

April 19, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
LOUISIANA ENERGY SERVICES, L.P.)	Docket No. 70-3103
)	
(National Enrichment Facility))	
)	

NRC STAFF RESPONSE TO THE NEW MEXICO ENVIRONMENT DEPARTMENT'S
REQUEST FOR HEARING AND PETITION FOR LEAVE TO INTERVENE

INTRODUCTION

In response to the Notice of Hearing published by the Commission on January 30, 2004,¹ the New Mexico Environment Department ("NMED"), on March 24, 2004, filed a request for hearing and request for leave to intervene as a party in the hearing to be held before the Atomic Safety and Licensing Board on the application submitted by Louisiana Energy Services, L.P. ("LES") to construct and operate a centrifuge enrichment facility in Eunice, New Mexico. "The New Mexico Environment Department's Request for Hearing and Petition for Leave to Intervene" ("Petition"). As discussed below, NMED² has standing to participate in the hearing as a representative of the State of New Mexico³ and has advanced one admissible contention.

¹On January 30, 2004, the Commission issued an Order and published a notice regarding receipt of the application and consideration of the license application, and a notice of hearing. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-03, 60 NRC____ (2004), "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." 69 Fed. Reg. 5873 (February 6, 2004).

²NMED, in its hearing request, represents that it is an agency of the State of New Mexico, has the authority to serve as agent for the State in matters of environmental

BACKGROUND

On December 15, 2003, LES filed an application for a license to possess and use source, byproduct and special nuclear material and to enrich natural uranium to a maximum of five percent U-235 by the gas centrifuge process. Pursuant to the Atomic Energy Act and the Commission's regulations at 10 C.F.R. § 70.23a, a hearing on the application is required. Accordingly, the Commission issued an Order noticing receipt of the application and consideration of the license application, and of the hearing. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-03, 60 NRC ____ (2004), "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." In that Order, the Commission, among other matters, directed that the hearing in this proceeding will be subject to the recently revised provisions in 10 C.F.R. Part 2, and provided a broad overview of the requirements regarding the admissibility of contentions that may be proffered by petitioners. In its Order, the Commission also addressed specific issues which could be raised

management in which the United States is a party, and has been designated by the Governor of the State as the single representative for the State in this hearing. Petition at 1.

³In a filing submitted on April 6, 2004, the New Mexico Attorney General ("NMAG") asked to be admitted as a separate party to this hearing given its status under the State constitution and authority under State law to appear on behalf of the State before regulatory bodies, citing the Commission's observation in promulgating the new Part 2 regulations that when a State constitution provides that both a Governor and another State official may represent the interests of the State before the NRC, the Governor and the other State official may be considered separate potential parties. 69 Federal Register 2,182 at 2,222 (January 14, 2004). "The New Mexico Attorney General's Request for Hearing and Petition For Leave to Intervene," April 5, 2005, at 1-2. The Staff will respond to the NMAG's petition in a separate filing on April 30, 2004. The Licensing Board, by Memorandum and Order dated April 15, 2004, has directed that the NMED and NMAG each examine the contentions of the other and identify which, if any, are the same in substance and whether they wish to adopt the contentions of the other. While the Staff does not take a position as to whether the New Mexico constitution provides that two separate State officials may appear in this proceeding, it respectfully submits that the efficiency of the hearing process would be greatly served if a single representative were designated to represent all of the State's interests. Further, the Board, pursuant to 10 C.F.R.

in the hearing, noting that a number of Commission decisions had been issued in the course of a previous enrichment facility licensing proceeding which could be relied upon as precedent.⁴

DISCUSSION

In order to be admitted as a party in a hearing, a petitioner must establish standing by showing that it has a distinct, redressible interest in the action subject to the proceeding. When the petitioner is a State, however, the Commission's regulations provide that the standing requirements need not be addressed when the facility subject to the proceeding is located within the State's boundaries. 10 C.F.R. § 2.309(d)(2). NMED has represented that it has been authorized to act on behalf of the Governor of New Mexico in this proceeding. Accordingly, NMED has adequately established standing.

