

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of

Docket No. 70-3103

Louisiana Energy Services, L.P.
National Enrichment Facility

ASLBP No. 04-826-01-ML

DRAFT 040914 10:30 am

**REPLY BRIEF ON BEHALF OF PETITIONERS
NUCLEAR INFORMATION AND RESOURCE SERVICE/
PUBLIC CITIZEN
IN SUPPORT OF
NIRS/PC CONTENTION EC-3/TC-1**

Preliminary statement

This memorandum is submitted on behalf of petitioners Nuclear Information and Resource Service and Public Citizen (“NIRS/PC”) pursuant to the Memorandum and Order of the Nuclear Regulatory Commission (the “Commission”) dated August 18, 2004. That Order allows the parties to file briefs concerning the admissibility of contention NIRS/PC EC-3/TC-1, which was admitted by the Atomic Safety and Licensing Board (“Board”). This memorandum is submitted in reply to contentions contained in the briefs submitted on behalf of the Applicant, Louisiana Energy Services, L.P. (“LES”), and the Staff of the Commission.

Argument

LES and the Staff have filed briefs with the Commission, inviting the Commission to decide, on this referral, that waste generated from the proposed National Enrichment Facility (“NEF”) would be “low-level radioactive waste,” which LES may tender to the U.S. Department of Energy (“DOE”) for dispositioning under Section 3113 of the U.S. Enrichment Corporation

Privatization Act, Pub. L. 104-134, Title III, Ch. 1, Subch. A, 110 Stat. 1321- 35) (1996). This Commission would commit serious error if it accepted those ill-considered invitations. It is important to remember what is in issue at this stage. No hearing has been held on the contention in issue or any other contention. No evidence has been introduced or weighed or cross-examined. The issue here is admissibility of an allegation. The only question before the Commission is whether contention NIRS/PC EC-3/TC-1 should be admitted for purposes of further proceedings before the Board. The Board has said that it would like to admit evidence on that contention, and the question before the Commission is whether such evidence shall be admitted.

LES and the Commission Staff assert that any depleted uranium waste from the NEF would constitute low-level radioactive waste (LES Br. ___; Staff Br. ___). However, in considering whether to admit NIRS/PC EC-3/TC-1, the Commission should bear in mind certain points. First, the contention asserts that LES lacks a “plausible strategy” for waste disposal. To tender waste to DOE under Sec. 3113, there must be a *Commission determination* that such waste constitutes “low-level radioactive waste.” On this point, the Staff has expressly confirmed, in connection with this proceeding, that the Commission has made *no such determination*:

“NRC staff considers that Section 3113 would be a ‘plausible strategy’ for dispositioning depleted uranium tails *if NRC determines* that depleted uranium is a low-level radioactive waste. In that regard, the staff expects that LES will indicate in its application whether it will treat the tails as a waste or a resource. LES should also demonstrate in its application, given the expected constituents of its depleted tails, that the tails meet the definition of low-level radioactive waste in 10 CFR Part 61.” (Letter, R.C. Pierson, NRC ONMSS, to R.M. Krich, LES, March 24, 2003) (*emphasis supplied*).

Next, this Commission itself, in giving guidance for this proceeding, pointed out that whether depleted uranium constitutes low-level radioactive waste is one of the *unresolved issues*—

“if such waste meets the definition of “waste” in 10 CFR 61.2, the depleted tails are to be considered low-level radioactive waste within the meaning of 10 CFR part 61 . . .” (69 Fed Reg. at 5877) (*emphasis supplied*).

On this issue, LES’s application fails to describe the specific form of the waste but argues that the waste should be considered low-level (App. ____). In response to LES’s argument, NIRS/PC filed its contention NIRS/PC EC-3/TC-1, addressing the unresolved issue. NIRS/PC stated that the Commission had not determined that the waste would be low-level radioactive waste, and that, based upon its estimate of the waste form, such depleted uranium would not constitute low-level waste. (NIRS/PC Petition, April 6, 2004, at ____). NRC Staff then acknowledged that NIRS/PC had advanced an admissible contention:

“NIRS, by providing a detailed analysis for its conclusion that DU cannot be considered low level waste, has raised a genuine issue of fact which is material to this proceeding further supporting the admission of this contention.” (NRC Staff Ans. 14, May 3, 2004).

The Board ruled that the contention (as to Bases B, C, and D) is “sufficient to establish a genuine material dispute adequate to warrant further inquiry.” (____).

Now, Staff and LES have filed conclusory affidavits, asserting that LES’s Application establishes that the depleted uranium would be low-level radioactive waste (LES Br., Attachment; NRC Staff Br. ____). There has been no hearing and no opportunity to cross-examine such affiants. However, despite such cursory evidence, the waste form is still undefined, and the unresolved issues that impelled this Commission to identify the status of the waste as a litigable issue remain. LES has not established that the depleted uranium waste will be “acceptable for disposal in a land disposal facility” in the words of 10 CFR 61.2. This is the

question that the Commission identified in its hearing order, and LES and the Staff have done nothing to resolve it.

