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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)	)	

LOUISIANA ENERGY SERVICES, L.P. RESPONSE TO AUGUST 10, 2004 ORDER

I. INTRODUCTION AND SUMMARY

Pursuant to the August 10, 2004 "Order (Schedule for Responses to Lead Counsel Status Report)," Louisiana Energy Services, L.P. ("LES"), applicant in the captioned proceeding, responds to the August 9, 2004 Status Report of intervenors Nuclear Information and Resource Service/Public Citizen ("NIRS/PC") and the Attorney General of New Mexico ("NMAG"), regarding co-lead party designation in connection with admitted consolidated contention NIRS/PC EC-5/TC-2 – NMAG TC-i.[1] In summary, LES believes that the intervenors' plan for sharing authority over all aspects of the trial of the designated consolidated contention as "co-lead parties" raises many questions of practical implication and is inconsistent with the objectives of consolidation of contentions in NRC proceedings as directed by the Commission. Furthermore, NMAG is not prejudiced by the Atomic Safety and Licensing Board's ("Licensing

[1] "Status Report by Petitioners Nuclear Information and Resource Service/Public Citizen and Attorney General of New Mexico Regarding Co-Lead Party Designation as to NIRS/PC Contention EC-5/TC-2 and AGNM Technical Contention 1" (August 9, 2004) ("Status Report").

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Board") designation of NIRS/PC as lead on this contention. The Board has already anticipated the possibility of conflicts between the two parties and has already designated a resolution process for concrete issues which may arise; no deficiency in the Board's defined process has been demonstrated by the parties. Thus, the Board reached the correct conclusion with respect to consolidation of this issue.

II. BACKGROUND

In its July 19, 2004 "Memorandum and Order (Rulings Regarding Standing, Contentions and Procedural/Administrative Matters),"[2] the Licensing Board admitted Contention NMAG TC-i to the extent that the adequacy of the LES contingency factor relating to disposal security will be calculated. Therein, the Board consolidated this contention with the admitted aspects of NIRS/PC EC-5/TC-2.[3]

On July 22, 2004, the NMAG petitioned for leave to file a motion for reconsideration of the designation of NIRS/PC as the lead party for this consolidated contention. Therein, based upon the different interests of NMAG and NIRS/PC, NMAG requested that the Board designate both the NMAG and NIRS/PC "co-lead parties on the contingency factor issue." Neither LES[4] nor the NRC Staff[5] took a position on the petition for leave to file a motion for reconsideration.

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2 *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, ___ NRC ___ (July 19, 2004 slip op.).

3 *Id.*, slip op. at 21.

4 *See* July 29, 2004 letter to the Licensing Board from David A. Repka, Counsel for LES.

5 *See* July 29, 2004 "NRC Staff Response to the New Mexico Attorney General's Petition for Leave to File a Motion for Reconsideration." In its response, the Staff stated that should the NMAG's request be granted, the Board should "require coordination between the parties to avoid duplication of evidence, and that the coordination take the form of a

Pursuant to the Licensing Board's direction during a July 29, 2004, prehearing telephone conference, petitioners NIRS/PC and NMAG filed a Status Report on August 9, 2004, concerning their proposal for a structure by which the two parties propose to act as co-lead parties with respect to the subject admitted contention. After reciting the terms of the consolidation in the Status Report,[6] NIRS/PC and NMAG proposed a sharing of responsibilities at odds with the Board's July 19, 2004, Memorandum and Order:

> In connection with preparation of items listed above (items 1-7), NIRS/PC and NMAGO shall communicate concerning the positions to be taken in the litigation. If in the course of such discussions it becomes apparent that there is a difference in positions supported by NIRS/PC and NMAGO concerning the contingency factor applicable in developing cost estimates, then the co-lead parties may each present evidence or argument on such matters through witnesses, discovery responses, briefing, or proposed findings of fact and conclusions of law. In the absence of any such difference, the witnesses, discovery responses, briefing, and proposed findings of fact and conclusions of law shall be presented on behalf of both co-lead parties.[7]

III. DISCUSSION

LES does not believe that the proposal of the two parties can be appropriately reconciled with the Licensing Board's purpose in designating a lead party or with the Commission's explicit directions to streamline the hearing process and create certainty in schedule. Furthermore, LES does not believe that any party is prejudiced by such consolidation; the procedures the Licensing Board has put in place adequately protect the rights of the parties.

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discovery and litigation plan detailing the respective roles of the AGNM and NIRS regarding the contention at issue." (p. 1).

6 Status Report at 3.

7 *Id.* at 4.

As early as 1981, in a Statement of Policy on the Conduct of Licensing Proceedings, the Commission emphasized the use of consolidation as a means to reduce the time for completing licensing proceedings while still ensuring that hearings are fair and produce full records.[8] While recognizing that no consolidation should be ordered that would prejudice the rights of any intervenor, the Commission stated that "single, lead intervenors should be designated to present evidence, to conduct cross-examination, to submit briefs, and to propose findings of fact, conclusions of law, and argument."[9] The Commission further directed that, where such consolidation has taken place, the functions of the lead intervenor "should not be performed by other intervenors except upon a showing of prejudice to such other intervenors' interest or upon a showing to the satisfaction of the board that the record would otherwise be incomplete."[10] The Commission's 1998 Policy Statement on the Conduct of Adjudicatory Proceedings[11] indicated that the Commission continued to endorse the guidance in its 1981 Statement of Policy.[12] Further, in its recent amendment to the rules of practice,[13] the

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8 *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (1981).

9 *Id.*, 13 NRC at 455.

10 *Id.*

11 *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998).

12 *Id.*, 48 NRC at 18-19.