In addition to establishing standing, a petitioner must proffer at least one admissible contention that meets the requirements of 10 C.F.R. § 2.309(f). As explained in the Commission Order, that regulation requires that contentions include: (1) a specific statement of the issue of law or fact to be raised or controverted, (2) a brief explanation of the basis for the contention, (3) a demonstration that the issue is within the scope of the proceeding, (4) a demonstration that the issue is material to the findings the NRC must make regarding the action subject to the proceeding, (5) a concise statement of the alleged facts or expert opinions which support the contention and on which the petitioner intends to rely at hearing, including references to the specific sources and documents, and (6) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. NMED has proffered five contentions it seeks to have admitted in this proceeding. Each will be addressed separately

§2.319, may order consolidation of parties who have substantially the same interests and raise substantially the same questions.

⁴These decisions are: *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-92-7, 37 NRC 93 (1992); *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-97-15,

below. As discussed, only contention 5e meets the standards for admission set forth in the regulations.

NMED Contention 5a:

In its Application, LES requests to be allowed to buildup [sic] or store depleted uranium (DU) in the form of uranium hexafluoride (UF₆) throughout the life of the Facility. Application, § 4.13, Environmental Report, vol. 2. The life of the Facility is anticipated to be thirty years. Buildup of DU waste for thirty years is not acceptable to the State of New Mexico and is contrary to the representations made by LES to the State. Storage of such highly dangerous waste over a thirty year period may pose a threat to the protection of health and property. 10 C.F.R. § 40.32(c). Furthermore, LES's proposed plan for storage of this waste is not sufficiently detailed, and does not demonstrate that issuance of a license will not be inimical to the health and safety of the public. 10 C.F.R. § 40.32(d). Additionally, the DU waste could become a stockpile of legacy waste and, in the event of a default by LES, could become an above ground waste storage complex, for which adequate financial assurance is not provided. See Paragraph 5(c) below.

In this contention, NMED objects to the possibility that LES may store depleted uranium ("DU") throughout the life of the facility. As discussed more fully below, however, NMED's proposed contention is unduly vague, fails to provide the requisite basis and raises matters which are outside the scope of this proceeding.

In the application, LES has described two strategies it considers to be plausible for disposition of the DU generated during the life of the facility. National Enrichment Facility Environmental Report ("NEF ER") Vol. 2, 4.13.3.1.3⁵. This approach is consistent with the Commission's statement, when noticing consideration of the earlier application for an enrichment facility, that the applicant need only present a plausible strategy for disposition of

46 NRC 294 (1997); and *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998).

⁵The Application submitted for the National Enrichment Facility is comprised of a Safety Analysis Report, consisting of five volumes, an Environmental Report, consisting of three volumes, a Fundamental Nuclear Material Control Plan, consisting of one volume, and an Emergency Plan, consisting of one volume.

DU. 56 Fed. Reg. 23,313 (May 21, 1991).⁶ The two strategies described by LES are: (1) Private sector conversion of the tails, and (2) Department of Energy conversion of the tails. Under both options, storage of the tails will be necessary for some period of time until they are transported to the conversion facility. NEF ER Vol. 2, 4.13.3.1 Storage is to be onsite in uranium byproduct cylinders which are placed on a storage pad in an open air storage yard. NAF ER Vol. 2, 4.13.3.1.1 With respect to the time period that storage will occur, LES states that storage will not extend beyond the life of the plant. *Id.*

Because the application contemplates that DU will be stored at the site for some period of time, LES has addressed health, safety and security issues associated with the manner in which the DU will be stored. Specifically, the application describes the environmental, health and safety aspects of storing DU in uranium byproduct cylinders in open air storage yards. NEF ER Vol. 2, 4.13.3.1.1, 4.13.3.1.2. As a necessary part of its review, the NRC Staff ("Staff") will determine whether those provisions are adequate to assure that public health, safety and security are adequately protected before issuing the requested license. While NMED claims that the plan for storage is not sufficiently detailed, it has not addressed any specific aspects of the proposed plan it finds insufficient.

When, as here, the application addresses an issue which a petitioner wishes to contest in a hearing, Commission regulations require the petitioner to examine the application, identify the specific deficiencies it wishes to address, and provide support for its contention that the application is deficient. *Baltimore Gas and Electric Company* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-19, 48 NRC 132, 134 (1998); *Duke Energy Corp.* (Oconee

⁶Citing this Order, the Licensing Board in the earlier proceeding rejected a contention alleging that the applicant had failed to submit a plan for disposal of uranium tails, noting that there is no NRC regulatory requirement that a concrete plan be in place for disposal of the tails that the facility would generate each year. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center) LBP-91-4, 34 NRC 332, 337 (1991).

