

RAS 8327

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 08/16/04

SERVED 08/16/04

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

August 16, 2004

MEMORANDUM AND ORDER

(Memorializing and Ruling on Matters Raised
in Conjunction with August 3, 2004 Conference Call
and Setting General Schedule for Proceeding)

In our July 19, 2004 memorandum and order, the Licensing Board instructed the parties to meet for the purpose of formulating a discovery schedule to be presented to the Board in a future scheduled conference call. See LBP-04-14, 60 NRC __, __ (slip op. at 36-37) (July 19, 2004). Thereafter, the parties submitted a joint report that included a proposed discovery schedule and a discussion regarding additional issues related to the proceeding. See Joint Status Report Regarding the Parties' Proposed Discovery Plan and Other Adjudicatory Process Issues (July 29, 2004) [hereinafter Joint Status Report]. Following this submission, the Board conducted a conference call with the parties on August 3, 2004, during which discussions were held relating to the discovery schedule authored by the parties and other related matters. See Tr. at 291-339. On the basis of the July 29 joint party filing, and the August 3 telephone

conference, the Board has drawn up a general schedule for this proceeding, which is attached as Appendix A to this order.¹

In addition to the attached schedule, the Board provides the following updates, guidance, and directives as this proceeding moves forward:

A. “Lead” Party Designation for contention NIRS/PC EC-5/TC-2 - AGNM TC-i

In its July 19 issuance, the Board admitted and consolidated two related contentions of intervenors Nuclear Information and Resource Service/Public Citizen (NIRS/PC) and the Attorney General of New Mexico (AGNM), designating NIRS/PC as the “lead” party for adjudication purposes. See LBP-04-14, 60 NRC at ___ (slip op. at 33). Citing a Board instruction regarding potential changes to this designation, see id., AGNM filed a request seeking to have both NIRS/PC and AGNM named as “co-lead” parties for this consolidated contention. See [AGNM’s] Petition for Leave to File a Motion for Reconsideration (July 22, 2004) at 5.

Following discussions on this topic at the prehearing conference, see Tr. at 297-302, NIRS/PC and AGNM were instructed to submit jointly, on or before August 9, 2004, a plan for handling this issue while minimizing duplication and overlap throughout the adjudication of this contention, which those parties timely filed, see Status Report by Petitioners [NIRS/PC] and [AGNM] Regarding Co-Lead Party Designation as to NIRS/PC Contention EC-5/TC-2 and AGNM [TC-i] (Aug. 9, 2004) [hereinafter Status Report]. Following receipt of this submission, the Board instructed all parties wishing to file a response to the status report to do so no later than August 12, 2004. See Licensing Board Order (Schedule for Responses to Lead Counsel

¹ As was noted during the telephone conference, see Tr. at 321, the Board recognizes that amendments to this general schedule may be required should the Commission remand for adjudication the rejected contention rulings that were referred in LBP-04-14, 60 NRC at ___ (slip op. at 38).

Status Report) (Aug. 10, 2004) (unpublished). Both LES and the NRC staff filed such a response. See [LES] Response to August 10, 2004 Order (Aug. 12, 2004) [hereinafter LES Response]; NRC Staff Response to Status Report Filed by [NIRS/PC] and [AGNM] Regarding Co-Lead Party Designation (Aug. 12, 2004) [hereinafter Staff Response].

As both LES and the staff point out, see LES Response at 7, Staff Response at 2-3, the NIRS/PC/AGNM filing is short on details about how these parties would carry forward their “co-lead” party suggestion, other than to indicate that if they do not agree on witness presentation or some other aspect of the proceeding they would act separately, see Status Report at 4. As LES and the staff also point out, see LES Response at 7; Staff Response at 3, this undermines significantly the purpose of a lead party designation, which is intended to ensure, to the maximum extent practicable, that the Board receives a unified, coordinated presentation regarding a contention that reflects consultation among the intervenors involved, subject to Board resolution of any disputes. Nor do we find persuasive the AGNM’s assertions regarding the differing nature of the public and private interests involved relative to the “contingency factor” aspect of contention NIRS/PC EC-5/TC-2 - AGNM TC-i that is the sole AGNM feature of that consolidated issue statement. Her expressed concern, which amounts to little more than an assertion she may not agree with the NIRS/PC litigation strategy, can be accommodated through the “consultation and objection” process provided for by the Board.²

