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November 17, 2004

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)	)	

RESPONSE OF LOUISIANA ENERGY SERVICES, L.P. TO MOTION FOR LEAVE TO FILE REPLY FILED ON BEHALF OF NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN

I. INTRODUCTION AND BACKGROUND

On November 17, 2004, Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") filed a motion for leave to file a reply[1] to the November 5, 2004 responses of Louisiana Energy Services, L.P. ("LES") and the NRC Staff to the NIRS/PC motion to amend and supplement contentions. Notably, NIRS/PC included – without prior leave from the Licensing Board – an actual reply to the LES and NRC Staff responses to the NIRS/PC amended contentions. In accordance with the schedule established by the Atomic Safety and Licensing Board ("Licensing Board") by order dated November 15, 2004, LES herein responds to the NIRS/PC motion.

For the reasons set forth below, LES opposes the NIRS/PC motion. Accordingly, LES requests that the Licensing Board not consider any portion of the associated reply.

[1] "Motion on Behalf of Petitioners Nuclear Information and Resource Service and Public Citizen for Leave to Reply to Opposition of Applicant and NRC Staff Response to Motion to Amend and Supplement Contentions and Reply on Motion to Amend and Supplement Contentions," dated November 11, 2004 ("Motion for Leave to Reply").

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SECY-02

II. ARGUMENT

LES opposes the NIRS/PC motion for leave to file a reply as a procedural matter. The Licensing Board's Initial Prehearing Order for this proceeding states unequivocally that:

> In accordance with the agency's rules of practice, leave must be sought to file a reply to a response to a motion. *See* 10 C.F.R. § 2.323(c). A request for Licensing Board *preapproval* to file a reply shall be sought in writing no less than three business days prior to the time the reply will be filed. A request to file a reply must (1) indicate whether the request is *opposed* or supported *by the other participants* to the particular proceeding; and (2) demonstrate *good cause* for permitting the reply to be filed.

Licensing Board Memorandum and Order (Initial Prehearing Order) (Apr. 15, 2004) (unpublished) at 7 ("Initial Prehearing Order") (emphasis added). Section 2.323, in turn, specifically states that "[t]he moving party has *no right to reply*, except as permitted by the Secretary, Assistant Secretary, or the presiding officer." 10 C.F.R. § 2.323(c) (emphasis added). Consistent with the "good cause" showing contemplated by the Licensing Board in its Initial Prehearing Order, Section 2.323(c) further states that "[p]ermission [to file a reply] may be granted only in *compelling circumstances*, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply." *Id.* (emphasis added).

As an initial matter, NIRS/PC did not seek to ascertain the position of LES and the NRC Staff relative to their motion. Nor did they file the requisite motion for leave to reply three business days prior to the reply. Instead, NIRS/PC simply filed the motion and associated reply with the Board. These actions are clearly contrary to the terms of the Board's Initial Prehearing Order, Section 2.323(c), and, as discussed further below, recent NRC case law. This non-compliance alone is a valid reason to deny the motion.

Additionally, in their motion, NIRS/PC fail to make the requisite "good cause" or "compelling circumstances" showing. NIRS/PC expressly acknowledge in their motion that primarily they:

> . . . rely upon the principle that "before any decision is made on the admissibility of any contention in an NRC proceeding, the proponent of the contention must be given the opportunity to be heard in response to any opposition to the contention." *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71, 73 (1981).

Motion for Leave to File Reply at 1-2 (quoting *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-94-11, 39 NRC 205, 206 (1994). The "principle" and decisions cited by NIRS/PC, however, are in no way binding on this Licensing Board.[2] In fact, the *Allens Creek* Appeal Board stated that "[t]hese views are somewhat tentative, for necessarily we reached them without benefit of briefing by the parties," and that "we are not directing the Board to take any particular action." *Allens Creek*, ALAB-565, 10 NRC at 525 n.17.[3] Indeed, it appears that no NRC licensing board has invoked the *Allens Creek* "principle" since the *Claiborne* board's ruling in LBP-94-11. Moreover, in recent years licensing boards have adhered to the *rule* that an

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2 *Stare decisis* effect is not given to Licensing Board conclusions on legal issues not reviewed on appeal. *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), ALAB-713, 17 NRC 83, 85 (1983), citing *Duke Power Co.* (Cherokee Nuclear Station, Units 1, 2, & 3), ALAB-482, 7 NRC 979, 981 n.4 (1978).

