

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

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Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of)

LOUISIANA ENERGY SERVICES, L.P.)

Docket No. 70-3103-ML

(National Enrichment Facility))

CLI-04-35

MEMORANDUM AND ORDER

The Commission today addresses several pending items. These include motions by the New Mexico Environment Department (Environment Department) and the Attorney General of New Mexico (Attorney General) for reconsideration of our decision in CLI-04-25,¹ as well as the Attorney General's motion for leave to file a late-filed contention, and the Environment Department's similar request to submit late contentions. We also respond to issues referred to us by the Atomic Safety and Licensing Board in an order issued on September 14, 2004, specifically the Board's rulings on (1) motions for clarification on participation in this proceeding, filed by the Attorney General and the Environment Department, who seek to participate on contentions admitted by other parties, and (2) the Attorney General's request to act as a "co-lead" party on contention NIRS/PC EC-5/TC-2-AGNM TC-i, a consolidated contention on decommissioning costs on which the Board designated joint intervenors Nuclear Information and Resource Service (NIRS) and Public Citizen (PC) the lead party.

¹ 60 NRC 223 (2004).

As explained further below, the Commission denies the motions for reconsideration of CLI-04-25. We remand to the Board the Attorney General's motion (and the Environment Department's request) to admit a late-filed contention. We deny the Attorney General's and Environment Department's requests to participate in this proceeding on other parties' admitted contentions. Finally, we do not disturb the Board's ruling denying the Attorney General's request to act as a "co-lead" party on the consolidated decommissioning costs contention.

1. Motions for Reconsideration of CLI-04-25

In CLI-04-25, the Commission reviewed contentions that the Licensing Board referred to us. Four were contentions that the Board rejected in LBP-04-14² for failure to meet our contention rule standards. The Environment Department had submitted one of these contentions, and the Attorney General the other three.³ In rejecting these contentions, the Board stressed that the Environment Department and the Attorney General "'reply' filings essentially constituted untimely attempts to amend their original petitions" without addressing the late-filing factors set out in 10 C.F.R. 2.309(c) and (f).⁴ While the Board took into account information from the reply briefs that "legitimately amplified" issues presented in the Environment Department and the Attorney General hearing petitions, it did not consider entirely new support for the contentions offered in the reply briefs.⁵ In CLI-04-25, we affirmed the

² 60 NRC 40 (2004).

³ The Environment Department's contention was identified as NMED TC-1/EC/1. The Attorney General's contentions were identified as AGNM EC-ii, AGNM EC-iii, and AGNM MC-i. "TC" refers to contentions involving primarily technical health and safety issues, "EC" involves primarily environmental claims, and "MC"-designated contentions are a separate miscellaneous category. See "Initial Prehearing Order" (Apr. 15, 2004).

⁴ LBP-04-15, 60 NRC at 58.

⁵ *Id.*

Board's ruling on these contentions, agreeing that the reply briefs amounted to an out-of-time attempt to "reinvigorate" and effectively amend what had been inadequately supported contentions in the hearing petitions.⁶

Both the Environment Department and the Attorney General now ask us to reconsider our decision. The Environment Department claims that in requesting more time to file its reply, it acknowledged to the Board that its hearing petition had "not fulfill[ed]" the requirements of the contentions rule, and that therefore it "specifically requested additional time to meet those requirements" with its reply filing.⁷ Because the Board granted its request for an extension of time, the Environment Department states that it "could not have anticipated that its additional material [in the reply brief] would not have been considered."⁸

The Attorney General states that in her reply brief she responded to the "NRC staff's and Applicant's concerns about the specificity and bases" of her contentions.⁹ Because the applicant and staff were "uncertain what precisely [the Attorney General] was alleging and the basis therefore," she says she used the reply brief to "explain[] and narrow[] the focus of her contentions and provided citations" to cases and documents "that explained the precise basis for her concerns."¹⁰ Both the Attorney General and the Environment Department also suggest that their reply filings provided merely "additional bases" for the contentions.

