

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

LOUISIANA ENERGY SERVICES, L.P.)

(National Enrichment Facility))

Docket No. 70-3103-ML

ASLBP No. 04-826-01-ML

NRC STAFF RESPONSE TO MATTERS REFERRED
BY THE COMMISSION IN CLI-04-35INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(e) and the December 9, 2004 Order of the Atomic Safety and Licensing Board, ("Board") the Nuclear Regulatory Commission staff ("Staff") hereby files its response to the late-filed contentions of the Attorney General of New Mexico ("AGNM")¹ and the New Mexico Environmental Department ("NMED")², which the Commission referred to the Board in its December 8, 2004 Memorandum and Order.³ As discussed below, the Staff submits that the Board has already rejected NMED's contention under the late-filing rules. In addition, the Staff submits that the AGNM has not met the late-filing criteria. Therefore, neither the AGNM's nor the NMED's request to file late-filed contentions should be granted.

BACKGROUND

On August 27, 2004, and September 13, 2004, respectively, the NMED and the AGNM filed motions before the Commission requesting the admission of contentions on the ground that

¹ See "New Mexico Attorney General's Motion for Leave to File a Late-Filed Contention", dated September 13, 2004.

² See "NMED's Motion for Leave to File Motion for Reconsideration and Motion for Reconsideration", dated August 27, 2004.

³ See CLI-04-35, 60 NRC __, __, slip op. at 7-8 (Dec. 8, 2004).

a balancing of the late-filing factors in 10 C.F.R. § 2.309(c)(1)(i-viii) favored admission.⁴ On October 20, 2004, NMED then filed a motion before the Board requesting admission of the same contentions under the late-filing criteria.⁵ On November 22, 2004, the Board denied NMED's motion to file late-filed contentions on the grounds that NMED did not satisfy the late-filing criteria.⁶ In a Memorandum and Order on December 8, 2004, the Commission referred to the Board for disposition the requests of the NMED and the AGNM for the admission of late-filed contentions.⁷ In its December 9, 2004 order, the Board requested that parties respond to the matters referred to the Board by the Commission.⁸

DISCUSSION

In CLI-04-35, the Commission referred to the Board two requests by intervenors AGNM and NMED, originally made before the Commission, to file late-filed contentions.⁹ In doing so, the Commission noted that the Board was better suited than the Commission to make a determination regarding whether the contentions should be admitted under the late-filing criteria.¹⁰

⁴ See "New Mexico Attorney General's Motion for Leave to File a Late-Filed Contention", dated September 13, 2004; "NMED's Motion for Leave to File Motion for Reconsideration and Motion for Reconsideration", dated August 27, 2004.

⁵ See "NMED's Motion to File Late-Filed Contentions", dated October 20, 2004.

⁶ See Memorandum and Order (Ruling on Late-Filed Contentions) at 6-7, dated November 22, 2004.

⁷ See CLI-04-35, 60 NRC ___, ___, slip op. at 7-8 (December 8, 2004).

⁸ See Order (Schedule for Responses in Connection with Matters Remanded in CLI-04-35), dated December 9, 2004.

⁹ See CLI-04-35 at 8.

¹⁰ *Id.* The Commission noted that it was referring to the Board only the contentions presently before the Commission, related to the onsite storage of depleted uranium and the proper waste classification of depleted uranium, by the NMED and the AGNM, respectively. All other contentions the AGNM and NMED appeared to address in their motions, the Commission noted, were not before the Commission and could not be brought before the Commission until the conclusion of the hearing. *Id.* at 8-9.

A. NMED's Late-Filed Contention

The Commission referred to the Board NMED's late-filed contention dealing with the onsite buildup of depleted uranium.¹¹ The Commission noted that the Board had before it a similar motion by NMED for leave to file late contentions,¹² including the onsite buildup of depleted uranium contention that the Commission referred to the Board in its December 8, 2004 Order.¹³ In fact, the Board has already considered whether NMED satisfied the late-filing criteria in 10 C.F.R. § 2.309(c)(1)(i-viii) and ruled against admission of NMED's contentions, including NMED's contention related to the onsite storage of depleted uranium, in a memorandum and order on November 22, 2004.¹⁴ Therefore, the Board has already explicitly rejected NMED's contention regarding the onsite buildup of depleted uranium under the late-filing factors.¹⁵ To the extent that a further response on the part of the Staff is necessary, the Staff references its arguments against late admission of NMED's contentions made in its Response to NMED's Late-Filed Contentions, filed November 5, 2004,¹⁶ as instructed by the Board in its December 9, 2004 Order.¹⁷

¹¹ *Id.* at 8.

¹² See CLI-04-35 at 8, n. 29.

¹³ See "NMED's Motion to File Late-Filed Contentions", dated October 20, 2004. NMED's Motion to File Late-Filed Contentions merely incorporated the same information, bases, and contentions it first set forth in its Reply in Support of NMED's Petition to Intervene, information that the Board referred to the Commission in its July 19, 2004 order. Therefore, NMED's Motion to File Late-Filed Contentions contains a request to file the same late contention, related to onsite storage of depleted uranium, that the Commission referred to the Board in CLI-04-35.

