

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

July 28, 2004 (2:26PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Paul B. Abramson
Dr. Charles N. Kelber

In the Matter of)

LOUISIANA ENERGY SERVICES, L.P.)

(National Enrichment Facility))

Docket No. 70-3103-ML

ASLBP No. 04-826-01-ML

**NEW MEXICO ATTORNEY GENERAL'S PETITION FOR LEAVE TO FILE A
MOTION FOR RECONSIDERATION**

Comes now the New Mexico Attorney General ("Attorney General") and,
pursuant to 10 C.F.R. § 2.323(e) and 10 C.F.R. § 2.345, respectfully petitions this Atomic
Safety and Licensing Board ("Board") for Reconsideration with respect to its designation
of NIRS/PC as the lead party for the Attorney General's Technical Contention i. Counsel
for the other parties have been contacted on this Petition. The New Mexico Environment
Department ("NMED") concurs in the Attorney General's Petition for Leave to File a
Motion for Reconsideration. Nuclear Regulatory Commission Staff and LES take no
position on the Petition at this time, but have indicated that they will respond to the
Petition in writing. NIRS/PC has not responded as of the time of the filing of this
Petition.

Background

In its Memorandum and Order (Rulings Regarding Standing, Contentions, and Procedural/Administrative Matters) (July 19, 2004), the Board admitted the Attorney General's first technical Contention, which addressed the sufficiency of LES's contingency factor. However, the Board consolidated this contention with NIRS/Public Citizen's Contentions fifth Environmental Contention and its second technical contention, which, in addition to addressing the sufficiency of LES's contingency factor, challenged the low estimate of LES's cost of capital and LES's incorrect assumption that the costs are for low-level waste only. Additionally, the Board designated NIRS/Public Citizen as the lead party for this contention.

Discussion

The Commission's regulations permit the filing of leave for a motion to reconsider where the movant demonstrates "compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid." 10 C.F.R. § 2.323(e). The Attorney General respectfully submits that the designation of NIRS/PC as lead party with respect to the Attorney General's contention regarding the sufficiency of LES's contingency factor presents such a compelling circumstance given the different interests of the respective parties that will be affected by the proceeding.

10 C.F.R. Section 2.316 provides

[o]n motion or on its or his own initiative, the Commission or the presiding officer may order any parties in a proceeding who have *substantially the same interest that may be affected by the proceeding* and who raises substantially the same questions, to consolidate their presentation of evidence, cross-examination, briefs, proposed findings of fact, and conclusions of law and argument. However, it may not order any

consolidation that would prejudice the rights of any party. A consolidation under this section may be for all purposes of the proceeding, all of the issues of the proceeding, or with respect to any one or more issues thereof.

10 C.F.R. § 2.316 (emphasis added). Accordingly, consolidation is appropriate only where the parties raise substantially the same question and where the parties have “substantially the same interest that may be affected by the proceeding.” 10 C.F.R. § 2.316. In this instance, while the Attorney General submits that the questions regarding the sufficiency of LES’s contingency factor are substantially the same, the interests affected by the proceeding and the respective parties goals are most certainly not.

NIRS/PC represents a distinct group of residents located within a close proximity to the proposed Uranium Enrichment facility in this proceeding. See Petition to Intervene by Nuclear Information and Resource Service and Public Citizen, p. 2 (“NIRS is a non-profit corporation with more than 6000 members, *48 of whom reside in New Mexico and several of whom live in southeastern New Mexico.*”)(emphasis added); see also Petition to Intervene by Nuclear Information and Resource Service and Public Citizen, p. 2 (“Public Citizen is a national non-profit consumer advocacy organization with 126,537 members nationwide, including *1628 members in New Mexico.*”) (emphasis added). New Mexico’s Attorney General, on the other hand, represents the interests of *all* citizens of New Mexico in this proceeding. See, e.g., NMSA 1978, § 8-5-2(J)(1975) (“[T]he attorney general shall . . . appear before local, state and federal courts and regulatory officers, agencies and bodies, to represent and to be heard on behalf of the state when, in [her] judgment, the public interest of the state requires such action”). Consequently, the interests affected by NIRS/PC litigation of this issue extend well beyond its cumulative

1676 members in New Mexico, and serve to displace the Attorney General's role in protecting all of the citizens of New Mexico.

Additionally, the expressed goals of the Attorney General and NIRS/Public Citizen are inconsistent, which is likely to affect the manner in which each party approaches discovery and cross-examination with respect to this contention. In fact, NIRS has a stated mission of promoting "a non-nuclear energy policy." See Petition to Intervene by Nuclear Information and Resource Service and Public Citizen, p. 2. This clearly is not the Attorney General's position. The Attorney General has made abundantly clear that "she does not wish or intend to prohibit the construction and operation of this facility, but rather seeks to ensure that the construction, operation, and decommissioning are accomplished with adequate security and protection for the citizens of New Mexico." New Mexico Attorney General's Reply in Support of Petition for Leave to Intervene and Request for Hearing, p. 4. Additionally, the Attorney General, unlike NIRS/PC, "seeks to assure that the limited resources of the State will not need to be expended to avoid or mitigate the safety and environmental hazards that will arise should the enrichment tails be abandoned on the site without safe and complete decommissioning." New Mexico Attorney General's Reply in Support of Petition for Leave to Intervene and Request for Hearing, p. 4. NIRS/PC does not, nor can it, claim that it would be responsible for mitigating the potential safety and environmental hazards should the enrichment tails be abandoned on site without safe and complete decommissioning. These are distinct interests, which merit designating both the Attorney General and NIRS/PC co-lead parties on the contingency factor issue.

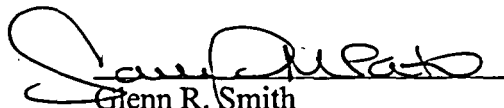
Finally, in accordance with the Commission's aggressive schedule and guided by the principle embodied in the rule regarding consolidation of claims, the Attorney General wishes to advise this Board that she will, to the greatest extent possible, work with NIRS/PC to avoid duplication and the presentation of cumulative evidence with respect to this issue should this issue be severed.

Conclusion

Provided the substantially different interests affected, the Attorney General respectfully requests that this Board designate both the Attorney General and NIRS/PC co-lead parties on the contingency factor issue. Again, the Attorney General will work closely with NIRS/PC to avoid duplication and the presentation of cumulative evidence with respect to this issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the NEW MEXICO ATTORNEY GENERAL'S PETITION FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION have been served upon the following persons by electronic mail, facsimile, and/or first class U.S. mail this 22nd day of July, 2004:

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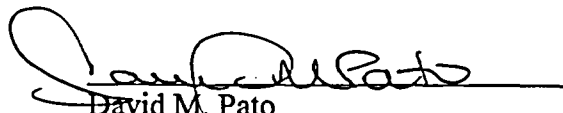
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July 22, 2004

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Re: **In the Matter of Louisiana Energy Services, L.P. (National
Enrichment Facility)**
Docket No. 70-3103

Dear Rulemaking and Adjudications Staff:

Enclosed are the original and three copies of the New Mexico Attorney General's Petition for Leave to File a Motion for Reconsideration for filing in the above matter. The New Mexico Attorney General would appreciate it if you would kindly file, endorse and return a copy in the enclosed self-addressed, stamped envelope provided herewith.

Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "David M. Pato".

David M. Pato
Assistant Attorney General
New Mexico Attorney General's Office

Enclosures