

December 13, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
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December 13, 2004 (4:38pm)

In the Matter of

Docket No. 70-3103

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Louisiana Energy Services, L.P.

ASLBP No. 04-826-01-ML

**RESPONSE ON BEHALF OF
NUCLEAR INFORMATION AND RESOURCE SERVICE
AND PUBLIC CITIZEN TO
MOTION ON BEHALF OF LOUISIANA ENERGY SERVICES, L.P. TO RESTRICT
SCOPE OF PREFILED TESTIMONY ON ENVIRONMENTAL CONTENTIONS
AND TO
NRC STAFF'S MOTION IN LIMINE TO PRECLUDE NIRS/PC TESTIMONY**

Preliminary statement

This Memorandum is submitted on behalf of Petitioners Nuclear Information and Resource Service and Public Citizen ("NIRS/PC"), pursuant to the Order of the Atomic Safety and Licensing Board (the "Board") dated December 7, 2004, in response to contentions contained in the Motion of Applicant, Louisiana Energy Services, L.P. ("LES") to Restrict Scope of Prefiled Testimony of NIRS/PC on Environmental Contentions and the Commission Staff's Motion in Limine to Preclude NIRS/PC Testimony.

LES and the Commission Staff have filed motions that are in substance identical.

Therefore, both motions are discussed in this response.

Factual background

Both LES and Commission Staff have at various times complained that expert witnesses for NIRS/PC have not completed their analyses and presented their opinions. (See, LES Motion to Compel 3-6, Oct. 4, 2004; Commission Staff Motion to Compel 3, Oct. 7, 2004). The Board

ruled on October 20, 2004 on several discovery motions. In response to a motion by Commission Staff asking for a statement of all forthcoming expert testimony, the Board stated that expert witnesses for NIRS/PC “must at some point in the near future go on the record with whatever conclusions they have reached, subject to whatever qualifications they must provide. To that end, we grant the staff’s motion to compel and establish a deadline for supplementing discovery requests to the extent that we establish the following schedules.” (Memorandum and Order 16, Oct. 20, 2004). The Board’s order directed (a) an interrogatory response as to Dr. Sheehan by November 1, (b) supplementation of *all* discovery materials by November 24, and (c) filing of Sec. 2.704(b) expert disclosures relating to general schedule environmental contentions by November 24.

NIRS/PC, in light of the Board’s statement that witnesses for NIRS/PC must “go on the record with whatever conclusions they have reached” and the Board’s order to supplement all disclosure—which would include responses to interrogatories seeking NIRS/PC’s expert opinions on all issues (See Commission Staff interrogatory 3, Sept. 9, 2004; LES interrogatories to NIRS/PC, Sept. 9, 2004)—decided that the best course was to present full expert reports on all issues. Such information would satisfy the requirement to supplement interrogatory responses. See 10 CFR 2.705(e). Accordingly, on November 24, 2004 expert reports were filed as to the testimony of George Rice, Michael Sheehan, Charles Komanoff, and Arjun Makhijani.

LES and the Commission Staff now complain that NIRS/PC have disclosed too much and that the NIRS/PC expert reports must be redacted to conform to evidentiary admissibility standards, which apply to prefiled testimony. NIRS/PC have conferred at length with counsel for LES and the Commission Staff. NIRS/PC have advised counsel that the material disclosed on November 24 relates both to issues scheduled for hearing in February 2005 and to other issues

scheduled for hearing in October 2005. Counsel for NIRS/PC have pointed out that all parties are scheduled to file prefiled direct testimony on December 30, 2004 and that issues of relevancy of certain facts to the contentions to be heard in February can be addressed when that proposed testimony has been filed. It should also be noted that the schedule calls for rebuttal testimony to be filed on January 13, 2005. LES and Commission Staff apparently desire to conduct an anticipatory editorial process to set limits to the subjects that may be discussed in any of the prefiled testimony, either direct or rebuttal. (LES Mot. 1; Staff Mot. 1).

NIRS/PC object to the application of evidentiary rules to the discovery process. The Board's Memorandum and Order dated October 20, 2004 ruled upon discovery motions and directed discovery. Discovery is not limited by evidentiary standards of admissibility but includes "any matter, not privileged, that is relevant to the subject matter involved in the proceeding." 10 CFR 2.705(b)(1). LES concedes that the NIRS/PC expert reports are discovery documents and that, in contrast, the matter that is offered in evidence will be contained in the prefiled testimony. (LES Mot. 4). Still, LES requests that the Board direct NIRS/PC to offer only testimony within the scope of the contentions. (id.). This is the intention of NIRS/PC.

