

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE THE COMMISSION

In the Matter of

LOUISIANA ENERGY SERVICES, L.P.

(National Enrichment Facility)

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Docket No. 70-3103-ML

NRC STAFF RESPONSE TO
NEW MEXICO ENVIRONMENT DEPARTMENT'S
MOTION FOR RECONSIDERATIONINTRODUCTION

Pursuant to 10 C.F.R. § 2.323(e), the Nuclear Regulatory Commission Staff ("Staff") hereby responds to the Petition for Reconsideration submitted by the New Mexico Environment Department ("NMED") on August 27, 2004.¹ The Staff contends that, because no grounds exist for reconsideration of the Commission's decision, NMED's Petition for Reconsideration should be denied.

BACKGROUND

On December 12, 2003, Louisiana Energy Services, L.P. ("LES") submitted an Application for an NRC license to authorize construction and operation of the National Enrichment Facility, a gas centrifuge uranium enrichment facility, to be located in Lea County, New Mexico. In response to a Notice of Receipt of Application and Notice of Hearing regarding the Application,² several

¹ See "New Mexico Environment Department's Motion For Leave to File Motion for Reconsideration and Motion for Reconsideration", dated August 27, 2004.

² See "In the Matter of Louisiana Energy Services, L.P. (National Enrichment Facility); Notice of Receipt of Application for License; Notice of Availability of Applicant's Environmental Report; Notice of Consideration of Issuance of License; and Notice of Hearing and Commission (continued...)"

petitioners requested leave to intervene in the proceeding, including NMED.³ The Staff and LES filed responses to the NMED hearing request, objecting to several of the contentions on the grounds that they lacked sufficient specificity to satisfy the NRC's contentions requirements.⁴ NMED filed a reply to the responses of the Staff and LES, which set forth additional information regarding her contentions and, for the first time, submitted supporting affidavits.⁵ The Board granted the Staff's request for leave to file a surreply to NMED's reply,⁶ which the Staff filed on May 24, 2004. In its surreply, the Staff argued that NMED had exceeded the scope of a proper reply pleading by setting forth new arguments and contentions, and that, therefore, the reply could not be properly considered in determining the admissibility of NMED's contentions.⁷

Following an initial prehearing conference on June 15, 2004, the Board, on July 19, 2004, issued a Memorandum and Order denying admission of several of NMED's contentions on the ground that, as initially submitted, they did not satisfy the requirements of 10 C.F.R. § 2.309(f) because they lacked the necessary specificity and basis. The Board, in its order, did not consider the additional information and arguments first presented in NMED's reply, finding that the reply

²(...continued)
Order," 69 Fed. Reg. 5873 (Feb. 6, 2004).

³See "The New Mexico Environment Department's Request for Hearing and Petition for Leave to Intervene" dated March 23, 2004. NMED subsequently organized its contentions pursuant to a Board order in its "Supplemental Request of the New Mexico Environmental Department for Hearing and Petition for Leave to Intervene" dated April 23, 2004. ("Petition") The New Mexico Attorney General, Nuclear Information and Resource Service, and Public Citizen also sought intervention in the proceeding.

⁴ See "NRC Staff Response to Request of the New Mexico Environment Department for Hearing and Petition for Leave to Intervene" dated April 19, 2004. ("Staff Response").

⁵ See "New Mexico Environment Department's Reply in Support of Petition for Leave to Intervene and Request for Hearing" dated May 10, 2004.

⁶ See "Order (Granting Requests to File Surreply)" dated May 20, 2004.