Nuclear Station, Units 1, 2 73), CLI-99-11, 49 NRC 328, 333 (1999). The petitioner's obligation is iron clad; it is required to examine the publicly available documentary material with sufficient care to uncover information that could serve as the foundation for a specific contention. *Duke Power Co.* (Catawaba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), *rev'd in part on other grounds*, CLI-83-18, 17 NRC 1041 (1983). In this instance, NMED has failed to provide any basis for its allegation that LES's proposed plan for storage of DU is not sufficiently detailed and that LES fails to demonstrate that public health and safety will be protected. Indeed, NMED does no more than state that storage for thirty years *may* pose a threat to health and property.

NMED, in its contention, makes the claim that storage of DU at the facility is not acceptable to the State and is contrary to representations made by LES to the State. These aspects are clearly outside the scope of this proceeding, which is limited to determining whether a license should be issued by the Commission. This Board, and the NRC, does not have the authority to interpret or apply any State requirements or agreements with LES.

NMED has also expressed its concern, in its basis for this contention, that the DU waste could accumulate and be left abandoned at the site in the event of a default by DES. However, the regulations provide a safeguard against this possibility by requiring that licensees provide assurance that funds will be available for decommissioning even in the event that the licensee defaults on its financial obligations. See, 10 C.F.R. § 70.25.

Accordingly, contention 5a should be rejected.

NMED Contention 5b:

Section 4.13.3.1.3 of the Application states that LES may classify the DU waste as resource material instead of as waste. The waste generated by LES's uranium enrichment process, UF₆ or uranium oxide waste, should not be classified as resource material. LES has not identified any use or economically

viable market for this material. Therefore the material cannot be properly categorized as resource material. The material should be categorized as a waste, and the Application should adequately provide for timely and safe disposal of this waste.

NMED is correct in stating that LES has represented in its application that the DU generated at the site could be treated as resource material or as waste material. Noting that the NRC has expressed an expectation that LES will indicate in its license application whether the DU will be treated as a waste or a resource, LES has stated that it will make this determination and notify the NRC. NEF ER Vol. 2, 4.13.3.1.3. The classification of the material will necessarily depend, in part, on whether an economically viable market exists for the material. However, it is premature at this time to determine that LES will not be able to demonstrate that the DU is a potential resource. Accordingly, contention 5b should be rejected.

NMED Contention 5c:

The proposed financial assurance amounts set forth in the Application are inadequate. Sections 4.13-10 and 10.3 of the Application set forth a cost estimate to decommission the Facility of \$850,000,000.00 and a cost estimate of approximately \$736,000,000.00 to dispose of the total DU. The cost estimate provided in the Application fail to include the cost of conversion to uranium oxide and is based upon a disposal rate of \$2.51 per pound of DU. Radiation specialists from NMED contacted outside entities (including Thomas Gray and Associates and US Ecology) to determine the actual cost, based on a price scale or regulated rate, to dispose of the amounts of DU set forth in the Application. NMED's review found the actual cost for disposal to be between \$1,900,000,000.00 and \$7,200,000,000.00. The cost estimate for disposal of the

DU, and the financial assurance associated with that cost, therefore, are not adequate and do not meet the requirements 10 C.F.R. § 70.25(a), (e).

While NMED contends that both LES's \$850 million facility decommissioning cost estimate and its \$736 million estimated cost for disposal of the depleted uranium hexafluoride (DUF₆) from the enrichment process are inadequate, NMED focuses only on the DUF₆ lifetime disposal cost. The proposed contention meets none of the requirements of 10 C.F.R. § 2.309, in that NMED states nothing beyond its bare assertion that: "The proposed financial assurance amounts set forth in the Application are inadequate." The Board should summarily reject admission of this portion of the proposed contention.

As to the second aspect of proposed Contention 5c, NMED begins with a statement that is plainly incorrect. At page 3, NMED states: "The cost estimate in the Application fail (sic) to include the cost of conversion to uranium oxide." To the contrary, LES states at page 10.3-2 of the National Enrichment Facility Safety Analysis Report ("NEF SAR"): "The costs in Table 10.3-1, represent the LLNL [Lawrence Livermore National Laboratory]-estimated life-cycle capital, operating, and regulatory costs, in 2002 dollars, *for conversion of 378,600 MTU [metric tons of Uranium] over 20 years, of DUF₆ to DU₃O₈. [depleted uranium octaoxide]....*" [emphasis added]. See also NEF ER Section 4.13.3.1.6, "Costs Associated with UF₆ Tails Conversion and Disposal." NMED continues by asserting that its estimate of tails disposal cost is between \$1.9 billion and \$7.2 billion. Petition p. 3. The basis for this alternative estimate is stated to be contacts with two outside entities, "Thomas Gray and Associates and US Ecology." *Id.* This generalized reference to two corporate entities does not satisfy the provisions of 10 C.F.R. § 2.309(f)(v) that a contention must:

Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue

Accordingly, NMED has both inaccurately stated a fundamental fact underlying proposed Contention 5c and has failed to identify with the required specificity facts, expert opinions, sources or documents in support of its proposed contention. With these basic deficiencies, NMED has not shown that there exists a “genuine dispute...with the applicant...on a material issue of fact or law,” as required by 10 C.F.R. § 2.309(f)(v), and the contention should therefore be rejected.

NMED Contention 5d:

The Application does not set forth any information regarding the economic viability of the proposed Facility. The economic viability cannot be evaluated without LES providing market projections and a business plan that take into consideration the market need for enriched uranium and a realistic cost of waste disposal. The economic viability of the proposed Facility is of critical importance to the State of New Mexico in light of the fact it is the State that will inherit the Facility and its waste should LES default on decommissioning the Facility or clean-up of its venture proves to be economically unsound.

NMED’s contention 5d must be rejected because it asks that the Board make a finding which is not required for licensing of this facility. The Commission’s regulations nowhere require that LES establish that the proposed facility be economically viable. Indeed, NMED does not cite any NRC requirement or precedent for assessing the economic viability of a facility. Instead, NMED repeats its concern that LES will not decommission and remediate the site in the event that the business venture fails.

Fundamentally, it is not the role of the NRC to assess whether the proposed facility will succeed as a business matter. Rather, the NRC has established, by regulation, that LES must provide adequate assurance of funding for decommissioning before a license may be issued.

10 C.F.R. § 70.25. In addition, the regulations require a determination of whether LES “appears to be financially qualified” to engage in the proposed activities for which it is seeking a license.

10 C.F.R. § 70.23(a)(5). As the Commission previously determined, the ultimate question to be considered regarding financial qualifications is whether the applicant will be able to raise sufficient capital to construct and operate the plant. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 308 (1997). If, at some point in the future, the project proves a failure in the marketplace, the lack of economic success will not adversely affect the public health and safety or the common defense and security.

LES, in its application, addresses financial qualifications in Section 1.2.2 of the NEF SAR Vol. 1, which states:

1. Construction of the facility shall not commence before funding is fully committed. Of this full funding (equity and debt), the applicant must have in place before constructing the associated capacity: (a) a minimum of equity contributions of 30% of project costs from the parents and affiliates of the partners; and (b) firm commitments ensuring funds for the remaining project costs.
2. LES shall not proceed with the project unless it has in place long-term enrichment contracts (i.e., five years) with prices sufficient to cover both construction and operation costs, including a return on investment, for the entire term of the contracts. NAF SAR, Vol 1, 1.2-4.

Thus, LES has committed that it will not begin construction of the facility unless, and until, funding of the facility is fully committed. As the Commission noted, this means that if the market does not allow LES to raise sufficient capital for construction or to obtain purchase contracts for the uranium product, it will not build or operate the facility. *Id.* NMED has provided no basis for concluding that these commitments are not sufficient to conclude that LES appears to be financially qualified to construct and operate the facility. Accordingly, NMED has failed to plead a genuine dispute of fact or law with respect to the adequacy of the application. See 10 C.F.R. § 3.309(f)(1)(v). Additionally, NMED has failed to satisfy the requirements of 10

C.F.R. § 2.309(f)(1)(v), in that it has provided no expert opinions in support of the proposed contention, nor has it referenced any sources and documents on which it intends to rely at hearing. For the above reasons, NMED's proposed Contention 5(d) does not constitute an admissible contention and should be rejected.