The Commission has made clear that, in considering a specific proposal for land disposal of supposed low-level waste under 10 CFR Part 61, it reserves the authority to add isotopes to the classification tables in 10 CFR 61.55 “later either generically or in specific waste streams.” (Final Environmental Impact Statement on 10 CFR Part 61 “Licensing Requirements for Land Disposal of Radioactive Waste,” Nov. 1982, at 5-38) (“Final EIS”). In response to a specific disposal request, the Commission may reinstate depleted uranium to the classification table, thus placing it squarely in the Greater-than-Class C category, or may “authorize other provisions for the classification and characteristics of waste, on a specific basis, if, after evaluation, of the specific characteristics of the waste, disposal site, and method of disposal, it finds reasonable assurance of compliance with the performance objectives in subpart C of this part.” (10 CFR 61.58).

The Commission Staff in SECY-91-019 (Jan. 25, 1991) recognized the range of issues to be determined in deciding how depleted uranium waste may be disposed of. Staff then noted that the exact form of the waste must be known:

“[I]t should be noted that without knowing the specifics of the enrichment process, the following discussion must be generic. The amount of UF₆ tails and their activity depends on specifics such as the uranium-235 content of the feed and the efficiency of the process used for enrichment. . . . (SECY-91-019, Att. at 1).

Staff then observed that, in deciding whether some form of land disposal will be permitted, the Commission must consider the waste characteristics and the proposed disposal methods:

“Under 10 CFR 61.58, the Commission may authorize other provisions for the classification and characteristics of waste, on a specific basis. This will be the case if, after evaluation of the specific characteristics of the waste, disposal site, and method of disposal, the Commission finds reasonable assurance of compliance with the performance objectives of Subpart C of Part 61.” (SECY-91-019, Att. at 2).

Further, Staff then specifically pointed out that no National Environmental Policy Act analysis had been done of the application of 10 CFR Part 61 to the disposal of depleted uranium tails and said that such analysis “should be conducted”:

“Review of the Environmental Impact Statement supporting 10 CFR Part 61 shows that although NRC considered the disposal of uranium and UF₆ conversion facility source terms in the analysis supporting Part 61, NRC did not consider disposal of large quantities of depleted uranium from an enrichment facility in the waste streams analyzed because there was no commercial source at that time. Therefore, analysis of the disposal of depleted uranium tails from an enrichment facility at a Part 61 LLW disposal facility should be conducted similar to the pathway analysis conducted in support of Part 61.” (SECY-91-019, Att. at 4).

Thus, Staff’s analysis in SECY-91-019 is instructive as to the nature of the investigation that the Commission must make before it can determine whether waste from the proposed facility would be “acceptable for disposal in a land disposal facility” (10 CFR 61.2, “Waste”).

Nothing has been done to address such issues with regard to the waste from the proposed NEF. Under 42 USC 2243,

“The Commission shall conduct a single adjudicatory hearing on the record with regard to the licensing of the construction and operation of a uranium enrichment facility under sections 53 and 63.”

That hearing has not been held. It would contravene the hearing requirement of Sec. 2243 to attempt to decide on disposal methods for depleted uranium waste—one of the most critical contested issues in this proceeding—without the “adjudicatory hearing on the record” that Congress has mandated.

The question now is solely one of admissibility, and it would be incorrect to take evidence and resolve fact issues at this stage, for the presiding officer is “not to decide issues on the merits, but merely whether ‘further inquiry’ is warranted on the matters put forth in the contentions in question, such that they should be admitted for litigation,” In re *Duke Energy*

Corp. (McGuire Nuclear Station), LBP-02-4, 55 NRC 49, 105 (Jan. 24, 2002). It would be error “to prejudge the merits of a contention before an intervenor has an opportunity to present a full case” (*id.*, quoting the Commission at 54 Fed. Reg. at 33,171).

This abbreviated certification to the Commission is entirely unsuited to determine whether the waste from LES’s plant can be regarded as low-level radioactive waste under Part 61. For example, LES argues that SECY-91-019 refers to depleted uranium tails as “Class A wastes” (LES Br. ___, quoting from SECY-91-019, Att. at 4), but the very next sentence in SECY-91-019 emphasizes the need to establish the precise waste form, stating that, “if stored in 48G casks, they would not meet the minimum waste form requirements in 10 CFR 61.56(a).” (*id.*). These and other issues of the nature and form of the depleted uranium waste must be considered in a hearing under 42 USC 2243 before the Commission can determine whether the tails from this proposed plant can be managed and disposed as low-level waste.

LES’s contentions that the status of depleted uranium can be determined from the “plain language,” the supposed “unambiguous” terms, and the “clear terms” of Part 61 (LES Br. 2, 8, 10) ignore the fact-specific inquiry that the Commission is authorized to undertake under Part 61 before determining that a specific waste form is “acceptable for disposal in a land disposal facility” (10 CFR 61.2, “Waste”).