⁶ See 60 NRC at 224-25.

⁷ Environment Department's Motion for Reconsideration (Sept. 3, 2004) at 5.

⁸ *Id.*

⁹ Attorney General's Petition for Reconsideration (Aug. 31, 2004) at 1.

¹⁰ *Id.* at 3.

We do not lightly revisit our own already-issued and well-considered decisions.¹¹ We do so only if the party seeking reconsideration brings decisive new information to our attention or demonstrates a fundamental Commission misunderstanding of a key point.¹² Here, the Environment Department and the Attorney General reconsideration petitions do not come close to meeting such standards.¹³ As we explained in CLI-04-25, the four proffered contentions at issue contained conclusory and unsupported allegations and thus no adequate basis. For example, the Environment Department and the Attorney General each submitted a contention regarding the onsite storage of depleted uranium at the LES facility. The Attorney General claimed that such onsite storage “poses a distinct environmental risk to New Mexico.”¹⁴ Similarly, the Environment Department claimed that onsite storage “may pose a threat” to health and property and that LES’s proposed storage plan was insufficiently detailed.¹⁵ Neither petition alleged facts or expert opinion in support of these broad and conclusory allegations. LES’s application outlines potential environmental, health and safety impacts of storing depleted

¹¹ See, e.g., *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-18, 58 NRC 433 (2003), *aff’d*, *Connecticut Coalition Against Millstone*, No. 04-0109, (2d Cir., Oct. 14, 2004)(unpublished).

¹² Under the newly revised hearing procedures in 10 C.F.R. Part 2, a petition for reconsideration may only be granted upon a showing of “compelling circumstances,” such as a clear and material error in a decision which could not have reasonably been anticipated that renders the decision invalid. See 10 C.F.R. § 2.341(d)(referencing the standard found in § 2.323(e)). Petitions for reconsideration of a Commission decision after Commission review – such as the Attorney General and the Environment Department seek – are to be filed under § 2.341(d). Petitions for reconsideration of a *final* Commission (or Licensing Board) decision, on the other hand, are filed under § 2.345. Finally, there is a catch-all provision for motions for reconsideration, found in § 2.323(e), intended for reconsideration of orders in general, e.g., rulings on discovery, motions, etc.

¹³ *Ahmed v. Ashcroft*, ___ F.3d ___, 2004 WL 2382141, *1 (7th Cir., Oct. 26, 2004). A reconsideration motion, to be successful, cannot simply “republish” prior arguments, but must give the Commission a good “reason to change its mind.” *Id.* at *2.

¹⁴ See Supplemental Request of the Attorney General for Hearing (Apr. 23, 2004) at 5-6.

¹⁵ See Environment Department’s Request for Hearing (Mar. 24, 2004) at 2.

uranium in uranium byproduct cylinders (UBCs) on an open-air storage pad. But neither the Attorney General nor the Environment Department addressed with any particularity or support how LES's proposed plan for onsite storage of depleted uranium lacks sufficient information, provides an inaccurate environmental impacts assessment, or otherwise falls short.

“Allowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements,” as the NRC staff explains, “by permitting the intervenor to initially file vague, unsupported, and generalized allegations and simply recast, support, or cure them later.”¹⁶ The Commission has made numerous efforts over the years to avoid unnecessary delays and increase the efficiency of NRC adjudication and our contention standards are a cornerstone of that effort. We believe that the 60-day period provided under 10 C.F.R. 2.309(b)(3) for filing hearing requests, petitions and contentions is “more than ample time for a potential requestor/intervenor to review the application, prepare a filing on standing, and develop proposed contentions and references to materials in support of the contentions.”¹⁷ Under our contention rule, intervenors are not being asked to prove their case, or to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal basis to support the contention, and to do so at the outset. We agree with the Licensing Board that on these four particular contentions, the Attorney General and the Environment Department failed to do so.¹⁸

¹⁶ NRC Staff Response to Attorney General's Petition for Reconsideration (Sept. 3, 2004) at 6.

