settlement result appears unreasonable; (2) whether the terms of the settlement appear incapable of effective implementation and enforcement; (3) whether the settlement jeopardizes the public health and safety; and (4) whether the settlement approval process deprives interested parties of meaningful participation.[3] As is true with court proceedings requiring judicial approval of settlements, the Board does not have the authority to revise parties' agreements without their consent and must reject a settlement agreement as it is written if it determines that the agreement does not serve the public interest. *See In the Matter of Eastern Testing and Inspection, Inc.*, LBP-96-11, 43 N.R.C. 279, 282 n.1 (1996).

As discussed more fully below, the Staff submits that the proposed settlement agreement should be rejected because it contains two fundamental flaws. Specifically, the settlement agreement does not represent all affected parties because the consent and approval

[3] Although the settlement agreement in that case involved an enforcement matter, the Staff submits that these criteria also apply to a settlement involving a licensing proceeding.

of a representative of the Staff was not obtained and, further, the agreement attempts to impose license conditions that are not enforceable by the NRC.

Beyond those objections, the Staff notes that some provisions in the proposed license conditions are written in such a manner that they would be difficult, if not impossible, to realistically inspect and enforce.[4] In addition, the settlement agreement states that LES will permit inspections by the State. However, the function of inspection to ensure compliance with NRC regulations rests exclusively with the Staff and, as explicitly provided in § 274(l) of the Atomic Energy Act of 1954 ("AEA"), as amended, can only be delegated to a State by the Commission. Finally, the agreement states that all provisions - even those that would not be incorporated into license conditions - are fully enforceable before the NRC. In the Staff's view, approval by the Board would only have the effect of terminating the litigation of the contentions the parties agree to settle - it does not have the effect of making the provisions subject to review and enforcement by the Board or the Commission.[5] For all these reasons, the Staff submits that the settlement agreement does not serve the public interest.

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[4] For example, the license condition in provision 4 states that additional funding will be provided for decommissioning unless a "good faith application is pending before the NRC to construct and operate a deconversion facility. . ." The parties have attempted to cure the ambiguity in this language by explaining that the term "good faith application" means a docketed application with an agency responsible for review in the motion requesting approval. However, the motion would not be incorporated into the license condition nor available to NRC inspectors for the purpose of clarification of the license terms.

[5] This Board's jurisdiction is limited to the determination of whether to approve the LES application for a license to construct and operate the proposed uranium enrichment facility and cannot be enlarged to encompass the oversight of any and all matters addressed in a settlement agreement simply by approving the terms of that agreement. *See Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985).

I. The Agreement Fails to Include an Affected Party

The settlement agreement reached by LES and the parties for State suffers from a fundamental flaw that precludes approval - it does not reflect any input, much less agreement, from a party that is subject to implementing obligations under its terms, the NRC Staff as the representative of the agency responsible for ensuring compliance with NRC requirements. The applicant and the parties representing the State have, by themselves, crafted license conditions that the Staff would be expected to oversee through inspection and to enforce.

The Staff plays a critical role in the licensing process by reviewing and assessing all proposed license conditions - whether in the form of an application, amendment or exemption. Here, the Board should not approve a settlement agreement proposing license conditions created without the Staff's input and consent. Indeed, if this practice were sanctioned, parties could agree to relax NRC requirements and request a Board's approval without obtaining any safety or environmental review by the Staff. From a practical standpoint, parties are generally not sufficiently knowledgeable about the Staff's processes to write license conditions that are amenable to Staff inspection and enforcement. Allowing parties to bypass Staff review and develop their own license terms in this manner would violate the fundamental premise that the NRC has exclusive authority to license and regulate the construction and operation of the facility which is the subject of the LES license application under the AEA. *See* 42 U.S.C. § 2132 et seq.[6]

[6] The Supreme Court determined that under the AEA, federal preemption applies to radiological safety issues because the federal government maintains complete control over nuclear safety in *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 212 (1983).