LES argues, inconsistently, that the Commission should give weight to affidavits filed in the Claiborne proceeding, *In re Louisiana Energy Services* (Claiborne Enrichment Center), No. 70-3073-ML, ASLBP No. 91-641-02-ML, 1995 WL 110611 (March 2, 1995), as demonstrating the supposed low hazard of depleted uranium. (LES Br. 16-17). However, those affidavits are not in the record of this proceeding; this is not a hearing on the merits; NIRS will address those erroneous arguments when and if LES deigns to present them for criticism; and the decision in

the Claiborne case has been expressly vacated without Commission review. It would be a great mistake to rely upon erroneous non-record statements in another proceeding concerning a matter that the Commission itself specifically declined to review.

The additional assertion that the recent Draft Environmental Impact Statement for the Proposed National Enrichment Facility in Lea County, New Mexico, NUREG-1790 (Sept. 2004), resolves the present issue (LES Br. 2-3, 12), simply ignores that this Staff document *assumes*, without analysis, that the depleted uranium is “low-level radioactive waste” (at p. 2-27). More importantly, this draft document, issued by Staff for comment, clearly does not constitute a final decision by this Commission.

Finally, LES erroneously asserts that NIRS/PC are tardily seeking to challenge the Hearing Order (LES Br. 19), but in contending that the depleted uranium from the proposed NEF would not be “low-level radioactive waste,” NIRS/PC are simply grappling with the unresolved issue that this Commission identified in that order, *viz*:

“ . . . if such waste meets the definition of ‘waste’ in 10 CFR 61.2 . . . ”

Moreover, nothing in any of the papers filed by Staff or LES addresses the critical legal problem with applying 10 CFR Part 61 to depleted uranium waste, i.e., there has been no environmental impact analysis of the disposal of depleted uranium under the terms of 10 CFR Part 61. (See SECY-91-019, Att. at 4). Such an analysis requires full consideration of alternatives and a decision by the Commission that, based on the projected performance of the disposal system, disposal as low-level radioactive waste under the terms and conditions of Part 61 is acceptable to the Commission. That analysis has not been done.

NIRS/PC submit that such environmental impact analysis should be done on a programmatic basis, since it would, in effect, supplement the Final EIS issued in 1982. Further, United States Enrichment Corporation (“USEC”) recently filed its application for a license to build a commercial-scale centrifuge enrichment plant at Piketon, Ohio. That application has not been made public, but the proceeding is likely to involve whether depleted uranium from the USEC plant can be transferred to DOE under Section 3113.

Conclusion

As this Commission expressly noted, in declining to take that issue on interlocutory review in the Claiborne case, whether a particular form of depleted uranium constitutes “low-level radioactive waste,” and if so what class of waste, is a “subtle and complex” issue which should not be addressed without opportunity for full inquiry. In re *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-95-7, No. 70-3070-ML (June 22, 1995). This Commission then ruled that that it would prefer “to review waste disposal as a whole, rather than in a piecemeal fashion, after a final Licensing Board decision resolving the entire case has been issued.” (Id.). The Commission should not be drawn in by simplistic arguments to decide an issue that is not ripe, nor fair, to resolve on the present insufficient record.

This Commission has not determined whether depleted uranium from enrichment plants may be classed as low-level radioactive waste, and the provisions of Section 3113 of the USEC Privatization Act simply do not apply. This Commission has not undertaken the full investigation, including environmental impact analysis, required to make that decision. NIRS/PC submit that the requisite environmental analysis should be undertaken in a supplement to the Final EIS, given the broad impact of the issue.

In any case, should the Commission undertake no supplemental environmental analysis, the present licensing proceeding cannot proceed to a decision, such as LES seeks, without an analysis of the impact of applying the standards of 10 CFR Part 61 to waste from the NEF. For that reason, as well as the “subtle and complex” inquiry needed to determine the status of depleted uranium waste, the unresolved matters raised in NIRS/PC contention EC-3/TC-1 should be admitted for hearing, in accordance with 42 USC 2243. It would be serious error for the Commission to attempt to resolve the status of LES’s waste, of unknown form and suitability for land disposal, on this abbreviated proceeding, where no evidence has been taken, and there has been no opportunity to present evidence or to cross-examine adversary testimony. NIRS/PC should be allowed to present evidence that the waste in issue does not constitute low-level radioactive waste and is not “acceptable for disposal in a land disposal facility.”

Respectfully submitted,

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September 17, 2004

CERTIFICATE OF SERVICE

Pursuant to 10 CFR § 2.305 the undersigned attorney of record certifies that on September 8, 2004, the foregoing Reply Brief on Behalf of Petitioners Nuclear Information and Resource Service /Public Citizen in Support of NIRS/PC Contention EC-3/TC-1 was served by electronic mail and by first class mail upon the following:

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