⁷ See "NRC Staff Surreply to New Mexico Environment Department's Reply in Support of Petition for Leave to Intervene and Request for Hearing" dated May 24, 2004. ("Surreply")

filings in several instances constituted untimely attempts to amend NMED's original petitions and were not accompanied by any attempt to address the late-filing factors in section 2.309(c), as required by NRC regulations.⁸ However, the Board referred the issue of whether the replies could be considered to the Commission under 10 C.F.R. § 2.323(f), along with determinations on the admissibility of the affected contentions.⁹

On August 18, 2004, the Commission issued an Order in which it found that NMED's reply should not be considered to the extent that it presented new arguments and contentions without addressing the late-filing factors in 10 C.F.R. § 2.309(c).¹⁰ On August 27, 2004, NMED filed a Petition for Reconsideration before the Commission.¹¹

DISCUSSION

NMED advances two arguments in support of its petition for reconsideration. First, NMED repeats the argument it made to the Board in oral argument that its reply pleadings should have been considered in their entirety in determining the admissibility of its contentions because the reply pleadings detailed additional bases, not additional contentions, and therefore, were within the proper scope of a reply.¹² Second, NMED argues that if, as the Commission found, its reply pleadings did set forth new contentions, that such contentions should have been nonetheless

⁸ See *Memorandum and Order* (Rulings Regarding Standing, Contentions, and Procedural/Administrative Matters), LBP-04-14, 60 NRC ___, slip op. at 16, July 19, 2004.

⁹ *Id.* at 18, 38.

¹⁰ CLI-04-25, August 18, 2004, slip op. at 2.

¹¹ See "New Mexico Environment Department's Motion For Leave to File Motion for Reconsideration and Motion for Reconsideration", dated August 27, 2004.

¹² See "New Mexico Environment Department's Petition for Reconsideration" at 4-5, dated August 27, 2004.

considered based upon the criteria for admitting late-filed contentions.¹³ Neither argument constitutes appropriate grounds for reconsideration, and NMED's request should be rejected on that basis. Moreover, NMED has failed to demonstrate any error in the Commission's decision.

A. Standard for Reconsideration

In January, 2004, the NRC amended its regulations to raise the standard for a motion for reconsideration.¹⁴ Under 10 C.F.R. § 2.323(e), a motion for reconsideration may only be granted upon a petitioner's showing of compelling circumstances, and may only be filed upon leave of the presiding officer or the Commission. A motion for reconsideration should only be granted where manifest injustice would occur in the absence of reconsideration, and the claim for reconsideration could not have been raised earlier.¹⁵ Reconsideration is an extraordinary remedy and should never be used as an opportunity to argue facts and rationales which were, or could have been, raised earlier.¹⁶ Because petitioner has not shown compelling circumstances justifying reconsideration and relies solely on arguments which were, or could have been raised earlier, petitioner's Motion for Reconsideration should be denied.

B. Reconsideration is Improper and Unwarranted

First, NMED claims that the Commission was incorrect in finding that its reply filing set forth new contentions and new information.¹⁷ However, this claim is not a proper basis for a petition for reconsideration. A properly supported reconsideration motion "is one that does not rely

¹³ See *id.* at 5.

¹⁴ See 69 Fed. Reg. 2182, 2207 (January 14, 2004) (The old standard allowed for motions requesting that the presiding officer reexamine existing evidence that may have been misunderstood or overlooked, or to clarify a ruling on a matter.).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See "NMED's Motion for Leave to File Motion for Reconsideration and Motion for Reconsideration" at 4-5, dated August 27, 2004.

upon...previously presented arguments that have been rejected.”¹⁸ NMED’s claim is just such an argument, as it relies on the theory, previously made in oral argument before the Board and rejected,¹⁹ that the information contained in its reply brief did not amount to new or amended contentions, but only new bases that therefore should have been considered. Despite this argument, the Commission found that NMED’s reply pleading “constituted a late attempt to reinvigorate thinly supported contentions by presenting entirely new arguments in the reply briefs,” and, in some places, presented “what effectively amount to entirely new contentions.”²⁰ NMED’s claim in this regard is, thus, one that has been previously raised and rejected and is an improper basis for a petition for reconsideration.²¹

NMED also claims that, to the extent that its reply filing did set forth new contentions, application of the late-filing criteria warrant admission in this proceeding.²² NRC regulations do provide for the filing of late contentions based upon a balancing of several factors, including good cause, the nature of petitioner’s right to be a party, and the extent to which petitioner’s participation will aid or hinder the proceeding. See 10 C.F.R. § 2.309(c). The late filing factors must be shown affirmatively by the petitioner at the time the contention is presented. See 10 C.F.R. § 2.309(c)(2).

