

December 7, 2004

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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

December 7, 2004 (12:34pm)

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))	

ANSWER OF LOUISIANA ENERGY SERVICES, L.P. TO
MOTION ON BEHALF OF PETITIONERS NUCLEAR INFORMATION AND
RESOURCE SERVICE AND PUBLIC CITIZEN TO COMPEL COMPLIANCE WITH
DISCOVERY SCHEDULE BY APPLICANT LOUISIANA ENERGY SERVICES, L.P.

In accordance with 10 C.F.R. Section 2.323(c), Louisiana Energy Services, L.P. ("LES") files this answer to the December 6, 2004 motion to compel filed on behalf of Nuclear Information and Resource Service and Public Citizen ("NIRS/PC").¹ In their motion, NIRS/PC state that, in its Memorandum and Order (Discovery Rulings) of October 20, 2004, the Atomic Safety and Licensing Board (the "Board") made "an addition" to the General Schedule for this proceeding, requiring filing of 10 CFR Section 2.704(b) expert testimony disclosures by November 24, 2004. Motion to Compel at 1,8. NIRS/PC maintain that "LES has not complied with that requirement." *Id.* at 1, 8-9.

LES opposes the NIRS/PC motion to compel and submits that it must be denied on procedural grounds alone. Specifically, counsel for NIRS/PC has not complied with the consultation and certification requirement set forth in Section 2.323(b), which provides, in relevant part:

¹ "Motion on Behalf of Petitioners Nuclear Information and Resource Service and Public Citizen to Compel Compliance with Discovery Schedule by Applicant Louisiana Energy Services, L.P.," dated December 6, 2004 ("Motion to Compel").

A motion *must be rejected* if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful.

10 C.F.R. Section 2.323(b) (emphasis added). Counsel for NIRS/PC did not make a "sincere effort" to contact Counsel for LES to discuss the specific issues raised in the December 6 NIRS/PC motion to compel.² In view of this failure, counsel for NIRS/PC clearly could not, and did not, provide the requisite Section 2.323(b) certification.

Ordinarily, counsel for LES would be reluctant to seek dismissal of a motion of this sort solely on the ground that it is procedurally defective. However, this is the second occasion within the past month that counsel for NIRS/PC has neglected to follow the consultation and certification procedures set forth in Section 2.323(b). Namely, in the NIRS/PC motion to compel filed immediately prior to this one, counsel for NIRS/PC likewise failed to make any effort to contact counsel for LES – *prior* to the filing of that motion – to discuss and

² On Friday, December 3, 2004, at LES's behest, counsel for LES, NIRS/PC, and the NRC Staff held a lengthy conference call to discuss, *prior* to the filing of any written motions by LES and the NRC Staff, LES and Staff concerns regarding the relevance of facts and opinions set forth in the expert reports filed by NIRS/PC on November 24, 2004. During that call, counsel for NIRS/PC indicated a general concern with the adequacy of the information provided by LES's experts in their prior depositions. He further said that he was displeased with the extent of LES's expert disclosures relative to Contention NIRS/PC EC-4 (regarding the environmental impacts of a deconversion facility). He made no mention of the NEPA "need" and ground water issues discussed in the December 6 motion at issue here. Nor did he request, as would be his right, the opportunity to conduct a deposition of Mr. Paul G. Schneider, the witness identified by LES in its filing of November 24th to testify on issues regarding the amended basis for NIRS/PC EC-4 admitted by the Board in its November 22nd Order, during the discovery period explicitly provided for by the Board for amended contentions (*i.e.*, until December 20, 2004). Finally, had he inquired about the "market analysis" referenced in Mr. Schwartz's deposition, he would have been advised by LES that a computer disc providing this information was provided to NIRS/PC on October 15, 2004. Instead, these issues are brought before this Board in the instant motion, with no "sincere effort" on the part of counsel for NIRS/PC to first seek to resolve these issues through discussions with the parties, as required by Section 2.323(b).

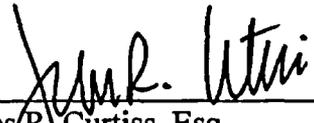
potentially resolve the issues giving rise to the motion.³ Indeed, the motion, which the Board ruled on yesterday, came as a complete surprise to LES. Moreover, the parties first discussed the specific complaints raised by NIRS/PC in that motion only *after* it was filed, and only after counsel for LES requested an opportunity to discuss the specific issues raised in the motion with counsel for NIRS/PC.

The consultation requirement of Section 2.323(b) exists for a reason – to encourage parties to resolve disputes without resort to formal compulsory motions. The receiving party and the Board, respectively, are often required to expend considerable time and resources in responding to and dispositioning such motions. The need for, and potential benefits of, such consultations are particularly evident in this proceeding, which, as counsel for NIRS/PC himself observes, is “governed by an expedited schedule.” Motion to Compel at 9.

³ See “Motion on Behalf of Petitioners Nuclear Information and Resource Service and Public Citizen to Allow Discovery Concerning Conversion and Disposal of Depleted Uranium,” dated November 12, 2004.

For the reasons set forth above, LES thus respectfully requests that the Board deny the NIRS/PC motion to compel on the ground that NIRS/PC have failed to comply with the consultation/certification provision of Section 2.323(b). Indeed, the circumstances described above and the imperative language of Section 2.323(b) (*i.e.*, “must be rejected”) dictate precisely that result.⁴

Respectfully submitted,



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Dated at Washington, District of Columbia
this 7th day of December 2004

⁴ LES reserves its rights to respond to the NIRS/PC motion in the event that the Board determines that the motion complies with the requirements of Section 2.323(b).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "ANSWER OF LOUISIANA ENERGY SERVICES, L.P. TO MOTION ON BEHALF OF PETITIONERS NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN TO COMPEL COMPLIANCE WITH DISCOVERY SCHEDULE BY APPLICANT LOUISIANA ENERGY SERVICES, L.P." in the captioned proceeding have been served on the following by e-mail service, designated by **, on December 7, 2004 as shown below. Additional service has been made by deposit in the United States mail, first class, this 7th day of December 2004.

Chairman Nils J. Diaz
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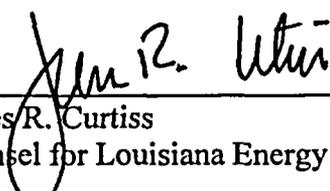
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