

RAS 8223

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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

August 3, 2004 (3:34PM)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:

Louisiana Energy Services, L.P.

(National Enrichment Facility)

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Docket No. 70-3103-ML

ASLBP No. 04-826-01-ML

JOINT STATUS REPORT REGARDING THE PARTIES' PROPOSED
DISCOVERY PLAN AND OTHER ADJUDICATORY PROCESS ISSUES

I. INTRODUCTION

In Section III.C of its Memorandum and Order (Rulings Regarding Standing, Contentions, and Procedural/Administrative Matters) of July 19, 2004, the Licensing Board requested that the parties submit a joint status report addressing discussions on a proposed discovery schedule. In addition to requesting a discovery plan, the Licensing Board requested that the parties provide their views on: (1) which, if any, of the admitted contentions may be subject to summary disposition, along with an appropriate filing schedule for those motions; (2) when this case, or any substantial portion thereof, will be ready to go to hearing; (3) the time necessary for the hearing on each of the admitted contentions if they were to go to hearing; (4) the status of any settlement negotiations relative to any of the admitted contentions; and (5) the possibility of appointing a settlement judge. Additionally, the Licensing Board instructed LES and the NRC Staff to state their views on how the Board should proceed relative to the "mandatory hearing findings" set forth in Sections II.C through II.F of the Commission's

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January 2004 Hearing Order. See CLI-04-3, 59 NRC 10 (2004) (published in the Federal Register at 69 Fed. Reg. 5873 (Feb. 6, 2004)).

Counsel for Louisiana Energy Services, L.P. ("LES"), Nuclear Information and Resource Service/Public Citizen ("NIRS/PC"), the NRC Staff, the New Mexico Environment Department ("NMED"), and the Attorney General of New Mexico ("AGNM") have discussed the issues set forth above. All parties have authorized counsel for LES to submit this joint status report.

II. DISCUSSION OF SPECIFIC ISSUES

A. Discovery Schedule

The parties have reached agreement on the discovery plan and hearing schedule attached to this report. Under the plan, the Staff will make its initial mandatory disclosures pursuant to Section 2.336(b) by August 18, 2004, and the other parties will complete their mandatory disclosures by September 2, 2004, pursuant to Section 2.704(a). The NRC Staff will create and maintain an electronic hearing file consistent with the Licensing Board's instructions, and notify the Board and parties when the electronic hearing file is available. The Staff will address the details of the hearing file by separate filing with the Licensing Board.

Deposition and interrogatory discovery directed to LES and all intervenors will commence upon conclusion of the mandatory disclosure period. Consistent with the Commission's Hearing Order, this discovery will conclude by October 18, 2004 (*i.e.*, within 90 days of the Licensing Board's decision on the admissibility of contentions).¹

¹ The parties recognize that completion of discovery is subject to resolution of any procedural matters that may remain before the Licensing Board as of this date.

The NRC Staff has indicated that formal discovery against the Staff on environmental issues can begin following issuance of the draft environmental impact statement ("EIS") and would not impact its ability to complete the final EIS in a timely fashion. Accordingly, the parties have agreed on a schedule commencing upon issuance of the draft EIS – presently planned for September 30, 2004 – that would include discovery against the NRC Staff on environmental issues in the same timeframe as the submission of and ruling on any late-filed contentions on the draft EIS. Thus, discovery against the Staff on those issues would conclude by December 20, 2004. The dates after September 30, 2004 on the attached schedule reflect the schedular milestones set forth in Section III.E of the Commission's January 2004 Hearing Order, and are contingent upon issuance of the draft EIS by September 30, 2004.

The NRC Staff is still considering when discovery against the Staff can proceed on safety issues to be addressed in the Staff's safety evaluation report ("SER"). A supplemental period for discovery against the NRC Staff on safety issues therefore may be required upon issuance of the SER or discrete portions thereof relevant to admitted safety contentions. The parties will discuss a supplemental schedule upon clarification from the NRC Staff on the schedule for issuance of the SER or discrete portions thereof. The parties will advise the Licensing Board of a proposed schedule for safety issues.

Depositions are scheduled to take place between September 13 and October 15, 2004. The parties plan to discuss a specific deposition schedule in the near future. The parties also will discuss the location(s) for depositions.

At present, apart from adopting the proposed schedule and other terms discussed herein, the parties have not identified the need for any other orders that should be issued by the presiding officer under Section 2.705(c).

The parties agree that the proposed discovery and hearing schedule is acceptable, with the qualification that the schedule is based on the contentions admitted in the Licensing Board's July 19th Memorandum and Order. However, if, in deciding the issues certified by the Licensing Board, the Commission permits Licensing Board consideration of the information included in NMED's May 5th reply and the AGNM's May 24th reply, and the Licensing Board admits additional issues based on its consideration of that information, then a parallel or supplemental discovery schedule would need to be considered for any additional issues.