¹⁸ *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 73-74, (August 5, 1998); *see also, Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980).

¹⁹ See “NMED’s Motion for Leave to File Motion for Reconsideration and Motion for Reconsideration” at 5, dated August 27, 2004; *see also* Transcript of Hearing Held in Hobbs, New Mexico on June 15, 2004, pp. 20-25.

²⁰ *Memorandum and Order*, CLI-04-25, at 2, August 18, 2004.

²¹ See *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation) LBP-98-17, 48 NRC 69 (August 5, 1998); *see also* 69 Fed. Reg. 2182, 2207 (January 14, 2004) (“Reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were...discussed earlier.”).

²² See “NMED’s Motion for Leave to File Motion for Reconsideration and Motion for Reconsideration” at 5, dated August 27, 2004.

Here, however, NMED did not seek the admission of late-filed contentions, or indeed make any mention of the late-filing criteria, when raising new issues to the Board after the deadline for filing contentions had passed. Accordingly, the Board acted appropriately in not considering the issue of whether late-filed contentions should be admitted.²³ Because this issue was not considered by the Board, it was neither referred nor appealed to the Commission. The Commission, therefore, did not have this issue before it for consideration. In the absence of consideration by the Commission of the issue of whether late-filed contentions submitted by NMED were admissible, there can obviously be no reconsideration now that NMED has raised the argument for the first time. NMED must present arguments on the admissibility of contentions first the Board, not the Commission.

For these reasons, NMED's request for reconsideration should be rejected as improper. In addition, as discussed below, NMED has failed to identify any error in the Commission's decision, much less "clear and material error...that renders the decision invalid" so as to justify reconsideration, as required by 10 C.F.R. § 2.323(e). Indeed, the Commission properly identified NMED's reply filings for what they were - untimely and impermissible attempts to amend contentions or supply entirely new contentions without addressing the late-filing requirements in 10 C.F.R. § 2.309(c).

NRC regulations require that an intervenor come forward with specific and adequately supported contentions in its original petition.²⁴ The regulations require that contentions identify

²³ Even if the Board had ruled on this issue, it would have had no option but to find that NMED had failed to demonstrate that the admission of late-filed contentions was warranted because of NMED's failure to make any showing on the late-filing criteria. See, *Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1&2), CLI-98-25, 48 NRC 325, 347, n.9 (1998).

²⁴ See C.F.R. § 2.309; see also *In the Matter of the Duke Energy Corporation*, CLI-99-11, 49 N.R.C. 328, 334-35, 338 (1999); *In the Matter of Arizona Public Service Company*, CLI-91-12, 34 N.R.C. 149, 155-56 (1991).

specific points of disagreement on material safety or environmental matters and that they be accompanied by supporting documentation of the facts alleged or expert opinion that provides the bases for the contentions.²⁵ The requirement is intended to ensure that the adjudicatory process is used to address real, concrete specific issues that are appropriate for litigation, in order to ensure the most efficient allocation of administrative resources possible.²⁶ The Commission has specifically amended the regulations to ensure that admissible contentions are brought and supported in the original petition for intervention, and declined to allow free amendment to and addition of contentions.²⁷ Allowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements,²⁸ by permitting the intervenor to initially file vague, unsupported, and generalized allegations and simply recast, support, or cure them later. The filing of such vague, unsupported, and generalized contentions controverts NRC regulations and policy.²⁹

In this case, the NMED failed to meet the contentions requirements in its initial Petition for Intervention.³⁰ The Staff noted this in its response to the initial Petition,³¹ and petitioner

²⁵ 69 Fed. Reg. 2182, 2201-02 (January 14, 2004).