13 69 Fed. Reg. 2182 (Jan.14, 2004).

Commission specifically provided for the consolidation of parties[14] and granted the presiding officer all necessary powers to consolidate parties in accordance with that section.[15]

In its July 19, 2004 Memorandum and Order, the Licensing Board designated a lead party for the litigation of the consolidated contentions. The Board stated that a party designated as the "lead" has the primary responsibility for the litigation of a contention:

> These litigation responsibilities of the lead party include, absent other instructions from the Board, the conduct of all discovery related to the contention; filing and responding to any dispositive or other motions related to the contention; submitting any required prehearing briefs regarding the contention; preparing prefiled direct testimony, conducting any redirect examination, providing any surrebuttal testimony in connection with the contention; and preparing posthearing proposed findings of fact and conclusions of law regarding the contention.[16]

The Board-designated lead party is responsible for consulting with the other parties involved regarding the activities relating to the litigation of the contention.[17] Importantly, the Board expressed its belief that the communication between the lead party and the other involved parties "will serve to protect the interests and concerns of all the parties regarding the contention."[18] The Board specifically left an outlet, however, by stating that should such consultation fail to yield a resolution to a dispute, those parties involved may request Board intervention. It directed that such requests for Board intervention must be "in writing, on the record, and be presented in such a timely fashion that will allow the Board to resolve the matter

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14 *See* 10 C.F.R. § 2.316 (Jan. 14, 2004).

15 *See* 10 C.F.R. § 2.319 (Jan. 14, 2004).

16 LBP-04-14, slip op. at 32.

17 *Id.* at 32-33.

18 *Id.* at 33, n.16.

without requiring the extension of any existing schedules."[19] Thus, the Board had anticipated that if there were issues between parties relating to a consolidated contention, these would be brought to the attention of the Board in a concrete manner. Should an issue arise, the Board's Order requires the parties to make a good faith attempt to cooperate and to resolve any differences.

While LES does recognize that there may be differences between the interests of a public and a private party, the differences identified in the current situation are in reality no different than would exist for any two intervenors. If differences in interest were a sufficient basis to preclude consolidation, the Commission's goal would be thwarted. Moreover, LES does not believe that, when viewed in the context of the particular contention, these claimed differences in interest between NMAG and NIRS/PC are sufficiently significant to negate the efficiencies achieved by consolidation in this case. The thrust of the admitted contention is the alleged inadequacy of the estimates of cost of decommissioning and the funding plan based upon, *inter alia,* a contingency factor that is alleged to be too low, an alleged low estimate of the cost of capital, and an alleged incorrect assumption that the costs are for low-level radioactive waste only. Should intervenors prevail on this contention in this proceeding, such estimates would presumably be increased which would inure to the interests of both the public and private parties. The objectives for their participation are apparently the same.

While NMAG hypothesizes that the parties may differ in their approach to the litigation of these contentions, LES believes that the Licensing Board has appropriately anticipated this potential and, should it arise, would consider any concrete dispute as affecting

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19 *Id.*

their interests at the appropriate time.[20] Thus, the parties are not prejudiced. LES would further note that the Attorney General has a broader contention relating to disposal cost estimates which it is pursuing. Thus, the contention at issue is a limited consolidation that does not cover the broader issues of disposal cost estimates, which are considered separately.[21]

LES does not believe that the proposal for a "co-lead" is a practical one, *e.g.*, in that it could result in duplicative pleading and discovery, and it would result in delay rather than an expedition of this proceeding. Without the discipline of the consolidated lead, there is no assurance that the intervenors would work internally to resolve disputes and, as a result, would more readily present disparate positions in this proceeding. The co-lead parties would reserve the right to present independent evidence or argument in the discovery, hearing and post-hearing phases.[22] We believe that this proposal is antithetical to the purposes for consolidation that were appropriately applied by the Licensing Board. As the Board has already recognized, it is open to considering and resolving legitimate fact-based differences between the consolidated parties. However, that should be the Board's prerogative, not that of the "co-leads."

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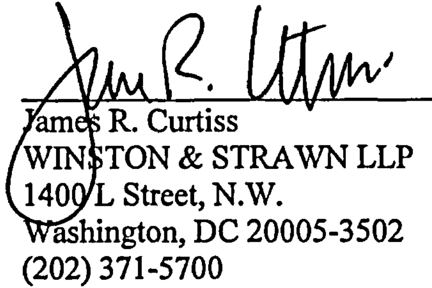
20 *See* LBP-04-14, slip op. at 33, n.16, *supra*.

21 *See* AGNM TC-ii. *See also* LBP-04-14, Appendix A, slip op. at 40.

22 Status Report, at 3-4.

On this basis, the Licensing Board's consolidation of the parties with regard to this contention should not be disturbed at the threshold.

Respectfully submitted,



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Dated at Washington, District of Columbia
this 12th day of August 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "LOUISIANA ENERGY SERVICES, L.P. RESPONSE TO AUGUST 10, 2004 ORDER" in the captioned proceeding have been served on the following by e-mail service, designated by **, on August 12, 2004 as shown below. Additional service has been made by deposit in the United States mail, first class, this 12th day of August 2004.

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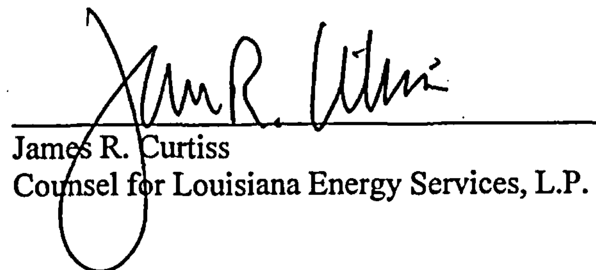

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