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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

October 15, 2004 (4:08PM)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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. OPPOSITION TO NUCLEAR INFORMATION
AND RESOURCE SERVICE AND PUBLIC CITIZEN MOTION TO COMPEL RESPONSES

I. INTRODUCTION

On October 8, 2004, Intervenors Nuclear Information and Resource Service and Public Citizen (“NIRS/PC”) filed a Motion to Compel discovery responses from Louisiana Energy Services, L.P. (“LES”) on the market for uranium enrichment services, the price of enrichment sales, and the cost of enrichment production related to the proposed National Enrichment Facility (“NEF”).¹ LES herein responds in opposition.

As explained in the Motion to Compel, and in an attached affidavit from Michael F. Sheehan, NIRS/PC wish to address the “need” for the NEF by evaluating whether the NEF will be an “economical” source of supply of enrichment services — and argue that they cannot pursue that issue without specific price and cost data “because market impact depends on the cost of the suppliers and the price that the market establishes.” Motion to Compel, at 8 (citing Sheehan Aff., ¶ 15). Specifically, NIRS/PC seek to compel these responses from the LES witnesses offered to address “need” issues raised by Contention NIRS/PC EC-7.

¹ “Motion to Compel Discovery Concerning Market for Uranium Enrichment on Behalf of Petitioners Nuclear Information and Resource Service and Public Citizen,” dated October 8, 2004 (“Motion to Compel”).

The current Motion to Compel raises issues similar to those addressed in the NIRS/PC motion to compel of October 4, 2004. For reasons similar to those addressed in LES's October 12, 2004 response to that motion,² LES opposes the current Motion to Compel as well. NIRS/PC is seeking information beyond the scope of the contention admitted by the Atomic Safety and Licensing Board ("Licensing Board") and is attempting to expand the scope of the issue of "need" properly litigable in this proceeding.

II. DISCUSSION

The issue of "need" for the NEF, cognizable under the National Environmental Policy Act ("NEPA") and litigable in this proceeding, is defined by the contention admitted in this case and by Commission precedent. Contention NIRS/PC EC-7 states as follows:

CONTENTION: Petitioners contend that the Environmental Report (ER) does not adequately describe or weigh the environmental, social, and economic impacts and costs of operating the National Enrichment Facility (See ER 1.1.1 et seq.) in that:

- (A) Louisiana Energy Services, L.P.'s (LES) presentation erroneously assumes that there is a shortage of enrichment capacity.
- (B) LES's statements of "need" for the LES plant (ER 1.1) depend primarily upon global projections of need rather than projections of need for enrichment services in the U.S.
- (C) LES has referred to supply and demand in the uranium enrichment market (ER 1.1), but it has not shown how LES would effectively enter this market in the face of existing and anticipated competitors and contribute some public benefit.

As explained in the LES October 12 Response, the Licensing Board, in admitting Contention NIRS/PC EC-7, stated unequivocally that LES "is under no obligation to present either a 'business case' or to demonstrate the profitability of the proposed facility." LBP-04-14,

² "Louisiana Energy Services, L.P. Opposition to Nuclear Information and Resource Service and Public Citizen Motion to Compel Responses to Interrogatories," dated October 12, 2004 ("LES October 12 Response").

60 NRC __ (July 19, 2004), slip op. at 30. Indeed, the Board specifically rejected two proposed bases, Bases D and E, in which NIRS/PC raised issues related to LES's ability to win market share and the impact of the NEF on market prices. *Id.* The discovery responses that NIRS/PC now seek clearly fall in the category of the "business case" or "business plan" and relate to the profitability of the proposed facility. Indeed, both of the witnesses to be called by NIRS/PC to testify on this contention, Michael Sheehan and Charles Komanoff, explicitly acknowledged in their depositions that this information is necessary in order for them to assess the "profitability" of the proposed NEF. In LES's view, this business information is not necessary to address the "need" showing made by LES in its application or to address the contention admitted in this case.

As in their first motion to compel, NIRS/PC misread the precedent setting forth the Commission's expectations relative to the "need" and "cost-benefit" analyses to be performed under NEPA. Both NIRS/PC motions rest principally on the specious argument that "[t]he issue of 'need' for a new enrichment facility is to be determined on *economic grounds*; so much is established by the decisions in the CEC [*Claiborne*] case." Motion to Compel at 10 (emphasis added). Similarly, NIRS/PC incorrectly assert that "[t]he decisions by the Board and the Commission itself in the CEC case establish that assessing the 'need' for a new enrichment facility *requires economic analysis of the market and its buyers and sellers.*" Motion to Compel at 8 (emphasis added). In making these assertions, NIRS/PC improperly conflate the NEPA "need" and "cost-benefit" inquiries, ignore LBP-04-14 and key aspects of the Commission's ruling in CLI-98-3,³ and overlook the factual distinctions between the *Claiborne* proceeding and this proceeding.