²⁶ *Id.* at 2202; see also *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 N.R.C. 235, 248 n.7 (1996).

²⁷ *Id.* 2202, 2238.

²⁸ See *id.* at 2202.

²⁹ See, e.g., *Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), 48 N.R.C. 132 (1998); 10 C.F.R. § 2.309(f).

³⁰ See, e.g. Board Memorandum and Order, *In the Matter of Louisiana Energy Services, L.P.*, at 20-25, ASLBP No. 04-826-01-ML, July 19, 2004.

³¹ See "NRC Staff Response to Request of the New Mexico Environmental Department for Hearing and Petition for Leave to Intervene at 12, dated April 30, 2004.

acknowledged that its original petition did not satisfy all of the contention rule requirements.³² Then, in its reply, the NMED exceeded the proper scope of a reply pleading by presenting new expert affidavits, new arguments, and in some cases, entirely new contentions.³³ As the Commission stressed in its affirmation of the Board's order, NRC's contention admissibility and timeliness requirements "demand a level of discipline and preparedness on the part of petitioners, who must examine the publicly available material and set forth their claims and the support for their claims at the outset."³⁴

NMED claimed that it did not have time or resources to meet NRC's contentions requirements.³⁵ However, as the Commission noted, if circumstances made it impossible for NMED to produce admissible contentions within the required time, NMED could have requested an extension of time.³⁶ Alternatively, NMED could have submitted supplemental arguments, information and contentions accompanied by information addressing the NRC's late-filing requirements, found in 10 C.F.R. § 2.309(c). NMED, however, did not do either, but instead attempted to circumvent the late-filing requirements by amending and adding new contentions in

³² See "NMED's Motion for Extension of Time to File Reply in Support of Petition for Leave to Intervene" at 2, April 22, 2004.

³³ See Commission Memorandum and Order, *In the Matter of Louisiana Energy Services, L.P.*, at 2, CLI-04-25, August 18, 2004. See also 69 Fed. Reg. 2182, 2203 (January 14, 2004) (noting that "any reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer," and not contain new arguments, new information, or new contentions).

³⁴ *Id.* At 2. (Internal citation omitted).

³⁵ See "NMED's Motion for Extension of Time to File Reply in Support of Petition for Leave to Intervene at 2 (April 22, 2004).

³⁶ See Commission Memorandum and Order, *In the Matter of Louisiana Energy Services, L.P.*, at 3, CLI-04-25, August 18, 2004. (noting that NMED requested and was granted an extension of time in filing its reply).

its reply filing.³⁷ The Board and Commission were, therefore, correct in not considering the additional contentions and additional information first submitted as part of a reply pleading.³⁸ Accordingly, NMAG has failed to establish any compelling circumstances that might warrant reconsideration by the Commission of its decision.

CONCLUSION

For the foregoing reasons, the Staff respectfully requests that the Commission deny NMED's Petition for Reconsideration.

Respectfully Submitted,

/RA/

Lisa B. Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
this 7th day of September, 2004

³⁷ See *In the Matter of Private Fuel Storage, L.L.C.*, ASLBP No. 97-732-02-ISFSI, Sept. 25, 2000 (explaining that new contentions that did not address the late-filing factors could not be considered as admissible late-filed contentions). Also see Part C., *supra*, regarding petitioner's claim based on the late-filed contentions criteria.

³⁸ *Id.* at 2.

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BEFORE THE PRESIDING OFFICER

In the Matter of)

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) Docket No. 70-3103

) ASLBP No. 04-826-01-ML
)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO NEW MEXICO ENVIRONMENT DEPARTMENT'S MOTION FOR RECONSIDERATION" 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 7th day of September, 2004.

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