¹⁷ Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2199 (Jan. 14, 2004).

¹⁸ In addition to the lack of supporting bases, the Board also found other deficiencies (with which we concur) among the referred contentions. These included impermissible challenges to rulemaking-associated generic determinations (e.g. the “plausible strategy” for disposition of depleted uranium by transfer to DOE if the NRC declares the depleted uranium to be low-level waste), and a failure to establish a genuine dispute with the application. See *generally* LBP-04-14, 60 NRC at 60-66.

If exigent circumstances warrant an extension of the petition deadline, our rules allow petitioners to file a motion requesting an extension of the filing deadline.¹⁹ Here, neither the Environment Department nor the Attorney General requested more time in which to prepare their hearing petitions. In addition, our rules allow a late-filed petition and contentions where there is a compelling justification.²⁰ What our rules do not allow is using reply briefs to provide, for the first time, the necessary threshold support for contentions; such a practice would effectively bypass and eviscerate our rules governing timely filing, contention amendment, and submission of late-filed contentions. While our rules provide that designated governmental entities need not provide a showing of standing to intervene, our rules do not, as the Board stated, “give[] them additional latitude to comply with the requirements governing the pleading and amendment of contentions.”²¹

Both the Environment Department and the Attorney General requested and were granted additional time in which to file reply briefs. The Environment Department suggests that because the Board allowed it extra time to file a reply brief, the Board in effect misled the Environment Department into assuming that it could use the reply brief to cure deficiencies in the hearing petition. The Environment Department states that once the Board granted its request for more time to submit a reply, it “then expended substantial resources to retain experts in order to make the proper showing.”²²

¹⁹ See Final Rule, 69 Fed. Reg. at 2200.

²⁰ See 10 C.F.R. § 2.309(c). The Environment Department and the Attorney General now seek to have contentions admitted under the late contentions rule. We address these requests in the next section of this decision.

²¹ LBP-04-14, 60 NRC at 57.

²²Environment Department’s Motion for Reconsideration at 5.

The Commission finds this claim unpersuasive. The Environment Department gave the Board “two reasons” for why it needed more time to file a reply. The first reason presented was that the Environment Department intended to coordinate resources with the Attorney General and accordingly “require[d] additional time to begin to coordinate [preparation of pleadings and presentation of evidence] with the Attorney General.”²³ The Environment Department’s second reason was the need to correct deficiencies in the hearing petition. In granting the extension request, the Board explicitly noted the NRC staff’s concern that the Environment Department appeared to contemplate utilizing the reply brief effectively to amend the hearing petition. The Board stressed that a reply filing “should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer.”²⁴ The Environment Department should not have assumed that the Board effectively had given it a special opportunity to file its contentions anew by submitting more detailed allegations in a reply brief.

The Attorney General claims that in CLI-04-25 we violated a provision of the Administrative Procedure Act (APA), 5 U.S.C. § 557(c),²⁵ because we affirmed the Board’s rulings on contention admissibility without giving her an opportunity to present her arguments in defense of her contentions. But the Commission’s decision in CLI-04-25 was based on the parties’ presentations already in the record, including all of the Attorney General’s pleadings. And our rules gave the Attorney General the opportunity -- which she has invoked -- to seek

²³Environment Department’s Motion for Extension of Time to File Reply (Apr. 22, 2004) at 1-2.

²⁴ Memorandum and Order (Granting Extension of Time)(4/27/04) at 2.

²⁵ Section 557(c) says that in “on the record” agency adjudications – this case is one (see 42 U.S.C. § 2243(b)) – agencies must give parties an opportunity to submit to the decision-maker “proposed findings and conclusions,” or “exceptions” to subordinates’ decisions, and “supporting reasons” for their “exceptions.” It is not self-evident that this language translates to a right to file appellate briefs when (as here) a hearing board refers a pre-hearing ruling on contention admissibility to the Commission.

reconsideration of our decision, with a supporting brief. Thus, the Commission is fully aware of the Attorney General's position. The Commission has considered both her arguments before the Board and those she later submitted directly to us with her reconsideration petition.

