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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

October 20, 2004 (1:02PM)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of )

LOUISIANA ENERGY SERVICES, L.P. )

(National Enrichment Facility) )

Docket No. 70-3103

NMED'S MOTION TO FILE LATE FILED CONTENTIONS

Introduction

Pursuant to 10 C.F.R. § 2.309(c), the New Mexico Environment Department (NMED) respectfully moves to file late-filed contentions. NMED requests to participate as a party on three contentions: (1) that Louisiana Energy Services, L.P.'s (LES) strategy for disposition of the depleted uranium is not plausible, (2) that storage of the depleted uranium over the life of the facility is not protective of the health and safety of the public, and (3) that the depleted uranium does not represent low level waste.

Pursuant to 10 C.F.R. § 2.323(b), NMED has contacted counsel for the other parties. The New Mexico Attorney General (NMAG) and Nuclear Information and Resource Service/Public Citizen (NIRS/PC) do not object to the motion. Nuclear Regulatory Commission (NRC) Staff and LES will respond in writing.

Factual and Procedural Background

On March 23, 2004, NMED filed its Request for Hearing and Petition for Leave to Intervene (Petition) in this proceeding pursuant to 10 C.F.R. § 2.309(c). NMED filed its Petition as the agency responsible for environmental management for the State of New Mexico and on behalf of the Governor of the State, Bill Richardson. In the Petition, NMED alleged, among

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other things, that LES's proposal to store the depleted uranium to be generated by its facility proposed over the life time of the facility was not acceptable to the State of New Mexico and that it may pose a threat to the protection of health and safety of the public. NMED Pet., p. 2. NMED alleged further that the depleted uranium "should not be stored over the life of the Facility, but should be disposed of in a timely and safe manner." *Id.* NMED alleged as well that the depleted uranium "should be categorized as a waste, and the Application should adequately provide for timely and safe disposal of the waste." *Id.* at p. 3.

NRC Staff complained strenuously in its answer to NMED's Petition that NMED had not complied with the requirements of 10 C.F.R. § 2.309(f) and that NMED's contentions were not sufficiently detailed. *See generally* NRC Staff Surreply in Response to NMED Reply.

On April 22, 2004, NMED filed a motion for extension of time to file its reply. In that motion NMED acknowledged that its Petition "[did] not satisfy each of the requirements of 10 C.F.R. § 2.309(f) for each of its contentions" and that "NMED did not initially have adequate time to prepare its petition." NMED Mot. for Extension of Time to File Reply, p. 2. NMED requested until May 14, 2004 "an opportunity to make the necessary showing in order to intervene."

On April 27, 2004, the Atomic Safety and Licensing Board (Board) granted NMED's motion for extension in part and allowed NMED to file its reply by May 10, 2004.

NMED then retained two experts, Robert Alvarez and George Anastas, to assist the State in development of its contentions. Mr. Alvarez is a former senior policy advisor to the Secretary of the United States Department of Energy (DOE) and Mr. Anastas is a health physicist with expertise in radiation safety. *See* CVs of R. Alvarez and G. Anastas, respectively, attached to Reply in Supp. of NMED Pet. (NMED Reply).

On May 14, 2004, NMED filed its reply, and set forth additional bases for its contentions, based on the opinions of Mr. Alvarez and Mr. Anastas. NMED alleged that “LES does not put forth in its application to the NRC a plausible strategy for treatment and disposition of the DUF6 that the facility will generate.” NMED Reply, p. 2. As part of NMED’s argument that LES did not have plausible strategy for disposal, NMED argued that LES’s proposal for DOE disposition was not plausible, in part, because classification of the waste as low level radioactive waste was problematic because of its high radioactivity. *Id.* at p. 6. NMED alleged further that “storage of the DUF6 on site for up to and exceeding thirty years would be inimical to the health and safety of the public. 10 C.F.R. § 40.32(d).” *Id.* at 2.

In support of these arguments, NMED detailed the bases for why LES’s strategy for disposition of the depleted uranium was not plausible, why storage of the depleted uranium over the life of the facility was not protective of the health and safety of the public, and why the depleted uranium does not represent low level waste. *See* NMED Reply, pp. 3-13. NMED incorporates herein the bases set forth in its reply, pp. 3-13.

On May 12, 2004, LES and NRC Staff moved for leave to file surreplies to NMED’s reply. NMED agreed that LES and NRC Staff should be given the opportunity to file surreplies in light of the additional detail in its reply. The Board allowed LES and NRC Staff to file surreplies by May 17, 2004.

In its surreply, LES did not oppose admission of NMED’s contentions related to storage, the plausibility of LES’s proposed disposition of the DUF6, or whether the depleted uranium is low level radioactive waste. *See* Surreply of LES to NMED Reply, pp. 2-3. NRC Staff generally opposed NMED’s reply as improperly supplementing its Petition.

The Board heard argument on the matter in an initial prehearing conference in Hobbs,

New Mexico on June 15, 2004 and, in its July 19, 2004 Memorandum and Order, pp. 17-18, denied admission of NMED's storage, plausible strategy for disposition and low level waste contentions on the ground that NMED's Petition did not satisfy the requirements of 10 C.F.R. § 2.309(f) and that it would not consider the additional material in NMED's Reply. The Board made a similar ruling with respect to contentions raised by the NMAG. The Board, however, referred the issue to the Commission. Mem. and Order (July 19, 2004), p. 18.