The parties also agree that it would be reasonable for the Licensing Board, in light of the importance of completing discovery on the schedule established in the Commission's Hearing Order, to place appropriate limits on interrogatories and depositions. The parties have agreed that depositions should be limited to one per witness or panel of witnesses.² The parties have not agreed on a specific numeric limit for interrogatories.³

B. Summary Disposition Motions

The parties have not identified any pre-discovery dispositive motions at this time. LES is still evaluating the admitted contentions for purposes of determining whether they are amenable to summary disposition. This evaluation is an ongoing process insofar as LES will need to consider information gathered during the discovery process. At this point, LES does not anticipate filing summary disposition motions with respect to NMED TC-3/EC-4 (Radiation

² Whether witnesses are deposed as individuals or panels will be determined by the party offering the witness being deposed, generally based upon schedule considerations.

³ LES takes the position that a limit of 10 interrogatories per contention would be appropriate. The AGNM requests a limit of no less than 25 interrogatories per contention. NMED concurs in this request. NIRS would accept a limit of 15 (subject to enlargement for good reasons) on contentions EC-1, EC-2, EC-4, EC-7, and TC-6. However, NIRS would like to have a limit of 25 interrogatories on contentions EC-3/TC-1, EC-5/TC-2, and EC-6/TC-3.

Protection Program) or AGNM TC-ii (Disposal Cost Estimates). However, LES believes that all of the other admitted contentions, or more likely, discrete bases thereof, may be candidates for summary disposition. Other parties did not identify any contentions or bases that they considered amenable to summary disposition.

The Commission's January 2004 Hearing Order provides that such motions are to be filed within 20 days after the completion of discovery. The parties expect to abide by the schedule for summary disposition set forth in the Hearing Order, and this is reflected in the attached proposed schedule. Under that schedule, if discovery is completed by October 18, 2004, summary disposition motions on admitted contentions would be filed by November 8, 2004. The Licensing Board's rulings on those motions would be by December 20, 2004, per the schedule set forth in the Hearing Order.

C. Timing of Evidentiary Hearings on Admitted Contentions

The parties have discussed the potential timing of the evidentiary hearing on the admitted contentions, and this is reflected in the attached proposed schedule. If, as required, discovery is completed within 90 days and summary disposition is addressed thereafter, the remaining issues would be ready for evidentiary hearings in mid-January 2005. At this juncture, the parties have agreed to move forward with the evidentiary hearing on the admitted environmental contentions in this timeframe. Based on the attached schedule, which assumes issuance of the draft EIS on September 30, 2004, the parties propose that the evidentiary hearing on the four environmental contentions (NIRS/PC EC-1, EC-2, EC-4, and EC-7) would be

conducted beginning January 17, 2004.⁴ The timing of the evidentiary hearing on the other contentions having technical or safety aspects will need to be assessed based on future input from the NRC Staff regarding the timing of the Staff's technical review associated with those contentions.

D. Time Required for Trial of Admitted Contentions

The parties have discussed the amount of time required for litigation of each admitted contention. Based upon the discussions, the parties provide the following estimates:

Environmental Contentions	Estimated Time for Evidentiary Hearing
NIRS/PC EC-1 (Impacts upon Ground and Surface Water) NIRS/PC EC-2 (Impact upon Water Supplies)	4 days total
NIRS/PC EC-4 (Impacts of Waste Storage and Disposal)	1 day
NIRS/PC EC-7 (Need for the Facility)	3 days

Technical & Environmental/Technical Contentions	Estimated Time for Evidentiary Hearing
NMED TC-3/EC-4 (Radiation Protection Program)	2 days
AGNM TC-ii (Disposal Cost Estimates) NIRS/PC EC-5/TC-2 & AGNM TC-i (Decommissioning Costs) NIRS/PC EC-6/TC-3 (Costs of Management/Disposal of DUF ₆)	5 days total
NIRS/PC EC-3/TC-1 (DUF ₆ Storage and Disposal)	3 days
NIRS/PC TC-6 (Natural Gas-Related Accident Risks)	1 days

These estimates are preliminary in nature. Although the time required for filing of prefiled testimony is established in 10 C.F.R. Part 2 (15 days before the evidentiary hearing pursuant to Section 2.711), the time required for cross-examination and rebuttal/surrebuttal testimony is not entirely predictable. Moreover, these estimates will need to be refined as discovery progresses and the contested issues become more focused. In any event, the parties

⁴ In addition, as shown in the attached proposed schedule, this evidentiary hearing would also encompass any amended or late-filed environmental contentions based on the draft EIS.

recognize that, consistent with the Commission's Hearing Order, the evidentiary hearing should not exceed 30 days.

