

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 ATTORNEY GENERAL'S
MOTION FOR LEAVE TO FILE A LATE-FILED CONTENTIONINTRODUCTION

Pursuant to 10 C.F.R. § 2. 323(c), the Nuclear Regulatory Commission Staff ("Staff") hereby responds to the New Mexico Attorney General's ("AGNM") Motion for Leave to File a Late-Filed Contention.¹ As discussed below, the Staff submits that this motion is improperly filed before the Commission, and should instead, be filed with the Atomic Safety and Licensing Board ("Licensing Board").

BACKGROUND

Following receipt and docketing of the application by Louisiana Energy Services, L.P. ("LES") to construct and operate the proposed enrichment facility, the Commission published an Order noticing the hearing to be conducted pursuant to the Atomic Energy Act. In that Order, the Commission, among other matters, provided guidance with respect to certain issues, including the appropriate body to make the determinations regarding the admissibility of contentions.²

¹ "New Mexico Attorney General's Motion for Leave to File a Late-Filed Contention" and "New Mexico Attorney General's Brief in Response to Commission's Order on NIRS/PC Contention D and Attorney General's Late-Filed Contention" dated September 3, 2004.

² "Notice of Receipt of Application For License; Notice of Availability of Applicant's (continued...)"

Specifically, the Commission indicated that the Licensing Board would rule upon the admissibility of contentions. Only the admissibility of environmental justice contentions were to be resolved by the Commission.

In response to this Notice, AGNM sought to intervene in the hearing. By Order issued July 19, 2004, the Licensing Board designated to preside in this proceeding granted each of the petitions, including AGNM's, and admitted certain contentions while others were referred to the Commission.³ The Commission, in an Order issued on August 18, 2004, agreed to review the waste classification issue presented upon referral, noting that the Board had considered it a novel legal or policy question.⁴ Specifically, the Commission stated that it would accept consideration of the contention that DU does not meet the Part 61 definition of low-level radioactive waste, and therefore would not be suitable for transfer to DOE under the USEC Privatization Act. *Id.* at 5. In doing so, the Commission noted that there appeared to be some confusion regarding its original hearing notice with regard to this issue, and directed the parties to file briefs. *Id.* at 6.

AGNM responded to the Commission Order with the subject motion requesting leave to file a late-filed contention and a Brief in support thereof. The Staff now responds to AGNM's Motion.

DISCUSSION

The Staff has interpreted the AGNM's proposed filings to constitute two separate requests. To the extent the AGNM seeks admission of a late-filed contention, the Staff submits that the request is improperly filed with the Commission, and should, instead, be filed with the Licensing

²(...continued)
Environmental Report; Notice of Consideration of Issuance of License; And Notice of Hearing and Commission Hearing and Commission Order," CLI-04-03, 69 Fed. Reg. 5873 (February 6, 2004).

³ *Memorandum and Order* (Rulings Regarding Standing, Contentions, and Procedural/Administrative Matters), LBP-04-14 ("Contention Order").

⁴ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC ____, slip op. at 4-5 (2004).

Board. On the other hand, to the extent the filing is meant to respond to the Commission's request for briefs on the referred depleted uranium question, the Staff will respond to the arguments raised by AGNM, to the extent necessary, in the Staff's reply brief on September 17, 2004.

As reflected above, and as the Staff indicated in its Initial Brief to the Commission on classification of depleted uranium as waste,⁵ in this proceeding, the appropriate venue to seek admission of late-filed contentions is the Licensing Board, not the Commission. AGNM's proposed late-filed contention does not involve environmental justice matters which, according to the Commission Order, are the only contentions the admissibility of which would necessitate Commission involvement. If, however, the Commission in its discretion decides to rule upon the admissibility of the proposed late-filed contention, the Staff requests the opportunity to respond to the admissibility of the proposed contention at that time.

To the extent the AGNM is responding to the Commission's request for briefs on the question of whether or not depleted uranium is "waste", the Staff will address any of those substantive arguments in its reply brief to the Commission on Friday, September 17, 2004.

CONCLUSION

For the reasons stated above, the Staff submits that AGNM's motion is improperly filed before the Commission. If the Commission decides to rule upon the admissibility of the late-filed contention, the Staff requests the opportunity to respond to its merits at that time.

Respectfully submitted,

/RA/

Angela B. Coggins
Counsel for NRC Staff

Dated at Rockville, Maryland
this 16th day of September, 2004

⁵ See "NRC Staff Brief on Classification of Depleted Uranium as Waste" filed September 8, 2004, pg. 1, fn 2.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO NEW MEXICO ATTORNEY GENERAL'S MOTION FOR LEAVE TO FILE A LATE-FILED CONTENTION" 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 16th day of September, 2004.

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