NMED Contention 5e:

The Application does not comply with the requirements of 10 C.F.R. § 20.1101 because it fails to provide sufficient information to demonstrate the establishment of an adequate radiation protection program. Specifically, the Application is deficient in providing the technical bases for monitoring and assessing effluent discharge, and in estimating occupational and public radiation doses. See e.g. Application, §§ 4.6, Safety Analysis Report, vol. 4; 4.12, Environmental Report, vol.2; 6.0, Safety Analysis Report, vol. 4; see 10 C.F.R. § 20.1101(b); Nuclear Regulatory Guidance Document 4.14 (setting forth the need for discharge and dosage information prior to and during operation of the uranium processing facility). The radiation dose quantities are provided, but are not supported by calculation protocols, formulae, or variables (e.g., occupancy factors, seasonal variations, diffusion coefficients). The additional information must be provided in order to verify the information in the Application.

In this contention, NMED has adequately described alleged deficiencies in the Application to raise a genuine issue of material fact as to whether the radiation protection program will be adequate. Accordingly, this contention should be admitted.

CONCLUSION

NMED has standing to participate as a party in the hearing on the application filed by LES to construct and operate an enrichment facility as the designated representative by the Governor of the State of New Mexico. Further, NMED has proffered one admissible contention

regarding the adequacy of the applicant's proposed radiation protection program. Accordingly, NMED should be admitted as a party and NMED Contention 5e should be admitted for litigation in the proceeding.

Respectfully submitted,

Lisa B. Clark
Angela B. Coggins
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of April, 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
LOUISIANA ENERGY SERVICES, L.P.) Docket No. 70-3103
)
(National Enrichment Facility))
)

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(a), the following information is provided:

Name: Lisa B. Clark
Address: Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop: O 15-D21
Washington, D.C. 20555
Telephone: (301) 415-1571
Facsimile: (301) 415-3725
Internet Address: lbc@nrc.gov
Admissions: Court of Appeals for the
State of Maryland
Name of Party: NRC Staff

Respectfully Submitted,

Lisa B. Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of April, 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
LOUISIANA ENERGY SERVICES, L.P.) Docket No. 70-3103
)
(National Enrichment Facility))
)

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(a), the following information is provided:

Name: Angela B. Coggins
Address: Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop: O 15-D21
Washington, D.C. 20555
Telephone: (301) 415-1574
Facsimile: (301) 415-3725

Internet Address: abc1@nrc.gov

Admissions: Court of Appeals for the
State of Maryland

Name of Party: NRC Staff

Respectfully Submitted,

Angela B. Coggins
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of April, 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
LOUISIANA ENERGY SERVICES, L.P.) Docket No. 70-3103
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)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO THE NEW MEXICO ENVIRONMENT DEPARTMENT'S REQUEST FOR HEARING AND PETITION FOR LEAVE TO INTERVENE", "NOTICE OF APPEARANCE" for Lisa B. Clark, and "NOTICE OF APPEARANCE" for Angela B. Coggins 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 (*), by electronic mail as indicated by a double asterisk (**), and by facsimile as indicated by triple asterisk (***) on this 19th day of April, 2004.

Administrative Judge * **
Paul Bollwerk
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
E-Mail: gpb@nrc.gov
Mail Stop: O-16C1
Washington, D.C. 20555

Administrative Judge * **
Paul Abramson
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
E-Mail: pba@nrc.gov

Office of the Secretary * **
ATTN: Rulemakings and Adjudication Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
E-mail: HEARINGDOCKET@nrc.gov

Office of Commission Appellate Adjudication*
U.S. Nuclear Regulatory Commission

Administrative Judge * **
Charles Kelber
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
E-Mail: cnk@nrc.gov

Ron Curry, Secretary **
Clay Clarke, Assistant General Counsel
New Mexico Environmental Department
1190 St. Francis Drive
Santa Fe, NM 87502-6110
E-mail: clay_clarke@nmenv.state.nm.us

Patricia A. Madrid, N.M. Attorney General ***
Glenn Smith, Deputy Attorney General
P.O. Box 1508
Santa Fe, NM 87504-1508
Facsimile: 505-827-4440
Mr. Rod Krich, Vice President
Licensing, Safety and Nuclear Engineering
Louisiana Energy Services
2600 Virginia Avenue NW.
Suite 610
Washington, D.C. 20037

Lindsay A. Lovejoy, Jr. **
Nuclear Information and Resource Service
1424 16th Street, NW.
Suite 404
Washington, D.C. 20036
E-mail: lindsay@lindsaylovejoy.com

James. R. Curtis, Esq. **
Winston & Strawn
1400 L Street, N.W.
Washington, D.C. 20005
E-mail: jcurtiss@winston.com

Lisa B. Clark
Angela B. Coggins
Counsel for NRC Staff