2. Requests to Admit Late-filed Contentions

In its motion for reconsideration, the Environment Department alternatively argues that it actually "has met the requirements for late-filed contentions, and should be allowed to intervene on [its] contentions."²⁶ For the first time in this proceeding, the Environment Department addresses the standards for late-filed contentions under 10 C.F.R. § 2.309(c). The Environment Department claims that there is "good cause" for its "failure to put forth in sufficient detail the bases for its contentions" in its hearing petition, and that once it had "additional time and the aid of outside consultants," it was able to support the contentions properly.²⁷ Given the fact-specific requirements of our "late-filed contention" rules,²⁸ and the Licensing Board's closer familiarity with how admission of the Environment Department's contention might affect the proceeding and parties, the Board in this instance is in a better position than the Commission to evaluate and balance our rules' multiple "late-filed" factors. Accordingly, the Commission remands to the Board the Environment Department's request to submit late-filed contentions.²⁹ On remand, the Board should apply the standards set forth in both sections 2.309(c) and (f).

It appears, however, that the Environment Department seeks to apply the late-filing standards to *all* of its rejected contentions, and not merely the one Environment Department

²⁶ MNED's Motion for Reconsideration at 5.

²⁷ *Id.* at 6.

²⁸ 10 C.F.R. § 2.309(c) and (f).

²⁹ Indeed, the Board already has before it a similar recently-filed (Oct. 20, 2004) motion by the Environment Department for permission to file late contentions.

contention that the Board earlier referred to us.³⁰ As to the two rejected contentions that the Board did not refer to us, the Environment Department may appeal the rejection of these contentions at the end of the hearing, if the Board does not admit them under the late-filed contention rule.³¹

The Attorney General also seeks to have a contention admitted under the late-filed contention rules. On September 13, 2004, the Attorney General filed a motion with the Commission seeking admission of a newly-proposed contention on the waste classification of depleted uranium under Part 61. As we noted above, the Board is best situated to consider and balance the fact-specific requirements under our “late-filed” rules. Therefore, we remand the Attorney General’s request to file a late-filed contention to the Board for its consideration.

3. Environment Department and Attorney General Participation On Other Parties’ Contentions:

In separate pleadings before the Licensing Board, the Environment Department and the Attorney General sought clarification of how they may participate in this proceeding on admitted contentions that they did not file. Specifically, the Environment Department sought to participate as an “interested state” on behalf of the State of New Mexico, pursuant to 10 C.F.R. § 2.315(c). The Environment Department seeks to participate as a party on its sole admitted contention, and as an “interested state” on other parties’ admitted contentions. It stated that it “should be permitted to participate in both capacities in order that it may raise all issues in which it has an

³⁰ The Environment Department submitted 5 contentions, but later withdrew one contention. Of these remaining 4 contentions, the Board admitted 1 and found 3 inadmissible. The Board referred only 1 of the 3 rejected contentions – a contention involving onsite storage of depleted uranium – to the Commission.

³¹ See, e.g., *Exelon Generation Co. (Early Site Permit for the Clinton ESP Site)*, CLI-04-____, 60 NRC ____ (Nov. 10, 2004), slip op. at 4. The same is true for the Attorney General, whose Petition for Reconsideration, in a footnote, apparently attempts to “appeal” portions of a contention rejected by the Licensing Board but not referred to the Commission.

interest.”³² “Interested states” may introduce evidence, interrogate witnesses where cross-examination is permitted, advise the Commission without the need to take a position on the subject at issue, file proposed findings where findings are permitted, and petition for review with respect to the admitted contentions.³³