¹⁴ See Memorandum and Order (Ruling on Late-Filed Contentions), at 6-7, dated November 22, 2004.

¹⁵ *Id.*

¹⁶ See "NRC Staff's Response to NMED's Late-Filed Contentions", dated November 5, 2004.

¹⁷ See Memorandum and Order (Schedule for Responses in Connection with Matters Remanded in CLI-04-35) at 1-2, dated December 9, 2004.

B. AGNM's Late-Filed Contention

In CLI-04-35, the Commission also referred to the Board a request by the AGNM seeking admission of a newly-proposed contention, related to the waste classification of depleted uranium under Part 61.¹⁸ The Commission is presently considering the issue of the proper waste classification of depleted uranium and the AGNM had the opportunity to fully brief the issue before the Commission, and did so.¹⁹ On December 8, 2004, the Commission referred the AGNM's contention to the Board for a determination of whether the AGNM satisfied the late-filing criteria.²⁰

The newly proposed contention states as follows:

Although also mixed waste, the enrichment tails that LES proposes to produce are low-level waste but there is inadequate material in the application upon which to base a classification under Part 61. Unless the Nuclear Regulatory Commission properly classifies the tails, there will be no disposal options for them.²¹

Because the AGNM originally submitted its late-filed contention before the Commission and the Staff argued in response that the late-filed contention was more properly a matter for the Board,²² the Staff has not yet addressed whether the AGNM satisfies the late-filing criteria. The criteria to be considered when determining the admissibility of late-filed contentions are set forth in 10 C.F.R. § 2.309(c)(1)(i-viii). The NRC's new Part 2 adjudicatory regulations, which became

¹⁸ See CLI-04-35 at 9; see also "New Mexico Attorney General's Motion for Leave to File a Late-Filed Contention", dated September 13, 2004.

¹⁹ See "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 13, 2004.

²⁰ See CLI-04-35 at 9.

²¹ See "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 13, 2004.

²² See "NRC Staff Response to New Mexico Attorney General's Motion for Leave to File a Late-Filed Contention", dated September 16, 2004.

effective January 14, 2004, and which apply to the LES proceeding²³, set out eight criteria for late filing.²⁴ The factors are:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of petitioner's right under the [Atomic Energy] Act to be made a party to the proceeding;
- (iii) The nature and extent of petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the petitioner's interest;
- (v) The availability of other means whereby petitioner's interest will be protected;
- (vi) The extent to which petitioner's interests will be represented by existing parties;
- (vii) The extent to which petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which petitioner's participation may reasonably be expected to assist in developing a sound record.²⁵

The petitioner is obliged to affirmatively address the lateness factors in its petition as well as to demonstrate that a balancing of the factors warrants overlooking the petition's lateness.²⁶ Factors

²³ See 69 Fed. Reg. 5873, 5874 (*Louisiana Energy Services*, 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 Order) (Feb. 6, 2004).

²⁴ See 69 Fed. Reg. 2182 (January 14, 2004) (final rule); 10 C.F.R. § 2.309(c).

²⁵ 10 C.F.R. § 2.309(c)(1)(i-viii).

²⁶ *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 n.22 (1985).

two, three, and four essentially deal with the question of whether a petitioner has standing to intervene.²⁷ Because the question of standing has already been settled for the AGNM, it is only necessary to address factor one, good cause, and factors five through eight.²⁸

1. Good Cause

The first and most important of the late-filing factors is whether good cause exists that will excuse the petitioner's late filing.²⁹ The AGNM argues that it has good cause for filing late because the Commission's decision in CLI-04-25 clarified that the issue of the proper waste classification of depleted uranium was a litigable issue, a fact that was not "clearly apparent" to the AGNM prior to the Commission's decision.³⁰

The AGNM's purported reason for its late filing does not constitute good cause. In making a judgment about good cause, the emphasis is on when sufficient information was made available to the petitioner so as to make it possible for the petitioner to raise and frame the contention with reasonable specificity and basis.³¹ Good cause does not exist for nontimely filings when the late-filed contentions were not based on new information arising after the original deadline and therefore could have been included in a timely petition.

In this case, the AGNM had the information it needed to frame its contentions with reasonable specificity and did not do so in a timely manner. The fact that the AGNM had the

²⁷ See Memorandum and Order (Ruling on Late-Filed Contentions), at 5-6, dated November 22, 2004.

²⁸ *Id.*

²⁹ *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 221 (2000); *aff'd*, CLI-04-04, ___ NRC ___ (Feb. 5, 2004).

