

August 31, 2004 (12:14PM)

UNITED STATES OF AMERICA
U.S. NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

In the Matter of:

LOUISIANA ENERGY SERVICES, L.P.

(National Enrichment Facility)

Docket No. 70-3103-ML

PETITION FOR RECONSIDERATION

The Attorney General of New Mexico ("AGNM") respectfully asks the Commission to reconsider its decision in CLI-04-25. For the reasons given below, and in accordance with 10 C.F.R. § 2.245, the AGNM believes this final Commission decision is clearly and materially wrong in ways that could not possibly have been anticipated inasmuch as it was issued after referral without affording the AGNM the courtesy and the right to support its position before the Commission. This Petition for Reconsideration is limited to those portions of CLI-04-25 that rejected the AGNM's timely effort, in response to the expressed concerns of NRC Staff and applicant, to clarify and consolidate the bases for its contentions EC-ii, EC-iii, and MC-i.¹

Argument

In her "New Mexico Attorney General's Reply in Support of Petition for Leave to Intervene and Request for Hearing," the AGNM replied (among other things) in timely fashion to the NRC Staff's and Applicant's concerns about the specificity and bases for its contentions EC-ii, EC-iii, and MC-i. This Reply explained (among other things) how all three proffered

¹ CLI-04-25 addresses specifically AGNM's EC-ii, EC-iii, and MC-i, referred to the Commission. However AGNM's TC-i, part of which was rejected by the Atomic Safety and Licensing Board without any referral to the Commission, raised the identical issue. See Reply at pp. 16-17. To this limited extent, this Petition for Reconsideration logically constitutes an appeal from the rejection of TC-i. In filing this Petition, the AGNM does not waive her right to appeal from other parts of the Atomic Safety and Licensing Board's decision at the conclusion of the proceedings before that Board.

contentions should be understood in important part as related to a concern that: (1) the application failed to provide a specific plan for disposition of the enrichment tailings that identified specific facilities and timeframes for processing and disposal; (2) as a result, no precise timetable was provided for when all of the tailings would be removed from the site; and (3) therefore adequate security needed to be provided for indefinite, safe storage of tailings on-site.² The Reply further provided a basis for this consolidated set of contentions firmly grounded in established NRC law and official DOE documents, as explained in an expert affidavit. No legitimate question is or has been raised about the specificity or adequacy of the basis of this consolidated contention. However, in CLI-04-25 the Commission affirmed the Atomic Safety and Licensing Board's rejection of these contentions on the basis that they "constituted a late attempt to reinvigorate thinly supported contentions" by virtue of "entirely new arguments in the reply briefs" that "in some places...present what effectively amount to entirely new contentions." As explained below, this ruling denies due process of law, violates the Administrative Procedure Act, and contravenes sound policy regarding the conduct of fair, effective, and efficient licensing hearings.

1. The Atomic Safety and Licensing Board's rejection of the consolidated contentions explained above constituted, in effect, its initial decision on these contentions. Under 5 U.S.C. § 557 (c) of the Administrative Procedure Act, the AGNM was entitled to file exceptions (or the procedural equivalent) with supporting reasons before that initial decision could be affirmed on review. As the Court explained in *Klinestiver v. DEA*, 606 F. 1128 (D.C. Cir. 1979), an agency conducting a formal adjudication "is required to provide an opportunity to file exceptions with the [agency head], even though petitioner had an opportunity to present proposed findings of fact to the [presiding officer]. The purpose of § 557 (c) is to permit parties'

² The AGNM believes that adequate insurance or surety to address her concerns is commercially available.

input at each level of the administrative decisional process. This right is unfulfilled if the party may present its views only at one level....” *Id.* at 1130. No such right was afforded to the AGNM; CLI-04-25 affirmed the Atomic Safety and Licensing Board and thereby finally decided the consolidated contentions without allowing the AGNM to speak one word in defense of her efforts to protect the citizens and environment of New Mexico.

2. CLI-04-25 also imposed a new procedural burden on a petitioner that is not sanctioned by the Commission’s rules and hinders the conduct of a fair and efficient hearing. The wording of contentions EC-ii, EC-iii, and MC-i clearly embrace the consolidated contention explicated above. EC-ii specifically alleged “the storage of large amounts of depleted uranium tails in steel cylinders...poses a distinct environmental risk to New Mexico,” EC-iii explained the applicant’s approach to tails disposition and alleged specifically how and why that these plans “present...large practical difficulties,” and MC-i stated a specific concern about the uncertainty in applicant’s disposition plans and the “potential adverse consequences resulting from this ambiguity.”³ Applicant and NRC Staff objected to the way these contentions were worded, apparently being uncertain what precisely the AGNM was alleging and the basis therefore. So, in response to NRC Staff’s and applicant’s objections, the AGNM did precisely the responsible thing—she explained and narrowed the focus of her contentions and provided citations to Commission precedent and DOE documents that explained the precise basis for her concerns.

The Commission has long made it clear that “intervenors must be heard in response [to objections to contentions] because they cannot be required to have anticipated in the contentions themselves the possible arguments their opponents might raise as grounds for dismissing them.” *Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1)*, ALAB-

³ Relatedly, TC-i stated that “the manner in which the disposal security will be calculated is unclear.

