

RAS 8459

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

DOCKETED 09/14/04

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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

September 14, 2004

MEMORANDUM AND ORDER
(Clarification Requests Ruling and Commission Referral)

The two governmental entities admitted as parties to this proceeding – the Attorney General of New Mexico (AGNM) and the New Mexico Environment Department (NMED) – have filed with the Licensing Board motions, respectively dated August 24 and 27, 2004, seeking clarification of certain aspects of their roles in the conduct of this licensing adjudication. Specifically, citing Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-252, 8 AEC 1175, aff'd, CLI-75-1, 1 NRC 1, 12 (1975); and Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291 (1979), the AGNM asks that we clarify her role relative to those admitted contentions for which she is not a lead party, including her ability to interrogate witnesses on these issues otherwise subject to cross-examination by private intervenors Nuclear Information and Resource Service/Public Citizen (NIRS/PC) and to file proposed findings of fact on such contentions. See [AGNM] Motion for Clarification of Extent of Attorney General's Participation in this Licensing Proceeding (Aug. 24, 2004) at 1-2. In contrast, NMED asks that we provide guidance regarding its ability to participate as an interested government entity pursuant to 10 C.F.R. § 2.315(c), including its

ability to participate under section 2.315(c) relative to contentions on which it is not a party and the procedural steps it needs to take to participate as an interested governmental entity. See NMED's Request for Clarification of Participating as an Interested State (Aug. 27, 2004) at 1-2.

The NRC staff and applicant Louisiana Energy Services, L.P., (LES) advised the Board they did not intend to take a position or otherwise respond to the NMED request and the staff likewise indicated it was not taking a position regarding the AGNM motion.¹ On August 31, 2004, however, LES filed a response to the AGNM's motion, asserting that, with respect to contentions other than contentions NIRS/PC EC-5/TC-2-AGNM TC-i (for which NIRS/PC is the lead party) and NMED TC-3/EC-4 (an AGNM-adopted issue statement for which the Board assigned NMED lead party status without AGNM objection), the AGNM's reliance on the Prairie Island line of authority is misplaced. According to LES, although never expressly overruled, those cases are no longer controlling precedent relative to the filing of proposed findings of fact and conclusions of law given a 1989 revision to 10 C.F.R. § 2.754(c) indicating that the right to file proposed findings and conclusions relative to a particular issue should be limited to the issues that a party placed in controversy or sought to place in controversy in a proceeding. Further, although acknowledging that cross-examination by a non-sponsoring party was not covered by the 1989 rule change that revised section 2.754(c), LES asserts that the Board's general authority to control the timing and scope of cross-examination, as well as the Commission's expressed preference for the use of lead parties relative to contentions, both weigh against an unlimited right to cross-examine regarding a contention by a non-sponsoring intervenor party. Finally, LES notes that what the AGNM appears to be proposing is in fact participation of the sort that NMED apparently may be interested in seeking as an interested

¹ Intervenor NIRS/PC did not submit any filings regarding the AGNM and NMED motions.

governmental entity. See Response of [LES] to the [AGNM] Motion for Clarification of Attorney General's Participation in this Proceeding (Aug. 31, 2004) at 4-8.

Although noting that it is a party's responsibility affirmatively to pursue those procedural avenues it believes will best serve its interests, as opposed to requesting what are essentially advisory opinions from a Licensing Board regarding interpretations of the agency's rules, given the recently adopted revisions to the agency's rules of practice that made significant changes to these agency procedural directives, we will in this instance respond to the AGNM and NMED requests. Turning first to the NMED inquiry, although interested governmental entity participation is a longstanding part of NRC adjudicatory practice -- going back to the rules of practice originally adopted under the Atomic Energy Commission -- as is pertinent to the NMED request the recently revised provision concerning such participation states "[t]he presiding officer will afford an interested State, local governmental body (county, municipality, or other subdivision), and affected, Federally-recognized Indian Tribe, which has not been admitted as a party under § 2.309, a reasonable opportunity to participate in a hearing." 10 C.F.R. § 2.315(c) (69 Fed. Reg. 2182, 2242 (Jan. 14, 2004)) (emphasis supplied). Of significance in this instance is the phrase "which has not been admitted as a party under § 2.309," language that was not in the current rule's predecessor, see 10 C.F.R. §2.715(c) (2004), or the proposed version of the current rule, see 66 Fed. Reg. 19,609, 19,639 (Apr. 16, 2001) (proposed section 2.315(c)). On its face, this new language precludes participation under section 2.315(c) by an interested governmental entity that has been admitted as a section 2.309 party to a proceeding, such as NMED, regardless of the fact its interested governmental entity participation would involve another party's admitted contentions. Such an interpretation is consistent with the provisions of the new Part 2 that explicitly discuss contention adoption by parties, thus providing an avenue of participation for any party in connection with any of the contentions proffered by another

participant, see 10 C.F.R. § 2.309(f)(3), as well as the recent Commission decision in this proceeding indicating that, relative to the standards governing the admission of contentions by those seeking section 2.309 party status in a proceeding, governmental entities are held to the same standards of compliance as private entities, see CLI-04-25, 60 NRC __, __ (slip op. at 2-4) (Aug. 18, 2004). Thus, under the provisions of the existing section 2.315(c), having obtained section 2.309 party status in this proceeding, NMED cannot invoke limited governmental entity status under section 2.315 to gain participation rights relative to other parties' admitted contentions in this proceeding.