3 On this point, it warrants mention that, in 1982, a different licensing board invoked the *Allens Creek* "principle" in support of its decision to *require* intervenors in the proceeding at issue to file replies to the applicant's and NRC Staff's responses to their late-filed contentions. *See Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-89, 16 NRC 1355, 1356-57 (1982). In doing so, however, the *Perry* board referred to the "somewhat tentative voice" of the Appeal Board in *Allens Creek*, and the "*advisory nature* of the Appeal Board's conclusion." *Id.* at 1356 (emphasis added). Although the *Perry* board opted to espouse the "reasoning" of *Allens Creek*, it explicitly noted that the *Allens Creek* decision "is *directly* applicable only to the filing of *timely* contentions." *Id.* (emphasis added).

intervenor has no *right* to reply to a responsive pleading, even if that pleading responds to a new or amended contention.

For example, in 2001, intervenors in the *Millstone* proceedings sought an opportunity to reply to licensee and NRC Staff responses to their motion to reopen the record and to admit a late-filed contention. The licensing board permitted the intervenors to reply, "but only to the alleged factual errors in the other parties' responses." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit No. 3; Facility Operating License NPF-49), 2001 NRC LEXIS 241, at *3-4 (Dec. 10, 2001) (citing *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 469 (1991)). Importantly, the *Millstone* board indicated that its decision to permit a limited reply was discretionary by stating that "[u]nder 10 C.F.R. § 2.730(c) [now 10 C.F.R. 2.323(c)], it is clear that [intervenors] would have no right to reply, *except as permitted by us*." *Id.* at *2 (emphasis added). The board also noted that it would "be able to analyze the *legal* issues based on the submissions of [the parties], without the assistance of further clarification." *Id.* at *3 (emphasis added). *See also Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), 2002 NRC LEXIS 27, at *9 (stating that "the Commission's Rules of Practice, 10 C.F.R. Part 2, Subpart G, do not provide for any right of reply to a responsive pleading"); *Private Fuel Storage*, L.L.C. (Independent Spent Fuel Storage Proceeding), LBP-00-28, 52 NRC 226, 232 (2000) (stating that "with the leave of the Board," the State of Utah filed a reply to PFS and Staff responses to its late-filed contentions); *Private Fuel Storage*, L.L.C. (Independent Spent Fuel Storage Proceeding), LBP-00-23, 52 NRC 114, 119 (2000) (stating that "acting pursuant to Board permission," petitioner submitted a reply filing that further addressed the late-filing requirements and reiterated his motivation for attempting to intervene in the matter); *Sequoyah Fuels Corp.*

(Source Materials License No. Sub-1010), LBP-94-39, 40 NRC 314, 316 (1994) (citations omitted) (stating that the intervenor was "correct in its speculation that the Presiding Officer did not rely on the Reply arguments," insofar as "[u]nder the provisions of section 2.730(c) [now section 2.323(c)], the moving party has no right to reply to an answer without first moving the Presiding Officer for permission to make the Reply").

In sum, therefore, insofar as NIRS/PC rely on the so-called *Allens Creek* "principle," they fail to show "good cause" for their reply. That principle is, in fact, "advisory" in nature and thus not binding on this Licensing Board. It is also clear from Section 2.323(c) (formerly Section 2.730(c)) of the Commission's Rules of Practice, and from more recent NRC case law, that an intervenor has no right to reply to an answer without first moving the licensing board for permission to file the reply. While it certainly is within the Licensing Board's *discretion* to grant an intervenor an opportunity to file a reply, the notion that the proponent of late-filed or amended contention "must" be given the opportunity to be heard in response to any opposition to the contention is at odds with current Commission rules and practice. Indeed, in its General Schedule for this proceeding, the Licensing Board did not specifically provide for an opportunity for replies to answers to late-filed, amended contentions and any motion for leave to reply would be subject to the procedures discussed above. *See also* 10 C.F.R. § 2.332(b). Thus, *Allens Creek* alone does not establish "good cause."