Quoting the language of § 2.315(c), the Licensing Board ruled that the opportunity for state or local governmental entities or affected Federally-recognized Indian tribes to participate in NRC proceedings is available only to those government representatives “which ha[ve] *not* been admitted as a party under § 2.309.”³⁴ Because the Environment Department is an admitted party to the proceeding, the Board found that the Environment Department cannot participate as an “interested state” on other parties’ admitted contentions. The Board pointed out that the new Part 2 adjudicatory rules explicitly provide the option for petitioners to “adopt” other petitioners’ contentions, “thus providing an avenue of participation for any party in connection with any of the contentions proffered by another participant.”³⁵ In this proceeding, the Board afforded the Environment Department and the Attorney General an early opportunity to adopt any of each other’s or NIRS/PC’s proffered contentions.³⁶ But the Environment Department did not adopt any other proffered contentions. The Attorney General adopted one contention submitted by the Environment Department (although that contention was not admitted).

³² Environment Department’s Request for Clarification (Sept. 3, 2004) at 2.

³³ See 10 C.F.R. § 2.315(c).

³⁴ Memorandum and Order (Clarification Requests Ruling and Commission Referral)(9/14/04) at 3 (emphasis added).

³⁵ *Id.*

³⁶ See Order (Supplements Regarding Contentions)(5/24/04).

The Board referred its “interested state” ruling to us. We find that the Board correctly read the plain terms of Section 2.315(c) as allowing government entities to claim “interested state” participation only if they are not already admitted parties. We therefore affirm the Board’s decision denying the Environment Department’s request to participate as an “interested state.”

While not citing the “interested state” provision under our rules, the Attorney General also sought guidance from the Board on whether she would be permitted, on behalf of the citizens of the State of New Mexico, to cross-examine witnesses where cross-examination is permitted and to file proposed findings on contentions where findings are permitted. The Attorney General cited NRC cases from the 1970s, which held that an intervenor with an interest in a matter could participate in such fashion on contentions sponsored by other parties, on those matters already placed into controversy.³⁷ The Presiding Officer ruled against the Attorney General’s request, but again referred his ruling to the Commission.

We agree with the Presiding Officer’s decision that our current rules do not provide an unconstrained right for a party to cross-examine and submit proposed findings on all other parties’ contentions, regardless of whether the contentions were ever adopted:

With contention adoption explicitly recognized as the method by which an intervenor can gain a role relative to another petitioner’s proffered contentions, to permit any party to the proceeding to take an active role regarding any contention without regard to whether that party made any attempt to adopt that contention would seriously undermine the efficacy of that provision.³⁸

³⁷ See *Northern States Power Co.* (Prairie Island Nuclear Generating Plan, Units 1 & 2), ALAB-252, 8 AEC 1175, 1181 *aff’d*, CLI-75-1, 1 NRC 1 (1975). The decisions nonetheless stressed that the cross-examination would be strictly confined to the scope of direct examination and that an intervenor would not have free license to put additional matters into controversy, or to conduct repetitious questioning.

³⁸ Memorandum and Order (Clarification Requests Ruling), slip op. at 4.

Thus, petitioners seeking intervention as a party under § 2.309 may choose to participate on other petitioners' contentions by *adopting* them.³⁹ Designated governmental representatives who have not been admitted as a party, but who choose to participate in NRC proceedings under 10 C.F.R. § 2.315 as interested states, local governmental bodies, or Federally-recognized Indian tribes, also may participate on any admitted contentions. The representative shall identify in advance of a hearing those contentions on which he or she wishes to participate.⁴⁰

4. "Lead" Party Designation for Contention on Decommissioning Costs

The final procedural issue the Board referred to us is its ruling on the Attorney General's request for permission to serve on one consolidated contention in a "co-lead" party status with intervenors NIRS/PC. The Board admitted one portion of an Attorney General contention on disposal security, which challenged the adequacy of the percentage amount LES has set aside to cover contingencies.⁴¹ The Board, however, consolidated this limited claim with a broader contention on decommissioning costs that intervenors NIRS/PC had submitted, which, among other claims challenged as insufficient LES's contingency factor. The Board designated NIRS/PC to be the "lead party" on this consolidated contention. The Board noted that the "lead" party would have the primary responsibility for litigation of the contention, including conducting all discovery, filing motions and testimony, conducting any redirect examination, and preparing proposed findings of fact and conclusions of law.