Relative to the AGNM query, although its request regarding participation in the evidentiary proceeding on other parties' admitted contentions is rooted in its status as a section 2.309 party rather than its potential status as a section 2.315(c) interested governmental entity, we find the answer is essentially the same. Although we are aware of nothing in the agency's case law that explicitly overrules the Prairie Island line of cases cited by the AGNM, we believe the recent revisions to the agency's rule of practice in fact mandate such a result. With contention adoption explicitly recognized as the method by which an intervenor can gain a role relative to another petitioner's proffered contentions,² to permit any party to the proceeding to take an active role regarding any contention without regard to whether that party made any attempt to adopt that contention would seriously undermine the efficacy of that provision, particularly in an instance (such as here) in which lead-party status is assigned relative to adopted contentions. As such, based on the recent rule revisions, we do not believe

² Although not part of the situation presently before the Board, it is not apparent that the new rules address whether a petitioner, having failed to proffer any admissible contentions on its own but having designated for adoption the contentions of another petitioner that are admitted in the proceeding, should be afforded party status based on the adopted contentions.

the type of intervenor participation previously recognized in the Prairie Island line of cases is still appropriate.

In noticing this proceeding for an adjudicatory hearing, the Commission directed that “in accordance with 10 C.F.R. §§ 2.319(l) and 2.323(f) all novel legal or policy issues that would benefit from early Commission consideration” should be certified/referred to the Commission. CLI-04-3, 59 NRC 10, 15-16 (2004). In this instance, given the Commission’s current consideration of the general issue of interested governmental entity participation in agency proceedings, see [AGNM] Petition for Reconsideration (Aug. 24, 2004); NMED’s Motion for Leave to File Motion for Reconsideration and Motion for Reconsideration (Aug. 27, 2004), as well as the longstanding nature of the Prairie Island line of cases, we conclude that our rulings on the NMED and AGNM requests should be referred to the Commission.

At the same time, the Board notes there is another, related matter that warrants Commission consideration at this time. In a recent ruling, the Board denied an AGNM request to be given “co-lead” party status with NIRS/PC relative to contention NIRS/PC EC-5/TC-2-AGNM TC-i, the result of which is that NIRS/PC remains the lead party for that consolidated contention. See Licensing Board Memorandum and Order (Memorializing and Ruling on Matters Raised in Conjunction with August 3, 2004 Conference Call and Setting General Schedule for Proceeding) (Aug. 16, 2004) at 2-4 (unpublished). In the course of doing research relative to the pending AGNM and NMED requests, however, the Board came across the following statement published in the supplementary information that accompanied a proposal for regulatory reform from a 1984 Commission-appointed task force that, among other things, would have revised then-section 2.715a regarding consolidation with respect to the issues in a proceeding:

Proposed § 2.715a is expanded in scope. Absent a showing by a party that its rights would be prejudiced, the proposed rule would require presiding officers to consolidate parties in initial licensing proceedings after first offering the parties an opportunity to consolidate voluntarily. State and local government entities appearing in NRC proceedings represent unique interests. Therefore, the Commission would not expect presiding officers to consolidate these participants with private intervenors.

49 Fed. Reg. 14,698, 14,701 (Apr. 12, 1984) (emphasis supplied). Although this proposal's "mandatory" consolidation approach was not endorsed by the Commission, see id. at 14,698, or subsequently adopted, see 10 C.F.R. § 2.715a (2004) (presiding officer "may" order consolidation of parties with respect to one or more issues in a proceeding), nor was it part of the recent revisions to Part 2, see 10 C.F.R. § 2.316 (same), the seemingly unequivocal nature of the statement in this proposal regarding consolidation of private and governmental entities

gives us pause regarding our recent ruling.³ As a consequence, we believe it appropriate to refer that ruling to the Commission as well.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁴

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

September 14, 2004

³ We note that our order is not the first time in the recent past that private and governmental entities have been “consolidated” for the purpose of litigating admitted contentions. In the Private Fuel Storage proceeding, a number of the admitted contentions raised by intervenor State of Utah (State) and various private entities were consolidated and, in several instances, an intervenor other than the State initially was designated as the lead party for the consolidated issue statement, see Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 243, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998), although lead party status subsequently was transferred to the State per the request of the other parties, see [State] Request for Revision of Lead Party Designation (May 6, 1998) at 1-2, or because the other party withdrew from the proceeding, see Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-6, 49 NRC 114, 118 (1999).

⁴ Copies of this memorandum and 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.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (CLARIFICATION REQUESTS RULING AND COMMISSION REFERRAL) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Docket No. 70-3103-ML
LB MEMORANDUM AND ORDER (CLARIFICATION
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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of September 2004