The additional "argument" proffered by NIRS/PC in support of their motion for leave to file a reply likewise fails to establish "good cause." Specifically, NIRS/PC enumerate six "general principles [that] govern admission of new or amended contentions." Motion for Leave to File Reply at 2-4. In effect, NIRS/PC devote the remaining ten pages of their motion to "addressing the arguments offered in opposition to amendment" (*Id.* at 4.), *i.e.*, to their actual

reply, despite not having received preapproval from the Licensing Board to file this reply. *See* 10 C.F.R. § 2.323(c). By this circular logic, the essence of the reply would constitute the "good cause" to reply. LES fully set forth its position regarding the admissibility of the amended NIRS/PC contentions in its November 5, 2004 answer, and offers no additional arguments in response to the NIRS/PC "reply." Suffice it to say, NIRS/PC's arguments should not constitute "good cause." The mere recitation of "certain general principles" by NIRS/PC does not establish the existence of "compelling circumstances," or otherwise demonstrate that that NIRS/PC "could not reasonably have anticipated the arguments to which it seeks leave to reply." 10 C.F.R. § 2.323(c).

Indeed, with respect to the asserted principles, LES does not dispute that an intervenor may amend contentions (or file new contentions) based upon the existence of new data or conclusions that differ significantly from data or conclusions that were in the applicant's documents, or were otherwise previously available. LES also recognizes that such information may appear in the Staff's draft environmental impact statement or emerge during the discovery process. These principles likewise are not in dispute.[4] Furthermore, to clarify, LES does not take the position that a "newly-filed contention" must come within the scope of an existing contention, as NIRS/PC suggest. Rather, LES sought to make the point that, where an intervenor seeks to amend an *existing* contention with new bases, the intervenor's original contention must encompass the specific challenges raised in the new bases (*i.e.*, the new bases must fall within the scope of the contention to be amended). *See Duke Energy Corporation* (McGuire Nuclear

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[4] In the absence of previously unavailable and materially different information, LES does not agree with the assertion that an intervenor need amend or supplement a contention "if only to clarify that the pending contentions apply to the new documents." Motion for Leave to File a Reply at 2. *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223 (2000)

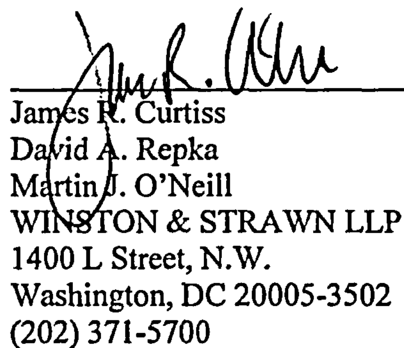
Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 378-81 (2002). Stated another way, "[a]n intervenor may not freely 'change the focus of an admitted contention at will as litigation progresses, but it is bound by the terms of the contention.'" *Id.* at 386 (citations omitted).

Finally, LES is well aware of the distinction between the "contention admissibility" and "merits" stages of a proceeding. In this regard, in responding to the proposed amendments of NIRS/PC, LES made a very deliberate effort to focus on the admissibility of the amended contentions in view of the applicable criteria set forth in 10 C.F.R. 2.309. The NIRS/PC assertion that LES "repeatedly argues the merits of contentions proposed by NIRS/PC" is sheer hyperbole. LES's arguments are directed at the sufficiency of the bases offered to establish a genuine dispute – which is precisely the relevant threshold admissibility issue. LES did not even begin to address the merits of the purported "bases."

