

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO STATUS REPORT FILED BY
 NUCLEAR INFORMATION AND RESOURCE SERVICE AND ATTORNEY GENERAL
 OF NEW MEXICO REGARDING CO-LEAD PARTY DESIGNATION

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's Order (Schedule for Responses to Lead Party Status Report) of August 10, 2004, the NRC Staff ("Staff") presents its position on the "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" filed August 9, 2004.

BACKGROUND

In the Board's Memorandum and Order (Rulings Regarding Standing, Contentions, and Procedural/Administrative Matters) of July 19, 2004 ("Board Order")¹, the Board admitted the New Mexico Attorney General (AGNM) as a party to this proceeding having found the AGNM to have standing and to have proposed at least one admissible contention. Board Order at 20-21. In admitting one of AGNM's contentions labeled "AGNM TC i", entitled "Disposal Security," the Board consolidated the contention with a similar contention filed by Nuclear Information and Resource Service and Public Citizen ("NIRS"). Board Order at 21. The Board then designated NIRS as the

¹ See *Memorandum and Order (Rulings Regarding Standing, Contentions, and Procedural/Administrative Matters)*, LBP-04-14, 60 NRC ___, July 19, 2004.

lead party regarding this contention explaining that the lead party has “the primary responsibility for the litigation of a contention.” Board Order at 32. The Board additionally instructed the parties that, should the parties involved in consolidated contentions agree that a party other than the one designated by the Board serve as lead party, the parties should seek Board approval for the change of designation. Board Order at 33.

Subsequently, on July 22, 2004, the AGNM filed a Petition for Leave to File a Motion for Reconsideration (“AGNM Motion”) requesting that the Board redesignate the AGNM as “co-lead party” regarding the consolidated contention.² AGNM Motion at 4. Staff’s response was due on July 29, 2004, however, on that date, the AGNM filed a Status Report indicating that NIRS and AGNM would soon thereafter file a written proposal detailing the anticipated agreement between the intervenors regarding the assignment of responsibilities for adjudication of the contention at issue.³ Therefore, Staff’s July 29, 2004 response to the AGNM reconsideration relayed the Staff’s desire to withhold substantive comment until the Staff reviewed the anticipated written proposal.⁴ The petitioners filed their written proposal on August 9, 2004,⁵ and Staff now provides its substantive response.

ARGUMENT

The Staff is sensitive to the distinct interests represented by the intervening parties and the difficulties this could present in the course of litigation. Therefore, as indicated in its earlier

² See “New Mexico Attorney General’s Petition for Leave to File a Motion for Reconsideration,” (“AGNM Motion”), filed July 22, 2004.

³ See “Status Report Regarding Designation of Lead Party to AGNM Technical Contention i and NIRS/PC Environmental Contention 5 and Technical Contention 2,” (“Status Report”) filed July 29, 2004.

⁴ See “NRC Staff Response to the New Mexico Attorney General’s Motion for Leave to File a Petition for Reconsideration,” filed July 29, 2004.

⁵ See “Status Report by Petitioners Nuclear Information and Resource Service/Public Citizen and the Attorney General of New Mexico Regarding Co-Lead Party Designation as to NIRS/PC Contention EC5/TC2 and AGNM Contention TC1,” (“Written Proposal”), filed August 9, 2004.

response, the Staff does not oppose a joint counsel designation in theory. However, in this instance, the Written Proposal filed by the Intervenors fails to convince the Staff that such a designation is necessary to protect the varied interests of the parties, or how such a designation would effectively be carried out in practice.

As the Board indicated in its Order, the Commission's regulations provide the Board with the authority to designate a lead party in order to eliminate duplicative or cumulative evidence or arguments. Board Order at 30, *citing* 10 C.F.R. § 2.319. The advantages of designating a single party to lead the litigation of a contention serve to reduce the burden on all parties involved, including those who have been joined based upon their common interest in the contention at issue. These advantages apply to any litigation, but are, perhaps, most evident in the present instance where extreme time constraints require the parties to recognize every conceivable efficiency. Because of the need to ensure effective coordination, the Staff submits that granting a "co-lead" designation should only occur following a written proposal which takes the form of a discovery and litigation plan detailing the respective roles of the AGNM and NIRS regarding the contention at issue. Such a detailed proposal is lacking here.

Moreover, the Staff has not been persuaded that a "co-lead" designation, and the related loss of efficiencies, are necessary in this instance. In the Written Proposal, the intervenors state that they will "communicate concerning the positions to be taken in the litigation." Written Proposal at 4. Thus, the intervenors have essentially agreed to do precisely as the Board originally indicated in its Order. In the Board's Order, the Board instructed the lead party to consult with the other parties involved with the consolidated contention regarding the activities related to the litigation of the contention. Board Order at 30. The Board anticipated that such communication between the involved parties would ensure protection of the interests and concerns of the parties. Board Order at 30, fn 16. The Written Proposal in this instance thus, seems to be an indication that the parties anticipate that such communication will serve precisely as the Board originally intended and thus, there will not be an issue with the lead party designation.

The only distinction between the Written Proposal and the Board's Order is that, under the Board's plan the intervenors would be required to approach the Board regarding any unresolved difficulties that the intervenors might experience as they proceed through litigation, a requirement which the Staff believes is essential given the time constraints of this proceeding. The intervenors' Written Proposal, however, effectively removes the Board from aiding in the resolution of such issues. The intervenors state that "[i]f 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 the 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." Written Proposal at 4. Thus, intervenors appear to be stating that they will work together on the three issues identified in the Board's admission of the contention, however, with respect to the first issue, that of the contingency factor, the parties may simply proceed independently if the need arises. The Staff submits that allowing the parties to proceed independently effectively negates the consolidation of the contention, at least as to that issue, and that the Board's participation in resolving any potential disputes that arise could prove extremely useful to all the parties involved.

The Board's participation is especially essential given the brevity of detail in the Written Proposal, which, most importantly, fails to identify a deadline upon which the decision to separately pursue the contingency issue would be made. Because of the potential difficulties to the Staff and remaining parties regarding such a decision, especially if made late in the process, the Staff supports active Board participation in this decision. Therefore, whether or not the designation as co-lead is granted, the Staff would request that, should the intervenors find it necessary to proceed separately on any part of the admitted contention at issue, the intervenors be required to consult with the Board first before doing so.

CONCLUSION

Therefore, while the Staff does not object to a shared status on litigation of a contention in theory, in this instance, the Staff is not convinced that such a status is necessary. Moreover, in order to support such an endeavor, the Staff would need to see more detail than what is currently provided in the intervenors' Written Proposal.

Respectfully submitted,

/RA/

Angela B. Coggins
Counsel for NRC Staff

Dated at Rockville, Maryland
this 12th day of August, 2004

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO STATUS REPORT FILED BY NUCLEAR INFORMATION AND RESOURCE SERVICE AND ATTORNEY GENERAL OF NUEW MEXICO REGARDING CO-LEAD PARTY DESIGNATION" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 12th day of August, 2004.

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