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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

September 8, 2004 (11:13AM)

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

RESPONSE OF LOUISIANA ENERGY SERVICES, L.P. TO THE
NEW MEXICO ATTORNEY GENERAL'S MOTION FOR CLARIFICATION
OF ATTORNEY GENERAL'S PARTICIPATION IN THIS PROCEEDING

I. INTRODUCTION AND SUMMARY

Pursuant to the Licensing Board's "Order (Schedule for Clarification Motion Responses)" of August 25, 2004, Louisiana Energy Services, L.P. ("LES") hereby responds to the August 24, 2004 motion for clarification of the Attorney General of New Mexico ("AGNM").¹ The AGNM requests that the Licensing Board "define the scope of her participation in this proceeding with respect to those contentions for which [the AGNM] is not a lead party." (Motion for Clarification at 1.) Specifically, the AGNM requests that "she be permitted to interrogate witnesses where cross-examination by NIRS/PC is permitted and to file proposed findings with respect to those particular contentions for which findings are permitted."

(Id.)

¹ "New Mexico Attorney General's Motion for Clarification of Attorney General's Participation in This Licensing Proceeding" (Aug. 24, 2004) ("Motion for Clarification").

As set forth below, participation in the manner proposed by the AGNM is neither contemplated nor permitted by the Commission's adjudicatory policies and regulations. Although the AGNM cites Commission precedent that she believes supports her request, that precedent is almost 30 years old and must be viewed in light of current Commission practice and procedures. Indeed, when this is done, it is clear that AGNM's motion contravenes the Commission's rule regarding submittal of proposed findings of fact and conclusions of law by parties to Subpart G proceedings. *See* 10 C.F.R. § 2.712(c). Additionally, as with her recent request for "co-lead" status, the AGNM's motion raises many questions of practical implication and is inconsistent with the objectives of current NRC regulations concerning consolidation of parties.

That being said, LES emphasizes that it has repeatedly recognized the unique and important role that the State of New Mexico plays in protecting the interests of the citizens of New Mexico. In this regard, should the AGNM wish to participate in this proceeding in the manner sought in her Motion for Clarification, the appropriate procedural avenue for such participation would be as an interested governmental entity pursuant to 10 C.F.R. § 2.315(c). Such an approach would enable the AGNM to interrogate witnesses where cross examination is permitted and to file proposed findings with respect to the contentions of other parties. Indeed, this very avenue is already being explored by the New Mexico Environment Department. *See* "NMED's Request for Clarification on Participating as an Interested State" (Aug. 27, 2004).

II. DISCUSSION

The AGNM seeks clarification with respect to those contentions for which she is not a lead party. This would include all admitted contentions except for contention AGNM TC-ii ("Disposal Cost Estimates"). As a threshold matter, the Licensing Board already has defined the

contours of the AGNM's participation with respect to two of the other nine contentions – NIRS/PC EC-5/TC-2-AGNM TC-i (“Decommissioning Costs”) and NMED TC-3/EC-4 (“Radiation Protection Program”). Specifically, in its Memorandum and Order of August 16, 2004,² the Board denied the AGNM's request for “co-lead” status on the joint NIRS/PC-AGNM contention. Under the “co-lead” proposal submitted by the AGNM and NIRS/PC, both parties would have reserved the right to present independent evidence or argument in the discovery, hearing, and post-hearing phases of the proceeding. In rejecting this proposal, the Board noted that it would “undermine[] 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.” August 16th Memorandum and Order at 3 (emphasis added).

With respect to NMED TC-3/EC-4, the AGNM informed the Board on April 23, 2004 of her desire to adopt TC-3/EC-4. See “Supplemental Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene” (Apr. 23, 2004) at 10-11. In the Board's Memorandum and Order of July 19, 2004, the Board concurred in the proposed adoption, noting that “while the AGNM did not specifically agree that NMED shall act as the representative for this contention . . . we will assume this is the case, unless within ten days of the entry of this order those two petitioners advise the Board they have agreed to some other arrangement.” *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 59

² Memorandum and Order (Memorializing and Ruling on Matters Raised in Conjunction with August 3, 2004 Conference Call and Setting General Schedule for Proceeding) (unpublished) (Aug. 16, 2004) (“August 16th Memorandum and Order”).