E. Settlement Negotiations/Settlement Judge

With the exception of the decommissioning cost contingency factor issue, the parties have not to date engaged in any substantive settlement-related talks with respect to specific contentions. As the parties previously informed the Board, LES, NIRS/PC, and the AGNM were unable to reach agreement on the contingency factor issue.⁵

The parties, however, recognize the need to undertake settlement talks and have scheduled a meeting in August in New Mexico to discuss – among other things – the possibility of settlement of contested issues. The parties will advise the Licensing Board of the outcome of these discussions, and will address at that time the question of whether a settlement judge may be helpful.

On a related note, counsel for the NRC Staff indicated that she has been in contact with a governmental mediation organization, the U.S. Institute for Environmental Conflict Resolution (www.ecr.gov), and queried whether certain issues might be resolved through mediation. The parties agreed to take the suggestion under advisement, with counsel for the AGNM and counsel for NMED (following her discussions with the Cabinet Secretary) indicating that they generally supported pursuing the use of alternative dispute resolution processes in this proceeding.

⁵ See "Notification of Licensing Board of Status of Discussions on Facility Decommissioning Contingency Factor Issue" (July 7, 2004); "New Mexico Attorney General's Notification of Licensing Board of Status of Position on Facility Decommissioning Contingency Factor Issue" (July 9, 2004).

F. Mandatory Hearing Findings

The Licensing Board also solicited the views of LES and the NRC Staff with respect to the Board's "mandatory hearing findings."⁶ Accordingly, counsel for LES and the NRC Staff offer the following observations.

First, Sections II.C through II.F of the Commission's Hearing Order establish the framework for the mandatory hearing. These paragraphs contain three overarching principles:

- The Licensing Board's "mandatory" review is to focus on the completeness of the license application and hearing record, and on the adequacy of the Staff's evaluation of the application. It is not, however, a *de novo* review of the application.
- The particular substantive areas to be reviewed by the Board will generally coincide with the standards set forth in 10 C.F.R. §§ 30.33, 40.32, and 70.23, 10 C.F.R. Part 51, and the Commission's Hearing Order.
- The Licensing Board's review, however, should be confined to matters "not already covered by admitted contentions." If there is an admitted contention on an issue, a determination on that admitted contention will suffice.

Second, bearing these principles in mind, and based upon a review of relevant precedent,⁷ LES and NRC Staff recommend that the Licensing Board adopt the following process for making the mandatory hearing determinations:

⁶ See Memorandum and Order (Rulings Regarding Standing, Contentions, and Procedural/Administrative Matters) (July 19, 2004) at 34 n.20.

⁷ See, e.g., All Chemical Isotope Enrichment, Inc. (AlChemIE Facility-1 CPDF and AlChemIE Facility-2 Oliver Springs), LBP-89-05, 29 NRC 99 (1989); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), LBP-74-20, 7 AEC 637 (1974); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), LBP-74-64, 8 AEC 339 (1974).

- The NRC Staff would provide an executive summary of the key areas of review and Staff findings, with references to the Staff's final review documents (*i.e.*, the final SER and EIS).
- LES, the NRC Staff, and the Licensing Board would hold a prehearing conference to discuss (1) specific questions following the Licensing Board's review of the Staff's executive summary, (2) the key issues to be considered by the Board at hearing, and (3) the scope of the further evidentiary presentations necessary to support the Licensing Board's mandatory determinations. The Board would take into account issues covered by admitted contentions and any record already developed in any hearings on those contentions.
- LES and the NRC Staff would respond, at the hearing, to pre-hearing questions issued by the Licensing Board to those parties, by way of written testimony, affidavits, exhibits, and/or live testimony, on key issues underpinning the Licensing Board's required legal determinations. During the hearing, the Board could question LES and Staff witnesses, as necessary, to obtain any additional clarification or information necessary to support the Board's findings.
- LES would submit proposed findings of fact and conclusions of law on the mandatory hearing issues, in the form of a proposed initial decision. After reviewing LES's submittal, the NRC Staff would then submit any revised and/or supplemental findings it deems necessary.
- The Licensing Board would issue a partial initial decision on the mandatory hearing determinations after review of the record and proposed findings.

The parties look forward to the prehearing conference call scheduled for Tuesday, August 3, 2004, to updating the Board on any new developments related to the issues discussed in this joint status report, and to resolving the open issue of an appropriate limit on the number of interrogatories.

Respectfully submitted,

A handwritten signature in black ink that reads "David A. Repka". The signature is written in a cursive style and is underlined with a single horizontal line.

