

October 4, 2004

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USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

October 5, 2004 (7:35AM)

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)	)	

APPLICANT'S MOTION TO COMPEL RESPONSE TO INTERROGATORIES  
BY NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.705(h), Louisiana Energy Services, L.P. ("LES" or "Applicant") hereby moves the Atomic Safety and Licensing Board ("Licensing Board") for an order compelling Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") to respond fully to interrogatories previously filed by LES pursuant to 10 C.F.R. § 2.706(b). As indicated below, the interrogatories that are the subject of this motion were included in "Applicant's Interrogatories to Nuclear Information and Resource Service and Public Citizen," dated September 9, 2004 ("Applicant's Interrogatories"). As a matter of procedure, this motion is timely filed by LES in accordance with the Licensing Board's General Schedule<sup>1</sup> for this proceeding. In addition, the undersigned attorney certifies that he has conferred with counsel for

<sup>1</sup> See Memorandum and Order (Memorializing and Ruling on Matters Raised in Conjunction with August 3, 2004 Conference Call and Setting General Schedule for Proceeding), App. A (General Schedule – Louisiana Energy Services, L.P. Proceeding) (Aug. 16, 2004).

NIRS/PC in an effort to resolve the dispute, but has not been successful in this endeavor. 10 C.F.R. § 2.705(h).

## II. BACKGROUND

On September 9, 2004, in accordance with 10 C.F.R. § 2.706(b) and 2.705(e), as well as in accordance with the Licensing Board's General Schedule for this proceeding, LES served interrogatories upon NIRS/PC. By these interrogatories of a continuing nature, LES sought information regarding each of the NIRS/PC contentions admitted to this proceeding. In particular, the LES interrogatories requested that NIRS/PC provide (1) the substance of the facts and opinions to which each witness is expected to testify, and (2) a summary of the grounds for each opinion, including the documents and all pertinent pages or parts thereof upon which each witness will rely or will otherwise use for his testimony.

On September 23, 2004, NIRS/PC filed "Responses on Behalf of Petitioners Nuclear Information and Resource Service and Public Citizen to Interrogatories by Applicant Louisiana Energy Services, L.P." ("NIRS/PC Responses"). For the reasons discussed below, the responses to the interrogatories identified herein are not fully responsive and are the subject of this motion to compel.

## III. DISCUSSION OF SPECIFIC REQUESTS TO COMPEL

### Contention EC-1 -- Impacts Upon Ground and Surface Water

In EC-1, "Petitioners contend that the Environmental Report (ER) contained in the application does not contain a complete or adequate assessment of the potential environmental impacts of the proposed project on ground and surface water, contrary to the requirements of 10 C.F.R. 51.45." With respect to this contention, LES Interrogatory EC-1, Question 4 states: "Provide the substance of the facts and opinions to which each witness is expected to testify, and a summary of the grounds for each opinion, including the documents and

all pertinent pages or parts thereof upon which each witness will rely or will otherwise use for his testimony." Applicant's Interrogatories at 4. The NIRS/PC response is as follows: "As stated in NIRS/PC Contention EC-1, LES has not adequately characterized existing conditions at the proposed site and has not adequately evaluated how its operations will affect groundwater and groundwater quality in the future." NIRS/PC Responses at 2.

This response is evasive and incomplete. It simply re-states the contention, providing no additional information germane to the question posed in the LES interrogatory. In this regard, the response fails -- in any manner -- to provide the substance of the facts supporting the NIRS/PC witness opinion on this matter. An evasive or incomplete answer or response to an interrogatory, such as that offered by NIRS/PC, shall be treated as a failure to answer or respond. *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), LBP-79-5, 9 NRC 193, 194-95 (1979). Furthermore, as expressly stated in Section 2.705(b)(5), "interrogatories may seek to elicit factual information reasonably related to a party's position in the proceeding, including data used, assumptions made, and analyses performed by the party." Accordingly, LES requests that the Licensing Board direct NIRS/PC to respond fully and completely to LES Interrogatory EC-1, Question 4.

