

July 5, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

July 6, 2005 (7:47am)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of

Docket No. 70-3103

Louisiana Energy Services, L.P.  
National Enrichment Facility

ASLBP No. 04-826-01-ML

MEMORANDUM ON BEHALF OF INTERVENORS  
NUCLEAR INFORMATION AND RESOURCE SERVICE  
AND PUBLIC CITIZEN  
IN RESPONSE TO JOINT MOTION FOR APPROVAL OF SETTLEMENT  
AGREEMENT

Preliminary statement

This memorandum is submitted on behalf of Intervenor Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") pursuant to the order of the Atomic Safety and Licensing Board (the "Board") dated June 27, 2005, in response to the Joint Motion for Approval of Settlement Agreement, dated June 23, 2005.

Factual background

Having been admitted as Intervenor in this case, the New Mexico Attorney General's Office ("NMAGO") and the New Mexico Environment Department ("NMED") have now reached terms of settlement with the Applicant, Louisiana Energy Services, L.P. ("LES") and seek Board approval. The settlement agreement provides, in brief, for the following terms:

- 1. Onsite storage of DUF<sub>6</sub> is limited to 5,016 type 48Y cylinders.

2. DUF<sub>6</sub> is not to be stored by LES in New Mexico except at the National Enrichment Facility ("NEF").
3. Storage of any one DUF<sub>6</sub> cylinder shall be limited to 15 years, subject also to the 30-year life of the license.
4. In determining the amount of financial assurance for dispositioning (*i.e.*, deconversion, transportation and disposal) of DUF<sub>6</sub> a contingency allowance of 25% shall be applied to estimated costs of dispositioning.
5. When stored DUF<sub>6</sub> reaches 4000 cylinders a 50% contingency allowance will apply unless an application is pending to construct a deconversion plant for the NEF.
6. When stored DUF<sub>6</sub> reaches 5016 cylinders a 50% contingency allowance will apply, if not already applicable, and shall continue until the stored DUF<sub>6</sub> falls below 98% of 5016 cylinders and (a) an application is pending to construct a deconversion plant for the NEF or has been approved or (b) LES is using another alternate method for removing the DUF<sub>6</sub> from New Mexico.
7. DUF<sub>6</sub> from the NEF shall not be disposed of in New Mexico, and LES shall not build or operate a deconversion plant in New Mexico.
8. In the event that LES requests that the Department of Energy ("DOE") accept for disposal DUF<sub>6</sub> from the NEF under Sec. 3113 of the USEC Privatization Act, such request shall not allow DOE to take possession of the DUF<sub>6</sub> at the NEF.
9. Conditions 1 through 8 shall be included in the NEF license.
10. Triennial reports on adjustment of the decommissioning cost estimate shall be provided to the NMAGO and NMED for comment and resolution in advance of submission to the NRC.

11. Financial assurance for disposition of DUF<sub>6</sub> shall be provided at the minimum amount of \$7.15/kgU.
12. LES shall not propose to the NRC that the amount of \$1.30 (added to LES's cost estimate of \$5.85 to make \$7.15) be eliminated from LES's cost estimate unless LES has a contractual agreement for removal of DUF<sub>6</sub> out of New Mexico.
13. Yearly reports shall be made concerning the number of DUF<sub>6</sub> cylinders stored and to be filled in the year.
14. NMED and NMAGO shall have access to information about the NEF radiation protection program
15. NEF shall comply with IAEA safeguards requirements.
16. LES shall provide to the State the NEF physical security plan.

Such terms are on their face non-prejudicial to NIRS/PC. NIRS/PC request that, in considering the proposed settlement, the Board keep in mind the following:

First, counsel for NIRS/PC have today received from Commission Staff counsel a memorandum opposing approval of the settlement. Staff raise questions as to (a) the scope and legal enforceability of the proposed settlement terms and (b) the practical difficulties of administering the agreed terms as license provisions. Staff suggest that terms in the settlement agreement restricting the storage, conversion or disposal of depleted uranium in New Mexico are unenforceable as license terms. Staff point out also that some of the terms of the settlement, such as those specifying a good faith application for a deconversion plant, could not effectively be applied in Staff's compliance efforts.

NIRS/PC are concerned about the matters raised by Staff and specifically do not wish the Commission to incorporate terms into the license, if it is issued, that cannot be effectively

enforced and applied in future years. NIRS/PC request that the concerns expressed by the Staff be addressed and resolved promptly. In our view it would be very unfortunate if terms agreed to in the year 2005 were found, decades later, to give none of the protection hoped for by the parties.

Second, it bears noting that NIRS/PC have been determined by the Commission to have standing to intervene in this matter. (Memorandum and Order, 60 NRC 223, 226 (Aug. 18, 2004). Further, the Board has determined that NIRS/PC are entitled to present and litigate several contentions before a license may be issued. (Memoranda and Orders dated July 19, 2004, Nov. 22, 2004, May 3, 2005). These contentions must be presented and resolved before the terms of a license may be decided, regardless of whether the parties to the proposed settlement have reached agreement on certain of the terms that they believe should be contained in a license.

Third, some of the contentions that NIRS/PC have presented may lead to the adoption of license terms different from the terms contained in the proposed settlement. For example, NIRS/PC submit that proceedings under Contentions NIRS/PC EC-5/TC-2 and EC-6/TC-3 will result in the determination that decommissioning costs (including costs for DUF<sub>6</sub> deconversion, transportation, and disposal) will be substantially in excess of \$7.15/kgU and, in fact, may be between \$20 and \$30/kgU. In such event the dollar amounts contained in the settlement agreement would be exceeded. Therefore, if it is to approve the proposed settlement agreement, the Board would need to understand that the dollar amounts stated in the settlement are to be regarded as minimum amounts, or a "floor," for a determination of decommissioning costs, but not a final amount. Rather, the final amount is to be determined only after all contentions admitted to this proceeding are resolved.

Last, the Board should adhere to the general rule in licensing proceedings when a settlement is reached between some, but not all, of the litigating parties: Such an agreement does not determine or affect the rights of non-settling parties to pursue contentions that they may make. *CFC Logistics, Inc.*, 60 NRC 475, 478, ASLBP No. 03-814-01ML (Nov. 4, 2004); *Sequoyah Fuels Corp.*, 1995 WL 761196 at 5, ASLBP No. 94-684-01-EA (Dec. 8, 1995). This principle underlies the joint motion, which states:

“The Board previously ordered the consolidation of AGNM TC-I with NIRS/PC EC-5/TC-2. In view of this Settlement Agreement, the dismissal of AGNM TC-I is appropriate and would leave to be addressed the issues originally raised by NIRS/PC in EC-5/TC-2. Further, in addition to EC-5/TC-2, nothing in the Settlement Agreement is intended to affect the rights of NIRS/PC relative to Contentions EC-3/TC-1 or EC-6/TC-3.” (Joint motion at 3 note 1).

Consequently, the making and approval of the Settlement Agreement may not, now or hereafter, be construed to affect the rights of NIRS/PC to make and pursue contentions in this proceeding.

Respectfully submitted,



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July 5, 2005

## CERTIFICATE OF SERVICE

Pursuant to 10 CFR § 2.305 the undersigned attorney of record certifies that on July 5, 2005, the foregoing Response on Behalf of Intervenors Nuclear Information and Resource Service and Public Citizen to Motion for Approval of Settlement Agreement was served by electronic mail and by first class mail upon the following:

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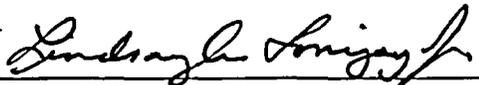
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