In its August 18, 2004 order, the Commission affirmed the Board, finding that NMED and the NMAG put forth new material which constituted an attempt to amend their petitions without addressing the late-filing factors in 10 C.F.R. § 2.309(c). Comm. Order, pp. 2-3. On August 27, 2004, NMED filed a Motion for Leave to File Motion for Reconsideration and Motion for Reconsideration (Mot. for Reconsideration) with the Commission requesting reconsideration of its ruling that it would not consider the material in NMED's reply in support of its petition. In that motion, NMED addressed the Commission's concern that NMED had not addressed the late-filing factors in 10 C.F.R. § 2.309(c), and set forth the reasons why NMED would satisfy those requirements. *See* Mot. for Reconsideration, pp. 5-8. That motion is pending before the Commission. NMED requested to participate as a party for purposes of the contentions for which it now seeks admission.

On August 27, 2004, NMED also filed a Motion for Clarification requesting clarification whether it could participate both as a party under 10 C.F.R. § 2.309 on its admitted contention and as an interested State for purposes of other contentions. On September 14, 2004, the Board issued an order finding that NMED could not participate in both capacities.

#### Argument

Section 2.309(c) allows for late-filed contentions, based upon a balancing of the

following factors:

- (1) Good cause, if any, for failure to file on time;
- (2) The nature of petitioner's right to be a party in the proceeding;
- (3) The nature of petitioner's property, financial or other interest in the proceeding;
- (4) The possible effect that any order may have on petitioner's interest;
- (5) The availability of other means by which petitioner's interest may be protected;
- (6) The extent to which petitioner's interest may be protected by other parties;
- (7) The extent to which petitioner's participation will broaden the issues or delay the proceeding;
- (8) The extent to which petitioner's participation will assist in the development of a sound record.

NMED will address each of these factors.

First, there is good cause for NMED's failure to put forth in sufficient detail the bases for its contentions. As NMED explained in its motion for extension of time to file a reply, it did not have adequate time and resources to prepare its Petition. While NMED acknowledges that it had sixty days from the date of notice of the application to prepare a petition, counsel for NMED did not receive actual notice of the proceeding until approximately thirty days prior to the filing date.

Furthermore, in virtually all legal proceedings in which NMED is involved, NMED uses expertise within the agency to develop its technical positions. In this proceeding, however, NMED has no in-house expertise on the storage, plausible strategy for disposition, and low level waste issues. NMED does have in-house expertise on the adequacy of the radiation protection program, a contention of NMED's that has been admitted.

In addition, NMED has not been involved in any of the prior LES proceedings because

LES had applied to operate in other states. NMED, therefore, had no familiarity with the issues surrounding the facility. Given the novelty and complexity of the issues, NMED did not have adequate time to identify all issues, retain experts to analyze and report on the issues, and put forth all details in support of its contentions in its Petition. By the time NMED filed its reply, however, it was able to put forth the necessary detail with the aid of outside consultants.

Second, NMED's right to be a party is without question: NMED has standing as a party pursuant to 10 C.F.R. § 2.309(d)(2)(i) and has been admitted as a party for purposes of its radiation protection program contention.

Third, NMED's interest in this proceeding is unique and compelling: NMED represents the State of New Mexico, through the Governor, and is the state agency responsible for protecting the State's environment. NMED's contention – that LES has no plausible strategy for disposition of the depleted uranium it will generate – represents a genuine and real concern for the citizens of New Mexico and our environment. As outlined in NMED's Reply, proper disposition of depleted uranium at the DOE facilities in the United States has proven to be a critical problem for decades. Indeed, the United States currently stores the largest quantity of depleted uranium in the world, approximately 732,000 metric tons. NMED Reply, p. 3. The State of New Mexico has a keen interest in not being added to the list of states with tons of depleted uranium for which there is no firm disposal pathway.

Fourth, because the LES proposes to establish its facility in New Mexico, it is the interests of this State, its citizens and its environment that will be effected by this proceeding.

Fifth, this proceeding provides the most direct means by which the State of New Mexico can address the long term storage and disposition issues raised by location of the LES facility in the State.

Sixth, there are no other parties that can adequately protect the interests of the State of New Mexico. While NIRS/PC also are concerned with the disposition of the depleted uranium, and have been admitted as a party for purposes of that contention, they do not represent the interests of the entire State, but of their members and, at present, the NMAG has not been permitted to put forth her contentions regarding disposition of the waste.<sup>1</sup>

Seventh, NMED's participation will not significantly broaden the issues or delay this proceeding: NIRS/PC's contention on plausible strategy for disposition has already been admitted and it has already put into play the low level waste issue. The trial on these issues is not set to begin until November 5, 2005. Therefore, there is more than adequate time for NMED's contentions to be addressed without prejudicing any party. Indeed, these are contentions that have been put forth by NMED since at least May 14, 2004, and the other parties have already been given an opportunity to respond to those contentions. LES, in fact, does not object to the admission of these contentions. Critically, there is no prejudice to any party by admission of NMED's contentions.

Eighth, NMED's participation will assist in the development of a sound record because the State of New Mexico's interests will be fully represented and because NMED has retained credible experts to pursue critical issues in this proceeding.

On balance, therefore, NMED should be allowed to put forth its contentions.

### Conclusion

NMED has met the requirements of 10 C.F.R. § 2.309(c). NMED, as representative of the Governor of the State of New Mexico and as steward of the State's environment, occupies a unique position in this proceeding, and should be allowed to participate fully. NMED, therefore,

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<sup>1</sup> As both NMED and the NMAG have pointed out, each represents separately elected officials, both of which have constitutional authority to represent the State in this proceeding.

respectfully requests the Board to admit its contentions regarding on-site storage of the depleted uranium, plausible strategy for disposition, and low level waste.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT



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Certificate of Service

I hereby certify that a copy of the foregoing pleading was served by mail and, as indicated by an asterisk (\*), by electronic mail on this 20th day of October, 2004.

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