Contention EC-2 -- Impacts Upon Water Supplies

In EC-2, Petitioners contend, *inter alia*, that "the Environmental Report (ER) contained in the application does not contain a complete or adequate assessment of the potential environmental impacts of the proposed project upon water supplies in the area of the project, contrary to 10 CFR 51.45. With respect to this contention, LES Interrogatory EC-2, Question 4 states: "Provide the substance of the facts and opinions to which each witness is expected to testify, and a summary of the grounds for each opinion, including the documents and all pertinent pages or parts thereof upon which each witness will rely or will otherwise use for his

testimony." Applicant's Interrogatories at 5. The NIRS/PC response to this interrogatory states as follows:

The water used at the proposed facility would be pumped from the Hobbs well field (Lea County Underground Water Basin, Ogallala Aquifer). Groundwater in the Basin is being pumped at a rate faster than it is being recharged. LES has not determined how this pumpage would affect water levels and the long-term productivity of the Hobbs well field or the Lea County Underground Water Basin.

NIRS/PC Responses at 6. This response likewise is evasive and incomplete, insofar as it merely reiterates assertions already set forth by NIRS/PC in its original petition to intervene. The response must provide additional details and supporting fact in order to be fully responsive to the interrogatory.

LES Interrogatory EC-2, Question 5 requests that NIRS/PC: "Provide the basis for the statement in [their] Petition that the NEF will have 'significant water needs.' Define 'significant.'" Applicant's Interrogatories at 6. The NIRS/PC response is, again, deficient as it only reads as follows: "In the context of the location and the nature of the facility, water needs are significant when they are substantial in volume and require an uninterrupted priority for an extended period of time, i.e., decades." NIRS/PC Responses at 6. This reply is both vague and unresponsive to the question. NIRS/PC simply defines "significant" as being "substantial in volume," without any definitive quantification or explanation. It must be compelled to now define the terms "substantial," as well as "uninterruptible priority."

LES Interrogatory EC-2, Question 6 asks that NIRS/PC "[p]rovide the basis for the statement in [their] Petition that there is a 'projected water shortage' or a 'severe long-term water shortage' in the area. Provide all documentation upon which these statements are based." Applicant's Interrogatories at 6. The reply is non-responsive. The NIRS/PC response is that "[a] projected water shortage is an anticipated situation in which some current and expected water users may be required to curtail their usage." NIRS/PC Responses at 6. In short, NIRS/PC

purport to do nothing more than define their understanding of the phrase "projected water shortage." This answer is devoid of information regarding the basis for the "projected water shortage" or "severe long-term water storage." Moreover, it fails to define the affected "area" subject to said water shortage(s). For these reasons, the response must be supplemented, and augmented with any supporting documentation.

Contention EC-5/TC-2 - AGNM TC-i - Decommissioning Costs

In this Contention, Petitioners challenge the LES cost estimate for general facility decommissioning on three primary bases: (1) "a contingency factor that is too low"; (2) "a low estimate of the cost of capital"; and (3) "an incorrect assumption that the costs are for low-level waste only." LES Interrogatory EC-5/TC-2 *et al.*, Question 4 states: "Provide the substance of the facts and opinions to which each witness is expected to testify, and a summary of the grounds for each opinion, including the documents and all pertinent pages or parts thereof upon which each witness will rely or will otherwise use for his testimony." Applicant's Interrogatories at 8-9. According to NIRS/PC, "[t]he answer to this question ('substance of facts and opinions') is in development as Komanoff researches and prepares his testimony." NIRS/PC Responses at 13.

With respect to this request for information regarding the "substance and facts of the opinion," NIRS/PC have failed to provide a responsive answer. As a general matter, Section 2.704(a)(3) provides that "[a] party is not excused from making its disclosures because it has not fully completed its investigation of the case, because it challenges the sufficiency of another party's disclosures, or because another party has not made its disclosures." Contrary to these regulatory requirements, NIRS/PC continue to refuse to disclose the substance of the facts and opinions supporting their expert witness testimony.

