UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 8344

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COMMISSIONERS:

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-04-25

MEMORANDUM AND ORDER

In LBP-04-14[1], the Atomic Safety and Licensing Board ruled that all petitioners in this proceeding have standing to intervene and that all submitted at least one admissible contention challenging the application of the Louisiana Energy Services, L.P. (LES) to build and operate uranium enrichment facility. Accordingly, the Board admitted the following petitioners as a parties to this proceeding: the New Mexico Environment Department (NMED), the New Mexico Attorney General(NMAG), the Nuclear Resource and Information Service (NIRS) and Public Citizen(PC). The Board also referred five of its contention determinations to the Commission, pursuant to 10 C.F.R. § 2.323(f). The Commission has reviewed the contentions referred to us by the Board, and affirms the Board's determinations in all respects but one. We have decided to review further a contention[2] concerning depleted uranium's appropriate classification under 10 C.F.R. Part 61.

[1] 60 NRC ___ (July 19, 2004) (slip opinion).

[2] NIRS/PC EC-3/TC-1, basis D.

Four of the referred contentions were submitted by the NMED and the NMAG.[3] The Board rejected these contentions for failure to meet the NRC's contention requirements under 10 C.F.R. § 2.309(f). In rejecting these contentions, the Board declined to consider new "purportedly material" information in support of the contentions that was first submitted as part of a reply pleading.[4] The Board stressed that it took into account any information from the reply briefs that "legitimately amplified" issues presented in the NMED and AGNM hearing petitions, but that "in several instances ... NMED and AGNM 'reply' filings essentially constituted untimely attempts to amend their original petitions that, not having been accompanied by any attempt to address the late-filing factors in section 2.309(c), (f)(2), [could not] be considered in determining the admissibility of their contentions." [5]

The Commission has reviewed the hearing petitions and replies submitted by NMED and AGNM. On all four of these contentions, we concur with the Board that the reply briefs constituted a late attempt to reinvigorate thinly supported contentions by presenting entirely new arguments in the reply briefs. Indeed, in some places, the reply briefs present what effectively amount to entirely new *contentions*. As the Commission has stressed, our contention admissibility and timeliness requirements "demand a level of discipline and preparedness on the part of petitioners," who must examine the publicly available material and set forth their claims and the support for their claims at the outset.[6] The petitioners' reply brief

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[3] One of these contentions was filed by the NMED, and is identified as NMED TC-1/EC-1. The other three were filed by the NMAG, and are 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 at 16 (slip op.).

[5] *Id.* at 15.

[6] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 428-29 (2003).

should be "narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer,"[7] a point the Board itself emphasized in this proceeding.[8] As we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount. There simply would be "no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements" and add new bases or new issues that "simply did not occur to [them] at the outset."[9]

The NMED acknowledged that its petition did not satisfy all of the contention rule requirements, stating that it did not have "adequate time to prepare its petition" to meet the NRC's "rigorous" contention requirements.[10] Similarly, the NMAG claimed that her office was in the middle of a "budget crisis," and was therefore "unable to obtain timely supporting expert testimony."[11] The NMAG also apparently was under the mistaken impression that a more generalized "notice" pleading would suffice to meet the contention standard.[12] But if there were in fact exigent or unavoidable circumstances warranting an extension of the deadline for filing a hearing petition, a timely request for an extension of time should have been made to the Board. Instead, both the NMED and the NMAG requested -- and were granted -- an extension of time in which to file reply briefs, but inappropriately used the occasion of the reply briefs to present

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[7] *Final Rule, "Changes to Adjudicatory Process,"* 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004).

[8] *See* Memorandum and Order (Granting Extension of Time)(Apr. 27, 2004) at 2.

[9] *McGuire/Catawba*, CLI-03-17, 58 NRC at 428-29 (citation omitted).

[10] *See* NMED's Motion for Extension of time to File Reply In support of Petition for Leave to Intervene (Apr. 22, 2004) at 2.

[11] *See* NMAG's Motion for Extension of Time (May 5, 2004) at 4.

[12] *Id.*

for the first time various new claims in support of their contentions. In Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief.[13] We therefore affirm the Board's disposition of these four contentions.

The Board admitted the fifth contention that has been now referred to us.[14] NIRS and PC, two public interest organizations, submitted this contention. It contends that LES does not have a "plausible strategy" to dispose of the depleted uranium hexafluoride waste that the LES facility will produce. Of note, in the hearing notice issued for this proceeding, the Commission set forth what would constitute one possible "plausible strategy" for disposal of the LES depleted tails. There, we said that "unless LES demonstrates a use for the uranium in the depleted tails as a potential resource, the depleted tails may be considered waste."[15] We went on to specify that if, additionally, "such waste meets the definition of 'waste' in 10 C.F.R. 61.2, the depleted tails are to be considered low-level radioactive waste within the meaning of 10 C.F.R. part 61," in which case "an approach by LES to transfer to DOE for disposal by DOE of LES['s] depleted tails pursuant to Section 3113 of the USEC Privatization Act constitutes a 'plausible strategy' for dispositioning the LES depleted tails."

One basis of the NIRS/PC "plausible strategy" contention, titled basis "D," alleges that the depleted uranium hexafluoride 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. The hearing record reflects some confusion in interpreting the Commission's original

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[13] *See Yankee Atomic Energy Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 261 (1996). *See generally Amgen Inc. v. Smith*, 357 F.3d 103, 117 (D.C. Cir. 2004).

[14] This contention is identified as NIRS/PC EC-3/TC-1.

[15] *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-3, 59 NRC 10, 22 (2004), *reprinted in* 69 Fed. Reg. 5873, 5877 (Feb. 6, 2004).

hearing notice.[16] That notice should not be understood to preclude consideration of whether petitioners' contention on appropriate waste classification amounts to an impermissible attack on NRC regulations (10 C.F.R. Part 61). The Board considered the waste classification issue a "novel legal or policy question."[17] Hence, we have decided to review the waste classification issue ourselves. Below, we establish a schedule allowing the parties to file briefs with the Commission on the issue.[18]

The Board also accepted two other bases for the NIRS/PC "plausible strategy" contention. Those bases, titled bases "B" and "C," raise the question whether LES has submitted a credible "plausible strategy" for *private sector* conversion and disposal of the tails. Those bases reflect a sufficiently supported challenge to LES's submitted strategies for the private conversion and disposal of the tails. While a "plausible strategy" for private conversion of the tails does not mean a definite or certain strategy, to include completion of all necessary contractual arrangements, it must represent more than mere speculation. Petitioners' bases "B" and "C" permit an inquiry of this kind.

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[16] *See id.*

[17] LBP-04-14, 60 NRC at __ (Slip op. at 27).

[18] In addition to whatever other materials they deem appropriate, the parties should address in particular 10 C.F.R. § 61.2, 10 C.F.R .§ 61.55(a)(6), and *Louisiana Energy Services* (Claiborne Enrichment Center) Licensing Board Memorandum and Order (Ruling On Intervenor's Petition To Waive Certain Regulations) (unpublished) (Mar. 2, 1995), *vacated,* CLI-98-5, 47 NRC 113 (1998).

In conclusion, the Commission *affirms* the Board's determinations on the five referred contentions, except for its acceptance of basis D of the "plausible strategy" contention. On that issue, the Commission *directs* interested parties to file briefs arguing their position. Such briefs may not exceed 25 pages and must be filed on or before September 8, 2004. The parties may also file answering briefs, not to exceed 10 pages, no later than September 17, 2004. All briefs should be served electronically on the Commission and on all other parties.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 18th day of August, 2004.