NRC ___ (July 19, 2004 slip op.) at 33 n. 17. As no such filing was made with the Board and, NMED is therefore the lead representative for TC-3/EC-4.

Notwithstanding the previous rulings of this Board, the AGNM now seeks to expand the scope of her participation with respect to contentions for which the AGNM is not even a co-sponsor, requesting that she be permitted to interrogate witnesses and file proposed findings and conclusions on "other parties' contentions." In support of this request, the AGNM cites two decisions from the *Prairie Island* lines of cases. (Motion for Clarification at 1-2, citing *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-252, 8 AEC 1175 (1974), *aff'd* CLI-75-1, 1 NRC 1, 1-2 (1975); *Pennsylvania Power & Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 291 (1979).) These cases, in the AGNM's view, support the proposition that any intervenor may cross-examine and submit proposed findings and conclusions of law on other parties' contentions (as well as any issues raised *sua sponte* by the Licensing Board) if it has a "discernible interest" in the resolution of those issues.

Although the *Prairie Island* doctrine has not been expressly overruled by the Commission via order, it no longer constitutes controlling precedent when viewed in the context of current Commission adjudicatory practice and procedures. Indeed, in 1989 the Commission amended former Section 2.754(c) to provide that "[a]n intervenor's proposed findings of fact and conclusions of law must be confined to issues which *that party* placed in controversy or sought to place in controversy in the proceeding." *Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process*, 54 Fed. Reg. 33,168, 33,177-78, 33,182 (emphasis added). In imposing this limitation, the Commission reasoned as follows:

Limitations on proposed findings and appeals to issues that the intervenor actually placed in controversy or sought to place in controversy will

ensure that the parties and the adjudicatory tribunals focus their interests and adjudicatory resources on the contested issues *as presented and argued by the party with the primary interest in, and concerns over, the issues*. These sorts of limitations should also serve to reduce the paper burdens for adjudicatory boards.³

Id. at 33,178 (emphasis added). Significantly, this provision has been retained in Section 2.712 of the Commission's current regulations. *See* 10 C.F.R. § 2.712(c). In short, allowing the AGNM to file proposed findings and conclusions on other parties' contentions would run afoul of this provision, a provision which is intended to ensure the fair but expeditious conduct of NRC proceedings.

Although the 1989 amendments do not expressly preclude intervenor cross-examination of witnesses on issues placed in controversy by other parties to a proceeding, any right to such cross-examination is by no means unconstrained. Indeed, in the *Prairie Island* decision cited by the AGNM, the Appeal Board noted that intervenor cross-examination in this regard should "not have the effect of expanding the boundaries of contested issues." ALAB-252, 8 AEC at 1179. Moreover, the *Prairie Island* cases acknowledge the ability of a licensing board to (1) require advance indication respecting what the intervenor will attempt to demonstrate or ascertain by such cross-examination; (2) preclude or limit such cross-examination it determines will be of no value to the development of a full record on the issue involved; (3) immediately halt cross-examination which is making no contribution to the ventilation of contested issues; and (4) consolidate the presentation of cross examination by several intervenors. *See, e.g., Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 868-69, *reconsideration denied*, ALAB-252, 8 AEC 1175 (1974), *aff'd* CLI-75-1, 1

³ The Commission further noted that the language "sought to place in controversy" was "intended to recognize that an appeal and briefs are permissible on the basis that a

NRC 1 (1975). Cf. 10 C.F.R. § 2.333(e) (stating that the presiding officer “[m]ay take necessary and proper measures to prevent argumentative, repetitious, or cumulative cross-examination”).

As the Commission reiterated earlier this year, parties to an NRC hearing “have no fundamental right to cross-examination, even in the most formal hearing procedures provided in Subpart C.” *Changes to the Adjudicatory Process*, 69 Fed. Reg. 2195-96, (Jan. 14, 2003) (citing *Curators of the Univ. of Mo.*, CLI-95-1, 41 NRC 71, 120 (1995)). On this point, the Commission added:

Since neither due process principles nor the APA require cross-examination, the Commission’s determination whether to permit cross-examination turns on whether cross-examination is necessary to elucidate relevant and material factual evidence, or whether the hearing process affords other mechanisms of assuring that the decisionmaker is privy to such evidence in a manner that conserves the decisionmaker’s and the parties’ time and resources.