Accordingly, the AGNM request for a change in the lead party designation for contention NIRS/PC EC-5/TC-2 - AGNM TC-i to a co-lead status is denied. Per the NIRS/PC and the AGNM commitment in their status report, see Status Report at 4, they should consult regarding all material aspects of the litigation of this contention, including discovery or other filings and

² In fact, the approach to this contention outlined by the AGNM appears to be one that comports more closely with participation by an interested governmental entity relative to an admitted contention. See 10 C.F.R. § 2.315(c).

proposed evidentiary presentations, and, if unable to agree on such matters, they should promptly bring their differences to the attention of the Board. NIRS/PC is the lead party for this contention; nonetheless, there is nothing in that designation that precludes the AGNM from having its insights and information relative to the contingency factor aspects of contention NIRS/PC EC-5/TC-2 - AGNM TC-i brought before the Board as part of the intervenor presentation on that consolidated contention.

B. NRC Staff Hearing File

In a July 29 filing, the staff provided the Board with its proposal for the LES hearing file. See NRC Staff Response to Board Questions Regarding the LES Hearing File (July 29, 2004). At the August 3 telephone conference, each of the parties indicated general satisfaction with the plan outlined by the staff within that submission. See Tr. at 302-307. The Board did note one potential issue related to keeping current the Universal Resource Locators (URLs) placed within the hearing file by the staff, about which a brief discussion followed. See id. In that regard, on or before August 19, 2004, the staff is to submit a proposal regarding the maintenance of the hearing file URLs, after which the other parties have five (5) days to submit responses.

C. Limits on Depositions and Interrogatories

In accord with the Board's instructions, see LBP-04-14, 60 NRC at ___ (slip op. at 35), the parties included within their July 29 joint report suggestions related to potential limits upon depositions and interrogatories. See Joint Status Report at 4. That report indicated each of the parties agreed that depositions should be limited to one per witness or panel of witnesses, although no consensus could be reached regarding possible limits to the number of interrogatories, suggestions for which ranged from ten to twenty-five. See id. The topic was addressed again in the course of the August 3 conference, during which the parties offered

some additional clarification about the proposal and provided their positions regarding potential interrogatory limitations. See Tr. at 307-18.

With these discussions in mind, absent prior Board approval or written stipulation, the following limits are set upon depositions and interrogatories in this proceeding:³

1. The number of depositions is limited to one (1) per witness or panel of witnesses.
2. The number of depositions per admitted contention will not be limited.
3. The number of interrogatories, including all discrete subparts, will be limited in the following manner:
 - a. Relative to the NIRS/PC contentions (including contention NIRS/PC EC-5/TC-2 - AGNM TC-i), NIRS/PC, LES, and the staff each can serve one-hundred thirty (130) interrogatories upon each of the other two

³ The Board is aware that certain circumstances may arise through the course of the discovery process when there will be a need to adjust the limits set out by the Board. In those instances the Board encourages the parties to attempt to resolve such matters among themselves. If a resolution cannot be reached, all requests for Board intervention must be in writing, on the record, and presented to the Board in such a manner that will allow the matter to be resolved without requiring an extension of the discovery schedule. Any extension of a period for conducting discovery must be sought from the Board. See Tr. at 319-21.

Also relative to the discovery process, discovery requests and responses (including requests for admissions) should be served on the Licensing Board (if agency rules require) and the other parties by e-mail. Additionally, any motion to compel shall be filed within seven business days of a party's receipt of the information giving rise to the motion to compel (e.g., within seven business days of mandatory disclosures, receipt of responses to interrogatories). Replies to any such motions shall be filed within two business days of service of the motion. The Licensing Board also reminds the parties that all motions to compel discovery must be preceded by the moving party either conferring or attempting in good faith to confer with the other party in an effort to resolve the dispute prior to seeking Licensing Board resolution. See LBP-04-14, 60 NRC at __ (slip op. at 36).

parties, to be allotted among the several admitted contentions as each of these parties sees fit.⁴

- b. Relative to contention AGNM TC-ii, the AGNM, LES, and the staff each can serve fifteen (15) interrogatories upon each of the other two parties.
- c. Relative to contention NMED TC-3/EC-4, NMED, LES, and the staff each can serve fifteen (15) interrogatories upon each of the other two parties.