565, 10 NRC 521 at 525 (1979). The AGNM did nothing more than avail herself of this procedural right.⁴ To be sure, the consolidated contentions explained above (and in the Reply) are narrower and more precise than those she filed before, but the "Nontimely filings" provision in 10 C.F.R. § 2.309 (c) cannot be read (and to the AGNM's knowledge has never been read) to impose stringent limitations on a petitioner's ability to *narrow* her contentions. Indeed, the AGNM cannot imagine what regulatory policy would possibly be served by such a limitation, which would only encourage the conduct of hearings that are broader in scope than even the petitioners would desire.

In her Reply the AGNM provided additional bases for her consolidated contentions, but in doing so she did nothing more than react responsibly and on a timely basis to the applicant's and the NRC Staff's objections. If these additional bases cannot be taken into account, then arguments over admitting contentions will be reduced to an unproductive and juvenile shouting match where one side says a contention is too vague and unsupported, the other side is reduced to answering "is not," and the reply is "is so."

Moreover, there is nothing in the NRC's rules that prevented the AGNM from offering additional bases (as opposed to entirely new contentions) in her answer to applicant's and NRC Staff's objections. The focus of 10 C.F.R. § 2.309 (c) is on late-filed *contentions*, not late-filed bases, and Commission case law has specifically recognized the difference between the two. In *Yankee Atomic Elec. Co. (Yankee Nuclear Power Station)*, LBP-96-2, 43 NRC 61 (1996), *reviewed and rev'd on other grounds*, CLI-96-7, 43 NRC 235 (1996), the Atomic Safety and Licensing Board rejected an argument by applicant and NRC Staff that certain arguments in support of contentions must be rejected because they failed to meet the late-filed requirements of

⁴ In this respect, the AGNM's Reply was in fact "narrowly focused on the legal or logical arguments presented in the applicant/licensee of NRC staff answer," contrary to what the Commission states in CLI-04-25. The Commission's reference to "litigation practice generally" to support its position is inapposite for the same reason.

10 C.F.R. § 2.714 (a) (now essentially codified in § 2.309 (c)). The decision states “we conclude Petitioners’ assertions fall within the realm of a response to the [applicant] and Staff challenges to their contentions, which should be permitted prior to dismissing a contention, *see Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1)*, ALAB-565, 10 NRC 521, 525 (1979), rather than constituting a formal amendment of their supplemental petition to intervene that...would require an assessment of the late-filed factors....”*Id* at 83, note 17.⁵ *See also Georgia Power Co. (Vogtle Elec. Generating Plant, Units 1 and 2)*, LBP-94-27, 40 NRC 103, 105 (1994); *Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Plant, Units 1 and 2)*, LBP-93-1, 37 NRC 5, 20-21 (1993) (distinguishing additional bases from additional contentions).

In effect, by extending the Commission’s requirements for acceptance of late-filed contention to a petitioner’s efforts to narrow her contentions and to offer additional bases, CLI-04-25 announces a new rule of practice and imposes it retroactively on the AGNM without affording her an opportunity to comply. This the Commission cannot do without violating administrative due process. *See City of West Chicago v. NRC*, 701 F. 2d 632, 647 (7th Cir. 1983) (“We do not doubt the authority of NRC to change its procedural rules on a case by case basis *with timely notice to the parties involved*” (*Emphasis added*); *Brown Express, Inc. v. ICC*, 607 F. 2d 695 (5th Cir. 1979).

3. Finally, the AGNM represents to the Commission that, if her consolidated contentions (as explained above) are admitted upon reconsideration, she will attempt to minimize delays to the extent possible so that admission will not impose a significant delay upon the completion of the proceeding. Moreover, she points out that, in accordance with section 193 of the Atomic Energy Act of 1954, as amended, and the Notice of Hearing, Section II. F. of CLI-

⁵ There is nothing in the Commission’s recent amendments to its rules of practice that suggests either the *Allens Creek* or *Vermont Yankee* cases are overruled.

04-03, the Atomic Safety and Licensing Board is obligated to determine whether the application contains sufficient information and the NRC Staff review has been adequate even with respect to matters not admitted in controversy. The AGNM submits that her consolidated contentions pose a significant safety and environmental issue that the Atomic Safety and Licensing Board cannot ignore in meeting this obligation. Therefore, admission of her consolidated contentions will not expand the scope of the proceeding.

Respectfully submitted,

PATRICIA A. MADRID
New Mexico Attorney General

A handwritten signature in black ink, appearing to read "Glenn R. Smith", is written over a horizontal line.

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DATED: August 24, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

Docket No. 70-3103-ML

ASLBP No. 04-826-01-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the Request for Reconsideration have been served upon the following persons by electronic mail, facsimile, and/or first class U.S. mail this 24th day of August, 2004:

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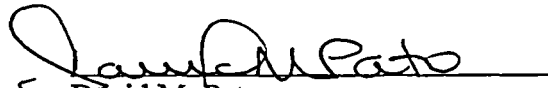
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August 24, 2004

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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 is the original and three copies of the PETITION FOR RECONSIDERATION. ~
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 cursive script, reading "David M. Pato".

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

Enclosures