Id. at 2196. See also 54 Fed. Reg. at 33,176 (citing *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir. 1978), *cert. denied*, 439 U.S. 824 (1978)).

Thus, again the aim is to achieve timely and efficient resolution of contested issues while still ensuring that hearings are fair and produce full records. Granting the AGNM the ability to cross-examine witnesses on the contentions of NIRS/PC would undercut the notion that either the sponsor of, or “lead” party on, a given contention bears the primary responsibility for litigating that contention. In fact, in the contention consolidation context, the Commission has stated that, absent a prejudicial effect on the rights of any intervenor, “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.*” *Statement of Policy*

contention was erroneously rejected. The language was not intended to allow appeals on a broader basis or on the merits of the contentions not admitted.” 54 Fed. Reg. at 33,178.

on *Conduct of Licensing Hearings*, CLI-81-8, 13 NRC 452, 455 (1981) (emphasis added). As the foregoing suggests, however, the ability to conduct cross-examination in an adjudication is not a fundamental right, such that its denial constitutes prejudicial error per se. See *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-82-11, 15 NRC 1383, 1384 (1982). In short, the AGNM's clarification motion represents an attempt by the AGNM to attain "co-lead" status – this time on contentions not even sponsored by the AGNM. For that reason, it should be denied as being inconsistent with current Commission rules and practice.

Finally, it warrants mention that, in denying the AGNM's recent request for "co-lead" status on contention NIRS/PC EC-5/TC-2-AGNM TC-I, the Board noted that the AGNM's proposed approach to that contention "appears to be one that comports more closely with participation by an interested governmental entity relative to an admitted contention." August 16th Memorandum and Order at 3 n.2. To a large extent, the same can be said of the AGNM's clarification motion, insofar as an "interested" State can participate in the evidentiary hearing phase of a proceeding by filing testimony, interrogating witnesses, advising the Commission without taking a position with respect to an issue, filing proposed findings, and petitioning for review by the Commission under Section 2.341. See 10 C.F.R. 2.315(c); 69 Fed. Reg. at 2200-01. As noted earlier, the New Mexico Environment Department is currently exploring just such an approach. In view of this, and in light of the procedural rights that are being sought by the AGNM, such an approach would be the recognized avenue for securing these rights

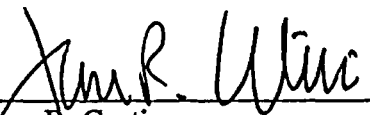
III. CONCLUSION

The scope of the AGNM's participation in this proceeding with respect to all admitted contentions is sufficiently clear, particularly in view of principles set forth in the

Commission's Rules of Practice and applicable agency precedent, including prior Board rulings in this proceeding. Consistent with these principles, the AGNM's request to cross-examine witnesses and file proposed findings with respect to other parties' contentions should be denied.

If the AGNM wishes to exercise procedural rights relative to the contentions of other parties, the appropriate procedural mechanism to accomplish this is through 10 C.F.R. 2.315(c).

Respectfully submitted,


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Dated at Washington, District of Columbia
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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
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Louisiana Energy Services, L.P.)	ASLBP No. 04-826-01-ML
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(National Enrichment Facility))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "RESPONSE OF LOUISIANA ENERGY SERVICES, L.P. TO THE NEW MEXICO ATTORNEY GENERAL'S MOTION FOR CLARIFICATION OF ATTORNEY GENERAL'S PARTICIPATION IN THIS PROCEEDING" in the captioned proceeding have been served on the following by e-mail service, designated by **, on August 31, 2004 as shown below. Additional service has been made by deposit in the United States mail, first class, this 31ST day of August 2004.

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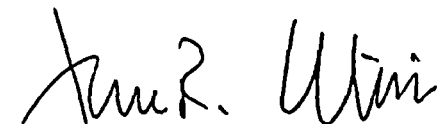
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