³⁰ See "New Mexico Attorney General's Motion for Leave to File a Late-Filed Contention" at 2, dated September 13, 2004. ("AGNM's Late Filed-Contention")

³¹ See *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 313 (1999); *interlocutory review denied*, CLI-00-02, 51 NRC 77 (2000).

information necessary to file a timely contention regarding the proper classification of depleted uranium is made all the more clear by the fact that another intervenor, the Nuclear Information and Resource Service and Public Citizen, ("NIRS/PC") was able to file a timely contention challenging the proper waste classification of depleted uranium.³²

The AGNM's contentions could have been raised with the available information in a timely manner and therefore, good cause does not exist for AGNM's late filing.

2. The Other Late-Filing Criteria

When good cause is lacking for a late-filed contention, the petitioner must make a compelling showing on the remaining late-filing factors.³³ The AGNM has not made a "compelling showing" with regard to the remaining factors and fails to satisfy some of them entirely. As stated above, because the question of the AGNM's standing has already been settled, we need only deal with factors five through eight.

The fifth and sixth criteria are the availability of other means by which petitioner's interest may be protected and the extent to which petitioner's interest may be protected by other parties. Here, another party to the proceeding, NIRS/PC, already raised the issue of the proper classification of the enrichment tails in an admitted contention. Presently, the issue of waste classification is before the Commission and AGNM took the opportunity to fully brief the issue.³⁴ For these reasons, these factors generally weigh against admission of this contention.

The seventh late-filing factor is the extent to which petitioner's participation will broaden the

³² See Memorandum and Order, LBP-04-14, 60 NRC 40, slip op. at 15 (July 19, 2004).

³³ *Private Fuel Storage*, LBP-00-14, 51 NRC 301, 310 (2000); see also *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986).

³⁴ See "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 13, 2004.

issues or delay the proceeding. At this point in time, the issue of waste classification has already been fully briefed before the Commission, and any ruling by the Commission will be dispositive. Admitting a contention on essentially the same issue, but premised on the new bases offered by the AGNM would broaden the issues to be adjudicated.³⁵ Therefore, this factor weighs against the admission of this contention.

The final late-filing factor is the extent to which petitioner's participation will assist in the development of a sound record. This factor weighs heavily against the AGNM. Precedent makes clear that when a petitioner addresses the sound record criterion, it must set out with specificity "the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony."³⁶ The Board has held in a number of decisions that when a petitioner merely identifies its prospective witnesses and asserts the qualifications of each, but does little in the way of summarizing planned testimony or identifying specific matters petitioner plans to address, that the sound record factor provides "little, if any, weight in favor of admitting the contention."³⁷

In this case, the AGNM has not identified planned testimony or witnesses at all, let alone done so with any specificity. The AGNM has merely made a conclusory and unsupported statement that "permitting her the opportunity to file a late-filed contention would assist in

³⁵ See *id.* at 2-3. The AGNM, unlike NIRS/PC, argues that the depleted uranium tails are low-level radioactive waste but that the applicant has failed to provide sufficient material in its application upon which to base a classification and that the tails cannot be classified without development of a record on hazards to intruders.

³⁶ *Private Fuel Storage*, LBP-00-27, 52 NRC 216, 224.

³⁷ *Id.*; see also *Private Fuel Storage*, LBP-00-14, 51 NRC 301, 310; *Private Fuel Storage*, LBP-99-43, 50 NRC 306, 315 ("Petitioners are required to provide the Board with a real clue about what they would say to support the contention beyond the minimal information they provide for admitting the contention") (internal citation omitted); *Private Fuel Storage*, LBP-01-13, 53 NRC 319, 328; *Duke Cogema Stone and Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), 2002 WL 31652507, slip op. at 5 (November 19, 2002), CLI-02-24, 56 NRC 335 (2002).

developing a full and sound record.”³⁸ This is clearly inadequate for purposes of the sound record criterion, which the Board has held requires more specificity than that required to file a timely contention.³⁹

For these reasons, the AGNM does not have good cause for its late-filed contentions. The AGNM has not made the compelling showing on the remaining late-filing factors that is necessary in the absence of good cause. Therefore, the AGNM's request to file a late-filed contention must be rejected.

CONCLUSION

For the foregoing reasons, the requests of the AGNM and NMED to file late-filed contentions should be denied.

Respectfully Submitted,

/RA/

Lisa Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
this 17th day of December, 2004

³⁸ See AGNM's Late-Filed Contention at 7. Although the AGNM did submit the affidavit of Allen L. Messenger along with its Brief in Response to the Commission's Order on NIRS/PC Contention D and Attorney General's Late-Filed Contention, it did not refer to its planned testimony or any prospective witness in its Motion to File a Late-Filed Contention in which it addressed the sound record criterion, as the Board requires. Therefore, there is no way of knowing whether this is information or planned testimony that would be intended to assist in developing a sound record, or whether it was merely submitted in support of the AGNM's brief before the Commission on the waste classification issue.

³⁹ See *Private Fuel Storage*, LBP-99-43, 50 NRC 306, 315.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO MATTERS REFERRED BY THE COMMISSION IN CLI-04-35" 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 17th day of December, 2004.

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