LES has been rebuffed on the grounds that the requested information is under development. In addition to being evasive, incomplete and contrary to NRC regulatory

requirements, this refusal by NIRS/PC to provide information on which their experts will rely improperly denies LES the opportunity to develop its case. *See Tenbarge v. Ames Taping Tool Systems*, 190 F. 3d 862, 865 (8th Cir. 1999); *Uresil Corp. v. Cook Group, Inc.*, 135 F.R.D. 168, 173 (N.D. Ill. 1991)("[I]n order to sufficiently answer expert witness interrogatories one must provide the theories which the experts will use . . . , a precise statement of the subject matter upon which the answer is based, an explanation of the terms used by the expert, and the rationale or reasons behind the expert's answers.") Furthermore, the failure of NIRS/PC to provide this information circumvents the very purpose of discovery -- to narrow the issues and eliminate surprise.

Accordingly, LES requests that the Licensing Board direct NIRS/PC to respond fully and completely to LES Interrogatory EC-5/TC-2 *et al.*, Question 4 at least twenty-four hours prior to the scheduled Komanoff deposition (*i.e.*, on or before 1:00 p.m. EDT on October 12, 2004).

*Contention EC-7-- Need for the Facility*

In summary, this Contention avers that the ER does not "adequately describe or weigh the environmental, social, and economic impacts and costs of operating the National Enrichment Facility," with particular focus on the need for the facility under the National Environmental Policy Act ("NEPA"). Specific to NIRS/PC witness Komanoff, LES Interrogatory EC-7, Questions 4 through 8 inquire about various facts and opinions to which the witness is expected to testify. *See Applicant's Interrogatories* at 12-13. Echoing a previous reply, NIRS/PC refuse to answer Questions 4 through 8 on the grounds that "[a]nswers to these questions with respect to Komanoff ('substance of facts and opinions') are in development as Komanoff researches and prepares his testimony." NIRS/PC Responses at 17. Furthermore,

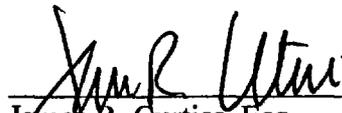
with respect to NIRS/PC witness Sheehan and Question 4 and 5, they refuse to answer fully on essentially the same grounds (*i.e.*, incomplete analysis). *Id.*

This rationale is legally insufficient for the same reasons set forth above regarding the inadequacy of the NIRS/PC response to LES Interrogatory EC-5/TC-2 *et al.*, Question 4. An answer must be compelled and any supporting documentation must be provided to LES. Finally, the response pertinent to witness Komanoff must be provided no later than twenty-four hours prior to his scheduled deposition (*i.e.*, on or before 1:00 p.m. EDT on October 12, 2004).

#### IV. CONCLUSION

For the foregoing reasons, the Licensing Board should compel NIRS/PC to respond to the LES interrogatories as identified above. Since depositions are already underway in this proceeding, LES requests the Licensing Board to order such disclosures to occur prior to October 11, 2004 -- with the exception of the Komanoff items identified above which are needed at least twenty-four hours in advance of his scheduled deposition.

Respectfully submitted,



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

John W. Lawrence, Esq.  
LOUISIANA ENERGY SERVICES, L.P.  
One Sun Plaza  
100 Sun Lane NE, Suite 204  
Albuquerque, NM 87109  
(505) 944-0194

Dated at Washington, District of Columbia  
this 4th day of October 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 "APPLICANT'S MOTION TO COMPEL RESPONSE TO INTERROGATORIES BY 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 October 4, 2004 as shown below. Additional service has been made by deposit in the United States mail, first class, this 4th day of October 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.\*\*  
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: abcl@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  
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

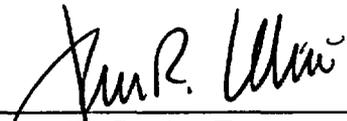
David M. Pato, Esq.\*\*  
Stephen R. Farris, Esq.\*\*  
Glenn R. Smith, Esq.\*\*  
Office of the New Mexico Attorney General  
P.O. Box Drawer 1508  
Santa Fe, NM 87504-1508  
e-mail: dpato@ago.state.nm.us  
e-mail: sfarris@ago.state.nm.us  
e-mail: gsmith@ago.state.nm.us

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

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  
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

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

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