D. Prefiled Rebuttal Testimony

An additional topic covered during the August 3 conference call was the Board's proposal to build into the schedule an additional period of time for prefiled rebuttal testimony. See Tr. at 324-31. After their opinions regarding this proposal were solicited by the Board, the parties offered varying preferences for a period ranging from fourteen days to twenty days to submit this type of filing. See id.

Taking into account the parties' arguments and the other time periods allotted for the preparation of evidentiary filings, the Board has built a fourteen-day period into the schedule to allow for prefiled rebuttal testimony. This insertion will impact both the filing date for cross-examination plans and the starting date for the evidentiary hearing. These changes are reflected within the general schedule found in Appendix A.

E. Outline Summaries

As was noted during the discussions pertaining to the prefiled rebuttal testimony, the Board will require each party to submit, along with its cross-examination plan, a brief bullet outline summarizing its respective positions in the case, including key points of witness testimony, and the particular relief and/or determinations sought. See Tr. at 325-28. The

⁴ Should the AGNM wish to have interrogatories submitted with respect to contention NIRS/PC EC-5/TC-2 - AGNM TC-i, the AGNM should coordinate with NIRS/PC regarding those interrogatories.

Board will provide the parties with an example of such an outline summary at a point nearer to the evidentiary hearing.

F. Mandatory Hearing

The final topic discussed during the August 3 telephone conference related to the mandatory hearing. See Tr. at 334-37. At this preliminary juncture, the Board anticipates that such a hearing should last no longer than one week and can occur in conjunction with the proceedings relating to the admitted technical contentions, at some period following the scheduled release of the staff's Safety Evaluation Report (SER), which is currently set for June 15, 2005. The schedule included as Attachment A tentatively incorporates such a mandatory proceeding, subject to further discussions with LES and the staff.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁵

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

August 16, 2004

⁵ Copies of this order were sent this date by Internet e-mail transmission to counsel for (1) applicant LES; (2) intervenors NMED, the AGNM, and NIRS/PC; and (3) the staff.

APPENDIX A

Dated: 8/16/2004

GENERAL SCHEDULE -- Louisiana Energy Services, L.L.C. Proceeding

Event	Environmental Contentions ¹	Technical/ Safety Contentions ²	Mandatory Hearing ³
Licensing Board Order on Admissibility of Contentions	July 19, 2004	July 19, 2004	
Staff Disclosures, in Electronic Format, Due	Aug. 18, 2004	Aug. 18, 2004	
Mandatory Disclosures by all Parties other than Staff Due	Sept. 2, 2004	Sept. 2, 2004	
Deposed Individuals Identified/Depositions Scheduled; Interrogatories and Admission Requests Due	Sept. 9, 2004	Sept. 9, 2004	
Request for Admissions Responses Due	Sept. 20, 2004	Sept. 20, 2004	
Interrogatory Responses Due	Sept. 23, 2004	Sept. 23, 2004	
Depositions Conducted	Sept. 13, 2004 - Oct. 15, 2004	Sept. 13, 2004 - Oct. 15, 2004	
Discovery Against Applicant and Intervenors Ends	Oct. 18, 2004	Oct. 18, 2004	
Formal Discovery Against NRC Staff Begins	Sept. 30, 2004 (DEIS Issued)	June 15, 2005 (SER Issued)	
Motions to Amend Contentions/for Late-Filed Contentions Due	Oct. 20, 2004	July 5, 2005	
Answers to Motions for Amended/ Late-Filed Contentions Due	Nov. 5, 2004	July 20, 2005	

¹ Environmental contentions include contentions NIRS/PC EC-1, NIRS/PC EC-2, NIRS/PC EC-4, and NIRS/PC EC-7, in addition to any potential amended or late-filed environmental contentions admitted to the proceeding.

² Technical/Safety contentions include NMED TC-3/EC-4, AGNM TC-ii, NIRS/PC EC-5/TC-2 - AGNM TC-i, NIRS/PC EC-6/TC-3, NIRS/PC EC-3/TC-1, and NIRS/PC TC-6, in addition to any potential amended or late-filed technical/safety contentions admitted to the proceeding. The post-Safety Evaluation Report (SER) portion of this schedule is tentative and subject to refinement by the parties and the Licensing Board once the staff's schedule for issuing its SER has been further clarified.

