

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 7852

ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 06/01/04
SERVED 06/01/04

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Paul B. Abramson
Dr. Charles N. Kelber

In the Matter of

LOUISIANA ENERGY SERVICES, L.P.

(National Enrichment Facility)

Docket No. 70-3103-ML

ASLBP No. 04-826-01-ML

June 1, 2004

MEMORANDUM AND ORDER

(Granting Motion for Leave to File Surreply;
Requesting Status on Proprietary Material Disclosure)

I. Staff Motion for Leave to File a Surreply

Pending with the Licensing Board is a May 26, 2004 NRC staff motion for leave to file a surreply to the May 24, 2004 reply of the Attorney General of New Mexico (AGNM) to the respective April 30 and May 3, 2004 responses of the staff and applicant Louisiana Energy Services, L.P., (LES) to the AGNM's April 5, 2004 hearing petition. In its motion, the staff represented that LES and petitioners Nuclear Information and Resource Service/Public Citizen (NIRS/PC) had no objection to the motion, while petitioner New Mexico Environment Department (NMED) and AGNM did object, which the latter planned to explain in more detail in a written response. In that response also filed on May 26, 2004,¹ among other things, the AGNM declares that the Commission's rule governing intervention petitions and responsive filings, 10 C.F.R. § 2.309, clearly contemplates that an intervenor's reply to responses filed by

¹ The Licensing Board appreciates the AGNM's prompt response to the staff's motion.

an applicant and/or the staff will be the last pleading to be submitted prior to a Licensing Board ruling on contentions admission. Further, the AGNM asserts that the staff, in giving examples of matters that its asserts are newly introduced material, is both mischaracterizing the information and seeking improperly to constrict the scope of the AGNM's reply pleading. See Response of [AGNM] to NRC Staff's Request for Leave to File Surreplies to Reply of the [AGNM] (May 26, 2004) at 2-3, 5-8 [hereinafter AGNM Response].

As the AGNM points out, section 2.309 of the Commission's rules of practice do contemplate that a reply pleading by a petitioner will normally be the last submission from the participants relative to any controversy over contentions admission (and standing, to the degree it is an issue). At the same time, that rule contemplates that an initial intervention petition will be a comprehensive, fully-supported exposition of a petitioner's challenges to the license application that is the subject of the proceeding. In this instance, for reasons the AGNM previously has outlined, see [AGNM] Motion for Extension of Time (May 5, 2004) at 4 [hereinafter AGNM Extension Motion], its eight-page initial intervention petition with no supporting documentation (as contrasted to its twenty-six page reply filing with ten pages of supporting documentation) may not have been as fully developed as it otherwise might have been.²

² Although the now-superseded agency rule governing intervention provided for a two-step process of issue identification, under the revised rules there is only one opportunity for a petitioner to outline its issue statements. Compare 10 C.F.R. § 2.714(a)(1), (b)(1) (2003) (initial petition identifies aspects, followed by supplement providing contentions) with id. § 2.309(f) (69 Fed. Reg. 2182, 2239-40 (Jan. 14, 2004)) (initial petition must set forth contentions). Given this construct, a petitioner concerned about its ability to submit adequate contentions because of its finances, see AGNM Extension Motion at 4, or its familiarity with the agency's procedural requirements, see [New Mexico Environment Department's (NMED)] Motion for Extension of Time to File Reply in Support of Petition for Leave to Intervene (Apr. 22, 2004) at 2, is best served by requesting a reasonable extension of time to prepare and submit its initial contentions, an approach that makes it considerably less likely its section 2.309(h)(2) reply opportunity will have to endure a challenge as an attempt to backstop elemental deficiencies in its original contentions.

Be that as it may, from the Licensing Board's perspective our interest (and that of section 2.309) is to ensure that at this juncture we have a thorough understanding of the participants' positions so that the upcoming oral arguments on contention admission can be focused explorations of the critical matters at issue. Under the circumstances here, we believe that cause would be served by permitting the staff to submit the requested surreply filing. Accordingly, the May 26 staff motion to file a surreply to the May 24, 2004 AGNM reply is granted in that such a surreply shall be filed on or before Thursday, June 3, 2004.

II. Proprietary Information Relating to AGNM Technical Contention (TC)-ii

Previously, in a May 12, 2004 memorandum and order, the Board indicated that with the issuance of a protective order regarding access to proprietary information, AGNM would have seven days from the date upon which it received the proprietary information referenced in the LES application to file its surreply regarding TC-ii. The protective order was issued by the Board on May 21, 2004, and the AGNM submitted a series of nondisclosure declarations beginning on May 25, 2004. In its May 26 response to the staff's motion for leave to file a surreply, however, the AGNM indicated that it has not yet received the proprietary information in question. See AGNM Response at 4-5.

Given the upcoming initial prehearing conference that will focus on contention admission, the Board requests that LES provide the Board with a status update regarding when

and how that proprietary information has or will be provided to the AGNM. That report should be filed with the Board on or before Wednesday, June 2, 2004.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD³

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

June 1, 2004

³ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant LES; (2) petitioners NMED, AGNM, and NIRS/PC; and (3) the staff.

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (GRANTING MOTION FOR LEAVE TO FILE SURREPLY; REQUESTING STATUS ON PROPRIETARY MATERIAL DISCLOSURE) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Docket No. 70-3103-ML
LB MEMORANDUM AND ORDER
(GRANTING MOTION FOR LEAVE TO FILE
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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 1st day of June 2004