³ *Louisiana Energy Servs., L.P. (Claiborne Enrichment Center)*, CLI-98-3, 47 NRC 77, 89 (1998), *aff'g in part & rev'g in part*, LBP-96-25, 44 NRC 331 (1996).

In the *Claiborne* proceeding, the Commission did not “establish” or “require” that the “need” for a proposed enrichment facility “be determined on economic grounds.” To the contrary, the Commission held only that, in that proceeding, “the Board had *sufficient reason* to examine the likely competitive price effects of the CEC,” insofar as “LES [had] repeatedly advanced in [that] proceeding the argument that the CEC would act to ‘suppress’ or ‘moderate’ future SWU price increases, perhaps significantly.” CLI-98-3, 47 NRC at 91, 96 (emphasis added). Notwithstanding LES’s position at the time, the Commission still “confess[ed] some puzzlement over the Board’s exclusive focus on the CEC’s potential price effects as the sole possible benefit of the project,” and expressed concern “that the Board not give excessive weight to its price effects finding when it comes time to balance the cost-benefit ledger for the CEC.” *Id.* at 90, 94. Significantly, the Commission rejected the position that NIRS/PC take in this proceeding, *i.e.*, “that ‘the benefit of competition as we have described it,’ *i.e.*, the Board’s price effect finding, ‘is *the* benefit that must be weighed against the various costs of the project in the NEPA-mandated cost-benefit analysis.” *Id.* at 94 (emphasis in original). Indeed, the Commission noted that “LES and the NRC staff were right in pointing out that the Board’s price-driven approach entirely overlook[ed] other benefits of the CEC discussed in the FEIS [final environmental impact statement] and elsewhere in the record.” *Id.* at 95.

As set forth in the NEF Environmental Report, LES’s statement of the “need” for the NEF resides largely in the need to ensure a diverse and secure *domestic* supply of enriched uranium, consistent with well-established national policy objectives. Section 1.1.1 of the Environmental Report reflects statements made by the Department of Energy, the Department of State, and Congress as to the importance of additional reliable domestic enrichment capacity to the energy and national security of the United States. Indeed, the Commission itself recognized this essential need in the *Claiborne* proceeding:

Indeed, it might fairly be said that not only the FEIS, but also national policy, establishes a need for “a reliable and economical *domestic* source of enrichment services.” See USEC Privatization Act, 42 U.S.C. 2243(f)(2)(B) (1996 & Supp. 1997) (emphasis added). Over recent years, Congress, its committees, and key legislators have referred to uranium enrichment as a “strategically important domestic uranium enrichment industry” of “vital national interest,” “essential to the national security and energy security of the United States,” and necessary “to avoid dependence on imports.” Congress also has promoted the identification and study of “alternative” enrichment technologies – defined as “methods other than the gaseous diffusion process” – under the assumption that “[t]he ultimate success of the domestic uranium enrichment industry could hinge on the decision to build a new plant using more economical technology.” Although these congressional and NRC policy statements have come in a variety of contexts, they bear, in our view, on any evaluation of the “need” for the CEC and its potential benefits.”

CLI-98-3, 47 NRC at 95-96 (footnotes and citations contained therein omitted).⁴

The upshot is that the statements of “need” for the proposed CEC and the proposed NEF are fundamentally different. With respect to the CEC, LES had maintained that “[t]he *fundamental case* for the CEC is that it can and will compete on economic grounds, allowing U.S. electric utilities a competitive source of supply *so that they can in turn achieve the lowest cost reliable supply of electricity to their rate payers.*” See *Claiborne*, LBP-96-25, 44 NRC at 350 (emphasis added). In contrast, both LES’s Environmental Report and the NRC Staff’s Draft Environmental Impact Statement (“DEIS”) state that the proposed NEF is intended to satisfy the need for an additional reliable and economical domestic source of enrichment services that would contribute to the attainment of national energy security policy objectives.