³⁹ See 10 C.F.R. § 2.309(f)(3).

⁴⁰ See 10 C.F.R. § 2.315(c).

⁴¹ See LBP-04-14, 60 NRC at 62.

Subsequently, the Attorney General requested that the Board allow her and NIRS/PC to be “co-lead” parties on this consolidated contention. The Attorney General stressed that her interests in this proceeding are significantly different than those of NIRS/PC. Specifically, she claimed that unlike NIRS/PC, she does not oppose the proposed LES facility, but seeks to assure that the facility is constructed and operated safely. The Attorney General also says that she seeks to assure that state resources will not need to be expended to avoid or mitigate any safety or environmental hazards that may be associated with the disposition of enrichment tails. She and NIRS/PC jointly submitted a status report on how they would share litigation responsibilities. They stated an intent to communicate on the positions to be taken in the litigation, and stated that in the event of differences concerning LES’s contingency factor, each “co-lead” party would present its own evidence or argument through witnesses, discovery responses, briefings, or proposed findings. Both the NRC staff and LES opposed this request for “co-lead” status, expressing concerns about delay and duplicative evidence.

The Board denied the Attorney General’s request for “co-lead” status. It found unpersuasive her claims “regarding the differing nature of the public and private interests involved relative to the ‘contingency factor’ aspect of the contention ... that is the sole [Attorney General] feature” of the consolidated contention.⁴² The Board also found that the plan to share responsibilities as “co-lead” parties was vague, and that the intent to proceed separately in the event of differences would undermine the purpose of the “lead party” designation, which aims for a unified presentation. The Board therefore kept NIRS/PC as the lead party for the contention, directed the Attorney General and NIRS/PC to consult on all material aspects of the litigation, and stated that if they are unable to agree they should promptly bring their differences to the Board for resolution.

⁴² See Memorandum and Order (8/16/04)(Memorializing and Ruling on Matters) at 3.

The Board referred this ruling to us, expressing some concern over whether it had been appropriate to consolidate a governmental and a private party on a contention, although noting that similar consolidations had occurred in other proceedings. In general, the Commission is very hesitant to disturb procedural case management decisions made by the Board.⁴³ We therefore leave in place the Board's decision to consolidate the two parties' contentions and to designate NIRS/PC as the lead party. The Board has taken care to protect the Attorney General's interests. As the Board has indicated, if the Attorney General strongly disagrees with any aspect of the litigation of this consolidated contention, she may bring her concerns to the Board for resolution.

The Commission stresses that if the Board's "lead party" process itself results in collateral controversies which might delay the proceeding more than simply having the Attorney General make her own separate presentation on the "contingency factor" issue, the Board may revisit its decision to consolidate this contention or to assign a "lead" litigation role for it. These are matters best decided by the Board and we leave them to the Board's judgment.

⁴³ See, e.g., *International Uranium (USA) Corp. (White Mesa Uranium Mill)*, CLI-02-13, 55 NRC 269, 273 (2002).

5. Conclusion

For the reasons given in this decision, (1) the Attorney General and the Environment Department petitions for reconsideration of CLI-04-25 are *denied*; (2) the Attorney General and the Environment Department requests to admit late-filed contentions are *remanded* to the Board for its consideration; (3) the Board's decisions denying the Environment Department's and Attorney General's requests to participate on other parties' contentions is *affirmed*; and (4) the Board's decision rejecting a "co-lead" litigation status on the consolidated decommissioning costs contention is *affirmed*.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 8th day of December, 2004.