III. CONCLUSION

For the foregoing reasons, the Licensing Board should dismiss the NIRS/PC motion for leave to file a reply. Moreover, in ruling on the admissibility of the amended contentions, the Licensing Board should exclude from consideration any arguments proffered by NIRS/PC in the reply portion of its motion, insofar as such reply lacked prior approval.

Respectfully submitted,



James R. Curtiss
David A. Repka
Martin J. O'Neill
WINSTON & STRAWN LLP
1400 L Street, N.W.
Washington, DC 20005-3502
(202) 371-5700

John W. Lawrence, Esq.
LOUISIANA ENERGY SERVICES, L.P.
100 Sun Avenue, NE
Suite 204
Albuquerque, NM 87109

Dated at Washington, District of Columbia
this 17th day of November 2004

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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "RESPONSE OF LOUISIANA ENERGY SERVICES, L.P. TO MOTION FOR LEAVE TO FILE REPLY FILED ON BEHALF OF NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN" in the captioned proceeding have been served on the following by e-mail service, designated by **, on November 17, 2004 as shown below. Additional service has been made by deposit in the United States mail, first class, this 17th day of November 2004.

Chairman Nils J. Diaz
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Commissioner Edward McGaffigan, Jr.
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Commissioner Jeffrey S. Merrifield
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Office of the Secretary**
Attn: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-16C1
Washington, DC 20555-0001
(original + two copies)
e-mail: HEARINGDOCKET@nrc.gov

Office of Commission Appellate Adjudication
Mail Stop O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the General Counsel**
Attn: Associate General Counsel for Hearings, Enforcement and Administration
Lisa B. Clark, Esq.**
Angela B. Coggins, Esq.**
Darani M. Reddick
Mail Stop O-15D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
e-mail: OGCMailCenter@nrc.gov
e-mail: lbc@nrc.gov
e-mail: abc1@nrc.gov
e-mail: dmr1@nrc.gov

Ron Curry, Esq.
Tannis L. Fox, Esq.**
New Mexico Environment Department
1190 St. Francis Drive
Santa Fe, NM 87502-6110
e-mail: tannis_fox@nmenv.state.nm.us

Administrative Judge
Paul B. Abramson**
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
e-mail: pba@nrc.gov

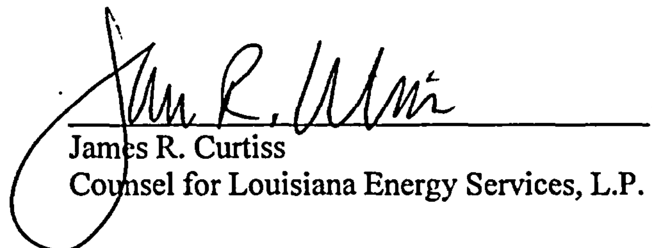
Administrative Judge
G. Paul Bollwerk, III, Chair**
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
e-mail: gpb@nrc.gov

Administrative Judge
Charles N. Kelber**
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
e-mail: cnk@nrc.gov

Christopher D. Coppin, Esq.**
David M. Pato, Esq.**
Stephen R. Farris, Esq.**
Glenn R. Smith, Esq.**
Office of the New Mexico Attorney General
P.O. Box Drawer 1508
Santa Fe, NM 87504-1508
e-mail: ccoppin@ago.state.nm.us
e-mail: dpato@ago.state.nm.us
e-mail: sfarris@ago.state.nm.us
e-mail: gsmith@ago.state.nm.us

Lindsay A. Lovejoy, Jr.**
618 Pasco de Peralta, Unit B
Santa Fe, NM 87501
e-mail: lindsay@lindsaylovejoy.com

Lisa A. Campagna**
Assistant General Counsel
Westinghouse Electric Co., LLC
P.O. Box 355
Pittsburgh, PA 15230-0355
e-mail: campagla@westinghouse.com



James R. Curtiss
Counsel for Louisiana Energy Services, L.P.

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