Certainly, Section 1.1.2 of the NEF Environmental Report — being a “market analysis” — contains some discussion of commercial considerations.⁵ Indeed, both LES and the

⁴ Dr. Sheehan states that he wishes to address whether the NEF is an additional “economical” source of enrichment supply. However, consistent with the quoted language from *Claiborne*, LES’s use of the term “economical” does not focus on profitability; rather, it reflects the advantages of gas centrifuge technology relative to prior technology such as the gaseous diffusion enrichment plants. See NEF Environmental Report at 1.1-2 to 1.1-3.

NRC Staff conclude that forecasts of installed nuclear-generating capacity suggest a continuing demand for uranium enrichment services both in the United States and abroad, though no such showing is required by NRC regulations or NEPA case law. Additionally, in considering a range of possible supply scenarios, LES appropriately pointed out that purchasers of uranium enrichment services (*i.e.*, U.S. nuclear utilities) view diversity and security of the domestic enriched uranium supply as being important from a commercial perspective. In this regard, LES believes that there is also an ancillary commercial justification for the proposed facility. This is, however, at most a secondary aspect of the NEF “need” showing.

For purposes of NEPA, neither LES nor the NRC is required to perform a full-blown “economic analysis” of the type for which NIRS/PC now seek data and information. Contrary to the assertions of NIRS/PC, (Motion to Compel, at 9-10), LES does not intend to introduce evidence on economic issues such as “cost to producers, uncommitted demand, uncommitted supply, project price and similar factors” to establish “need.” Economic issues of this stripe are not relevant to LES’s “need” case or to Contention NIRS/PC EC-7, as admitted by the Board. Any decision to permit inquiry into and litigation of the economic issues identified by NIRS/PC in their motions to compel would contravene the Board’s own admissibility ruling in LBP-04-14 and relevant Commission precedent.

As discussed in the LES October 12 Response, the contentions in this case must be read in a manner consistent with the actual LES statement of “need” for the NEF and with the Board’s exclusion of issues related to the business cases. Basis A raises a factual issue of whether the existence of a “shortage of enrichment capacity” is relevant to the asserted “need” for the NEF. It does not necessitate a sweeping inquiry into world supply and demand for

⁵ The market analysis set forth in Section 1.1.2 of the Environmental Report was provided in accordance with NRC guidance, which requests, *inter alia*, “a projection of domestic and foreign requirements for the services.” NUREG-1520 at 9-5.

enrichment services. Basis B similarly raises an issue of whether “need” must be based on global versus domestic demand for enrichment services. It does not necessitate a broad inquiry into the economics of the NEF — including costs to producers, market prices, or market supply and demand, as now sought by NIRS/PC.

As also discussed in the LES October 12 Response, Basis C is the only basis that could even arguably be purported to raise the economics of the business — and this is a basis in which the Licensing Board, in distilling the contention, specifically deleted the reference to the business plan and to “profitability.” Rather, Basis C, as actually admitted, is focused on LES’s ability to “enter this market,” to become the additional domestic supplier of enrichment services (which is the premise for the “need” for the facility). LES will demonstrate its ability to “enter the market” by introducing specific contracts for services from the NEF.⁶ A challenge to the existence, quantity, and term of these initial contracts could properly be raised under Basis C; however, “business case” issues related to production cost, price, profitability, and market impacts after entry into the market are beyond the scope of the Board’s inquiry and the contention.

As set forth above, in the *Claiborne* proceeding, the Commission did not hold that the NRC is required to assess the market or price effects or the “economic viability” of a proposed enrichment facility for purposes of a NEPA “need” or cost-benefit analysis. Indeed, the Commission took great pains to emphasize that the Board should have considered the other benefits of the proposed CEC for purposes of evaluating the need for that facility and its benefits under NEPA. Since its *Claiborne* ruling, the Commission has reaffirmed its view that economic analyses of the sort claimed necessary by NIRS/PC are not warranted under NEPA. Notably, in

⁶ As LES has previously noted, it has already entered secured commitments for over 50% of the NEF’s output for the first 10 years of operation.

2001, in ruling on a similar NEPA-based challenge to the “need” for a proposed in situ leachate uranium mining project, the Commission held as follows:

The FEIS simply recognizes the general need for domestic uranium production. It does not purport to evaluate who may be the strongest and most viable market participants in the domestic uranium field. Moreover, predictions of demand for uranium are highly speculative and subject to fluctuating factors The Intervenor has not called into question the general interest in maintaining a domestic uranium production industry or HRI’s possibly significant role as a domestic uranium producer. Regardless of the current market price for uranium or shifting market scenarios speculating upon future uranium market supply and demand, it remains in the national interest to maintain a domestic uranium production capability.

Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 48 (2001) (emphasis added). Similarly, in considering the same intervenors’ challenge to the NRC Staff’s cost-benefit analysis, the Commission stated that “the FEIS clearly provides that additional domestically-produced uranium would be the project’s primary public benefit,” despite potentially “frequent and significant fluctuations” in the price of uranium. *Id.* at 48-49.

In this regard, the Commission made clear that “[t]he NRC . . . is not in the business of regulating the market strategies of licensees,” and that it is within an applicant’s “business discretion to determine whether market conditions warrant commencing [] operations.” *Id.* The Commission underscored that it looks to whether an applicant “can conduct operations safely,” and “leave[s] to [an applicant] the intricate ongoing business decisions that relate to cost and profit.” *Id.* at 49.

As previously discussed in the LES October 12 Response, the Commission’s most recent affirmation of its view that NEPA does not require economic analyses of the type sought by NIRS/PC came in 2003, in the form of a denial of a petition for rulemaking submitted by the Nuclear Energy Institute. The Commission, citing CLI-98-3, stated as follows:

The Commission emphasizes, however, that while a discussion of need for power is required, the Commission is not looking for burdensome attempts

by the applicant to precisely identify future market conditions and energy demand, or to develop detailed analyses of system generating assets, costs of production, capital replacement ratios, and the like in order to establish with certainty that the construction and operation of a nuclear power plant is the most economical alternative for generation.

Nuclear Energy Institute; Denial of Petition for Rulemaking, 68 Fed. Reg. 55,905, 55,910 col. 1 (Sept. 29, 2003) (citing *Claiborne*, CLI-98-3, 47 NRC at 88, 94)

The Commission's treatment of economic analyses of the type identified by NIRS/PC is consistent with interpretations of NEPA by the federal courts. For example, the Court of Appeals for the District of Columbia Circuit has admonished federal agencies that they are not equipped "to canvas . . . business choices" insofar as they have "neither the expertise nor the proper incentive structure to do so." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 197 n.6 (D.C. Cir. 1996), *cert. denied*, 502 U.S. 1994 (1991). The same court added that:

And while Congress clearly wanted NEPA to extend federal agencies' range of vision to environmental concerns, it did not, so far as we can tell, aim at agencies' acquiring the skills of successful entrepreneurs. NEPA is supposed to make agencies more sensitive — but only, by definition, to matters environmental.⁷

Id.

At bottom, the Motion to Compel seeks too much. It seeks to draw LES and the Licensing Board into matters that are beyond the scope of LES's actual "need" showing for the

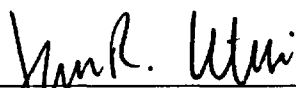
⁷ See also *Public Utilities Comm'n of State of Cal. v. F.E.R.C.*, 900 F.2d 269, 282 (holding that NEPA did not require the Federal Energy Regulatory Commission to make a "particularized inquiry into the economic benefits of [a] proposed pipeline," and finding that "California's insistence on a particularized assessment of non-environmental features finds no support in the statutory language" of NEPA, which requires "the agency to consider a variety of environmental, not economic, factors"); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1235-36 (D.C. Cir. 1996) (stating that despite NEPA's "rather sweeping list of interests intended to be served, . . . they do not include purely monetary interests, such as the competitive effect that a construction project might have on [a competitor's] commercial enterprise."

NEF, beyond the scope of the admitted contention, and beyond the scope of a reasonable NEPA inquiry. Economic or business information related to market share and profitability, including production costs and market prices, are not proper matters for discovery or litigation in this proceeding.

III. CONCLUSION

For the reasons set forth above, the NIRS/PC Motion to Compel should be denied.

Respectfully submitted,



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Dated at Washington, District of Columbia
this 15th day of October 2004

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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CERTIFICATE OF SERVICE

I hereby certify that copies of the "LOUISIANA ENERGY SERVICES, L.P. OPPOSITION TO NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN MOTION TO COMPEL RESPONSES" in the captioned proceeding have been served on the following by e-mail service, designated by **, on October 15, 2004 as shown below. Additional service has been made by deposit in the United States mail, first class, this 15th day of October 2004.

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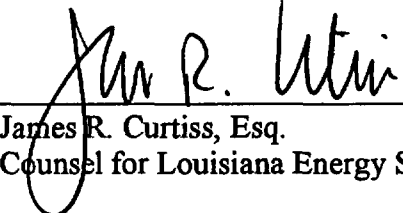
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