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Dated at Washington, District of Columbia
this 29th day of July 2004

PROPOSED DISCOVERY AND HEARING SCHEDULE

Date	Description
7-19-04	ASLB Order on Admissibility of Contentions
8-18-04	Staff Disclosures, in electronic format, pursuant to § 2.336(b)
9-2-04	Mandatory Disclosures by all parties other than staff pursuant to § 2.704(a)
9-9-04	Parties Identify Individuals to be Deposed/Depositions Scheduled
9-9-04	Parties Submit Interrogatories pursuant to § 2.706
9-9-04	Parties Submit Requests for Admission pursuant to § 2.708
9-20-04	Responses to Requests for Admission due pursuant to § 2.708
9-23-04	Responses to Interrogatories due pursuant to § 2.706
9-13-04 to 10-15-04	Depositions Conducted
9-30-04	NRC Staff issues Draft Environmental Impact Statement ("Draft EIS"); commencement of formal discovery against the NRC Staff on environmental contentions (interrogatories to Staff required to be submitted to ASLB pursuant to § 2.709)
10-18-04	Discovery against Applicant and Intervenors completed on contentions admitted on 7-19-04
10-20-04	Motions to amend contentions and motions for late-filed contentions based on Draft EIS
10-30-04	Notarized/corrected depositions forwarded to parties
11-8-04	Summary disposition motions filed on environmental contentions admitted on 7-19-04
11-9-04	Completion of answers and replies to motions for amended and late-filed contentions
11-19-04	Answers to summary disposition motions on 7-19-04 environmental contentions
11-19-04	ASLB decision on admissibility of late-filed contentions

11-29-04	Replies to summary disposition motions on 7-19-04 environmental contentions
12-20-04	ASLB decision on summary disposition motions on 7-19-04 environmental contentions
12-20-04	Completion of discovery on late-filed environmental contentions and completion of discovery against NRC Staff on all environmental contentions
12-30-04	Direct testimony filed on remaining environmental contentions and any amended or admitted late-filed contentions
1-10-05	Cross-examination plans filed on remaining environmental contentions and any amended or admitted late-filed contentions.
1-17-05	Evidentiary hearing begins on remaining environmental contentions and any amended or admitted late-filed contentions
4-4-05	Completion of findings and replies on environmental contentions
6-3-05	ASLB's initial decision

Additional Notes:

1. Discovery requests and responses (including requests for admissions) should be served on the Board (if required by agency rules) and the other parties by e-mail.
2. Any motion to compel shall be filed within 7 business days of a party's receipt of the information giving rise to the motion to compel (e.g., within 7 business days of mandatory disclosures, receipt of responses to interrogatories). Replies to any such motions shall be filed within 2 business days of service of the motion.
3. Consistent with the Commission's January 2004 Hearing Order, this schedule does not contemplate summary disposition motions on late-filed contentions.
4. The proposed schedule does not specifically address discovery against the NRC Staff on technical issues subject to completion of a Staff review document, or the schedule for summary disposition/evidentiary hearing on those issues. That schedule will be developed after further clarification from the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	Docket No. 70-3103-ML
)	
Louisiana Energy Services, L.P.)	ASLBP No. 04-826-01-ML
)	
(National Enrichment Facility))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "JOINT STATUS REPORT REGARDING THE PARTIES' PROPOSED DISCOVERY PLAN AND OTHER ADJUDICATORY PROCESS ISSUES" in the captioned proceeding have been served on the following by e-mail service, designated by **, on July 29, 2004 as shown below. Additional service has been made by deposit in the United States mail, first class, this 29th day of July 2004.

Chairman Nils J. Diaz
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Washington, DC 20555-0001

Commissioner Edward McGaffigan, Jr.
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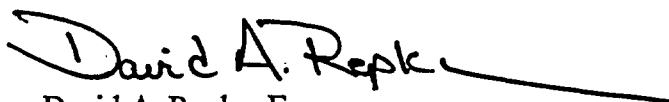
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**In the Matter of Louisiana Energy Services, L.P.
(National Enrichment Facility)
Docket No. 70-3103**

Dear Administrative Judges:

On July 22, 2004, the New Mexico Attorney General ("NMAG") filed in the above-captioned proceeding the "New Mexico Attorney General's Petition for Leave to File a Motion for Reconsideration." In an Order (Schedule for Reconsideration Petition Responses) dated July 23, 2004, the Licensing Board directed the parties to file any responses to the NMAG petition on or before Thursday, July 29, 2004. This letter is to inform the Licensing Board that Louisiana Energy Services, L.P. will not file a reply and takes no position on the petition.

Respectfully submitted,


David A. Repka, Esq.
Counsel for Louisiana Energy Services, L.P.

cc: Service List