

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

DOCKETED 10/19/05

SERVED 10/19/05

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

Docket No. 70-3103-ML

CLI-05-21

MEMORANDUM AND ORDER

The Licensing Board has referred to the Commission a decision rejecting three late-filed contentions.¹ The Board’s decision responded to a motion by intervenors Nuclear Information and Resource Service and Public Citizen (NIRS/PC) seeking admission of two late-filed amended contentions and one late-filed supplemental contention.² The Board rejected all three contentions on timeliness and other grounds, but referred its decision to the Commission. The Board said its rulings raised “novel legal or policy issues.”³ We decline the referral.

¹ See Memorandum and Order (Ruling on Motion to Admit Late-Filed Amended and Supplemental Contentions)(Aug. 4, 2005)(unpublished).

² NIRS/PC sought to amend their “plausible strategy” contention on depleted uranium disposal strategies as well as their “decommissioning costs” contention. They also submitted a new environmental contention alleging a deficient Final Environmental Impact Statement (FEIS) analysis of depleted uranium disposal.

³ See Memorandum and Order (Aug. 4, 2005), *slip op.* at 13, 22; *see also id.* at 26.

It is the Commission's customary practice to accept Board certifications or referrals,⁴ and indeed our original hearing notice in this proceeding encouraged the Board to promptly certify all novel legal or policy issues that would benefit from early Commission consideration.⁵ Similarly, the NRC's rules of practice permit interlocutory Commission review of referred Board rulings "if the ... referral raises significant and novel legal or policy issues, and resolution of the issues materially advance the orderly disposition of the proceeding."⁶ Earlier in this proceeding we accepted the Board's referral of its rulings on five contentions.⁷

The problem here is that we cannot tell which specific aspects of the Board's 28-page decision it expects us to review. The Board's referral order does not expressly identify particular "legal or policy issues" warranting immediate appellate review. Instead, the Board has referred to us, wholesale, the entirety of "its rulings rejecting [the three] contentions."⁸ Significantly, however, the Board rejected all three contentions largely on the ground of untimeliness. By their nature, the timeliness of late-filed contentions turns on fact-specific considerations, such as when new documents or information first became available and how promptly intervenors reacted. "[R]outine ruling[s] on contention admissibility" are usually not occasions to exercise our authority to step into ongoing Licensing Board proceedings and undertake interlocutory

⁴ See, e.g., *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, 59 NRC 203, 209 (2004).

⁵ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-3, 59 NRC 10, 15-16 (2004).

⁶ 10 C.F.R. § 2.341(f)(1).

⁷ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223 (2004).

⁸ See Memorandum and Order (Aug. 4, 2005), *slip op.* at 27.

review,⁹ particularly when, as here, a Board hearing on related matters is about to take place.¹⁰ Forcing parties to file appellate briefs on the eve of a Board hearing, and then devoting our own attention to largely factual questions, is not a fruitful use of litigant or Commission resources. While we encourage licensing boards to certify or refer to us “novel legal or policy” matters, that does not mean that all complicated questions, whatever their nature, must be resolved by the Commission prior to final Board decisions.

The Board did find timely one of NIRS/PC's claims, a challenge to the Department of Energy's estimate of the costs of depleted uranium disposal.¹¹ The Board noted that the estimate had only been made available June 6, 2005, just 30 days prior to NIRS/PC's July 5 submission of their late-filed contentions. The Board went on, however, to find challenges to the DOE cost estimate beyond the scope of this proceeding. It said that in estimating the disposal costs, DOE had acted pursuant to its statutory authority under section 3113 of the USEC Privatization Act,¹² and that therefore DOE cost calculations “are outside the scope of this proceeding and lacking materiality in that the agency has no basis for assuming DOE has erred in computing its fees and no authority to direct or challenge DOE's fee estimates established

⁹ See *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466 (2004).

¹⁰ The next round of Board hearings is expected to begin on October 24, 2005. The Board anticipates hearing evidence on “plausible disposal strategy” and decommissioning “costs” issues. These are the subjects of two of NIRS/PC's late-filed contentions. See note 2, *supra*.

¹¹ The only other claim that the Board found timely related to an amendment to the Envirocare license (Envirocare Amendment 22). See *id.*, *slip op.* at 12. This amendment placed a radioactivity limit on depleted uranium. However, as the Board found, on its face the amendment at issue applies only to a “Custom Source-55 gallon drum containing Depleted Uranium shaving in a homogenous concrete mix,” which the staff indicates is a calibration source used by Envirocare. Thus, the radioactivity limit imposed by the amendment does not appear to apply to LES's depleted uranium, making NIRS/PC's amendment-based claim inappropriate for immediate consideration.

¹² 42 U.S.C. § 2297h-11.

pursuant to its statutory authority.”¹³ Whether the USEC Privatization Act precludes a challenge to DOE cost estimates is the kind of broad legal question that ordinarily might warrant interlocutory appellate review. But given that the upcoming Board hearing on LES’s “plausible” disposal strategy and on LES’s financial assurance is scheduled to begin imminently, we do not believe that calling for briefs and deciding this question now will “materially advance the ... disposition of the proceeding.”¹⁴ If warranted, we can review the USEC Privatization Act question on a focused petition for review following the Board’s final decision on financial issues.

In short, we have decided not to undertake interlocutory appellate review of the Board’s timeliness (and other) rulings on the late-filed contentions. Our refusal to accept the referral is not tantamount to approval or disapproval of the Board decision. NIRS/PC may seek Commission review of the Board’s decision rejecting their late-filed contentions following a final Board decision on the remaining NIRS/PC contentions scheduled for hearing this fall.

¹³ Memorandum and Order (Aug. 4, 2005), *slip op.* at 21-22.

¹⁴ 10 C.F.R. § 2.341(f)(1).

CONCLUSION

For the reasons above, the Commission declines review of the Board's August 2 ruling rejecting NIRS/PC's motion to admit late-filed amended and supplemental contentions.

IT IS SO ORDERED

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 19th day of October 2005.