³ This schedule is tentative and subject to further refinement based on discussions between the Licensing Board and LES and the staff regarding the scope of and procedures for the mandatory hearing.

Event	Environmental Contentions ¹	Technical/ Safety Contentions ²	Mandatory Hearing ³
Summary Disposition Motions Due ⁴	Nov. 8, 2004	July 25, 2005	
Summary Disposition Motion Responses Due	Nov. 19, 2004	Aug. 4, 2005	
Licensing Board Decision on Admissibility of Late-Filed Contentions	Nov. 19, 2004	Aug. 5, 2005	
Summary Disposition Motion Replies Due	Nov. 29, 2004	Aug. 15, 2005	
Licensing Board Decision on Summary Disposition Motions	Dec. 20, 2004	Sept. 6, 2005	
Discovery on Late-Filed Contentions/Against NRC Staff Completed	Dec. 20, 2004	Sept. 6, 2005	
Prefiled Direct Testimony Filed	Dec. 30, 2004	Sept. 16, 2005	Sept. 16, 2005
Prefiled Rebuttal Testimony Filed	Jan. 13, 2005	Oct. 3, 2005	
Cross-Examination Plans and Party Outline Summaries Filed	Jan. 26, 2005	Oct. 13, 2005	
Evidentiary Hearing	Feb. 7, 2005 - Feb. 16, 2005	Oct. 24, 2005 - Nov. 7, 2005	Nov. 8, 2005 - Nov. 11, 2005
Proposed Findings of Fact/Conclusions of Law Due	Mar. 14, 2005	Dec. 6, 2005	Dec. 6, 2005
Reply Findings of Fact/Conclusions of Law Due	Apr. 4, 2005	Dec. 27, 2005	Dec. 27, 2005
Licensing Board Partial Initial Decision	June 3, 2005	Feb. 27, 2006	Feb. 27, 2006

⁴ Consistent with the Commission's instruction in CLI-04-3, 60 NRC 10, 19 n.*** (2004), this schedule does not contemplate summary disposition motions on late-filed contentions.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
LOUISIANA ENERGY SERVICES, L.P.) Docket No. 70-3103-ML
)
)
(National Enrichment Facility))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (MEMORIALIZING AND RULING ON MATTERS RAISED IN CONJUNCTION WITH AUGUST 3, 2004 CONFERENCE CALL AND SETTING GENERAL SCHEDULE FOR PROCEEDING) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
G. Paul Bollwerk, III, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Paul B. Abramson
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Charles N. Kelber
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Lisa B. Clark, Esq.
Angela B. Coggins, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Claybourne F. Clarke, Esq.
Assistant General Counsel
Tannis L. Fox, Esq.
Deputy General Counsel
Office of General Counsel
New Mexico Environment Department
1190 St. Francis Drive
Santa Fe, NM 87502-6110

Docket No. 70-3103-ML
LB MEMORANDUM AND ORDER
(MEMORIALIZING AND RULING ON
MATTERS RAISED IN CONJUNCTION
WITH AUGUST 3, 2004 CONFERENCE
CALL AND SETTING GENERAL SCHEDULE
FOR PROCEEDING)

James R. Curtiss, Esq.
David A. Repka, Esq.
Martin J. O'Neill, Esq.
Winston & Strawn LLP
1400 L Street
Washington, DC 20005-3502

David M. Pato, Esq.
Stephen R. Farris, Esq.
Christopher D. Coppin, Esq.
Assistant Attorneys General
Glenn R. Smith, Esq.
Deputy Attorney General
Office of the New Mexico Attorney General
P.O. Box Drawer 1508
Santa Fe, NM 87504-1508

Lindsay A. Lovejoy, Jr.
618 Paseo de Peralta, Unit B
Santa Fe, NM 87501

Lisa A. Campagna, Esq.
Assistant General Counsel
Westinghouse Electric Company LLC
P.O. Box 355
Pittsburgh, PA 15230-0355

John W. Lawrence, Esq.
Louisiana Energy Services, L.P.
2600 Virginia Ave., NW, Suite 610
Washington, DC 20037

[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 16th day of August 2004