II. The Proposed License Conditions Are Unenforceable

The proposed license conditions are also fundamentally flawed because they attempt to impose conditions that are beyond the scope of a license issued to construct and operate the NEF. While the NRC's authority is exclusive, it is not unlimited. The NRC's licensing authority is implemented through the regulations issued by the Commission. As relevant to this application, 10 C.F.R. Parts 30, 40 and 70 set forth the governing Commission regulations. By their terms, these regulations govern the manufacture, production, transfer, receipt, acquisition, ownership, possession, and use of byproduct material, source material, or special nuclear material by NRC licensees. §§ 30.3., 40.3, and 70.1. The Commission does not have authority to oversee the activities of all entities who may be called upon to manage the low-level waste produced by the NEF, such as DOE, under the aegis of a license to construct and operate the NEF. Further, the Commission does not regulate actions of licensees which do not relate to the specific material and activities which are subject to the NRC license. Nevertheless, the proposed license conditions attempt to impose requirements that concern such actions. The settlement provisions containing license conditions which the Staff believes exceed NRC authority are discussed below:

> 2. "NMED, NMAG, and LES agree to the following condition: Onsite storage of DUF_6 shall be limited to a maximum of 5,016 48 Y cylinders (or the equivalent amount of uranium stored in other NRC accepted and Department of Transportation ("DOT") certified cylinder types) of DUF_6 . . . . In no event shall DUF_6 be stored in New Mexico other than at the NEF. . . .
>
> 3. Onsite storage of any one cylinder of DUF_6 shall be limited to a maximum of 15 years, beginning from the date that each cylinder is filled in accordance with LES' standard procedures . . . . In no event shall DUF_6 be stored in New Mexico other than at NEF."

In the last sentence in both of these license conditions, the parties purport to prohibit storage of DUF_6 at any location in the State of New Mexico except at the NEF. Clearly, this last provision goes well beyond the authority of the NRC license governing the construction and operation of the NEF. For example, should LES transfer DUF_6 to DOE for disposal and DOE decide to store the material at a location within the State of New Mexico, the NRC could not prohibit DOE from doing so by virtue of an LES license condition. The license regarding the NEF governs only actions by LES or its contractors or agents and only material relating to activities at the NEF.

5. "NMED, NMAG and LES agree to the following condition:

> In no event shall DUF_6 from the NEF be disposed of in the State of New Mexico and in no event shall LES construct or operate a deconversion facility in the State of New Mexico.
>
> LES agrees that if it decides to submit a request to the Secretary of the United States Department of Energy ("DOE") pursuant to Section 3113 of Public Law 104-134 . . . such a request will be made only if both LES and DOE determine that the NEF is not and will not be considered an "existing DUF_6 storage facility" within the meaning of Section 311 of Public Law 108-447."

This license condition prohibits the disposal of DUF_6 from the NEF in the State of New Mexico and prohibits LES from constructing or operating a deconversion facility in New Mexico. However, any license issued to LES would not extend to disposal of DUF_6 once it is transferred to another entity, such as DOE. Furthermore, any license for the NEF would be limited to activities related to that facility and cannot prohibit LES from engaging in other commercial activities such as the construction or operation of a deconversion facility in the State of New Mexico or govern the circumstances under which LES deals with other agencies such as DOE. Accordingly, the Staff considers this license condition unenforceable.

CONCLUSION

For the reasons stated above, the Staff objects to the proposed settlement agreement and requests that the agreement not be approved.

Respectfully submitted,

/RA by Kathleen A. Kannler for/

Lisa B. Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
this 5th day of July, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT" 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 5th day of July, 2005.

Administrative Judge * **
G. Paul Bollwerk, III
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: ckelber@att.net

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

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

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

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

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

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

James. R. Curtiss, Esq. **
Dave Repka, Esq. **
Martin O'Neill, Esq. **
Amy C. Roma, Esq.
Winston & Strawn
1700 K Street, N.W.
Washington, D.C. 20006
E-mail: jcurtiss@winston.com
drepka@winston.com
moneill@winston.com

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

/RA/

Kathleen A. Kannler
Counsel for NRC Staff