However, LES and the Commission Staff ask the Board to conduct a preliminary review of the expert reports to specify which matters should be excluded from the hearing. No such review process is contained in the existing schedule. The parties and the Board will probably need to conduct a review process to determine admissibility of direct and rebuttal testimony before the February hearing. NIRS/PC suggest that it is preferable to undergo that process once, not twice, and the correct time would be after prefiled direct and rebuttal testimony has been filed.

Moreover, it would be inappropriate for the Board to issue a direction limiting the testimony to be filed, such as LES and Commission Staff seek, since such order apparently would prevent NIRS/PC from offering certain material even in rebuttal to matters contained in LES's testimony or that of the Commission Staff, which would be improper. (See LES Mot. 1; Staff Mot. 1).

Should it be deemed necessary to make anticipatory rulings on admissibility, before any prefiled testimony has been offered, NIRS wish to point out the following as to the objections made by LES and the Commission Staff:

1. Concerning the testimony of George Rice, LES (LES Br. 4) and Commission Staff (Staff Mot. 9) point out that certain parts of his report refer to matters excluded by the Board's decision dated November 22, 2004 regarding amended and supplemental contentions. Counsel for NIRS/PC have advised opposing counsel that NIRS/PC would not seek to introduce testimony on matters that the Board has ruled inadmissible. However, to seek at this stage to decide what testimony may be admitted, in NIRS/PC's direct case or on rebuttal, is a dubious exercise. For example, Mr. Rice has pointed out that the hydrologic characteristics of a stratum 600 feet below the site should have been determined. (Rice Report, 9 (Nov. 24, 2004)). The Board excluded this point as a basis for contention EC-1. (Memorandum and Order 11, Nov. 22, 2004). However, this particular rock body may be mentioned by other parties in their direct testimony, calling for rebuttal, or even by Mr. Rice in connection with other admitted bases. Thus, such facts cannot be wholly ruled out of the hearing at this stage. Similarly, the lack of monitoring plans for certain strata may need to be mentioned in response to statements by LES or Staff experts, despite being

excluded as a basis. (id.). It is too soon to decide that certain facts can never be mentioned at the hearing, as LES and Commission Staff suggest.

2. LES and Commission Staff seriously overstate the amount of material in Dr. Sheehan's report that would not be admitted under the existing contentions. The admitted contention states that the ER "does not adequately describe or weigh the environmental, social, and economic impacts and costs of operating the [NEF]." (NIRS/PC contention EC-7). The Board admitted three bases: (A) LES's erroneous assumption of a shortage in enrichment capacity, (B) LES's erroneous dependence upon global projections of need rather than projections for the United States, and (C) LES's failure to show how it would enter the enrichment market in the face of existing and anticipated competitors and contribute some public benefit. (Memorandum and Order, July 19, 2004, at 47). The Board admitted Bases A, B, and F contained in the Petition, "except to the extent that Basis F suggests that the applicant is under an obligation to present a 'business plan.'" (id. 32). Clearly, the public costs and benefits of the proposed NEF may include many environmental and other impacts, other than the business success of the plant. However, LES and NRC Staff would take the Board's decision to exclude a "business case" and expand it to exclude numerous public impacts. For example, they would exclude any reference to whether constructing the NEF would contribute to security of supply for U.S. utilities (Sheehan Report, 15, 21, Nov. 24, 2004), the likely impact of the NEF upon "existing and anticipated competitors" (id. 18-20), the possible public benefits upon employment, tax revenues, and resources (id. 20), and the public detriments such as avoidable environmental impacts (id. 20-21). But contention NIRS/PC EC-7 is an

“environmental contention” (Memorandum and Order 20, Nov. 22, 2004), and the issues under this contention include whether LES would “effectively enter this market and contribute some public benefit.” NEPA calls for a broad analysis of costs and benefits of a proposal. (See 10 CFR 51.45(c), 51.71). The restrictions that LES and Commission Staff would impose on Sheehan’s testimony ignore the terms of the Board’s order admitting this contention.

3. LES and Commission Staff would drastically curtail Mr. Komanoff’s testimony on the existence of a market need for the proposed facility. LES does not dispute that Mr. Komanoff’s testimony would be relevant to contention NIRS/PC EC-7. Mr. Komanoff has stated that he is assembling a supply-demand analysis that will demonstrate the inaccuracies of the analyses contained in the Environmental Report. (Komanoff Report at 39, Nov. 24, 2004). However, LES and Commission Staff assert that the analysis should have been completed earlier. (LES Mot. 8; Staff Mot. 11). Mr. Komanoff’s analysis in its current form has been described in his report, with “qualifications” (Memorandum and Order 16, Oct. 20, 2004), and the finished product will be presented fully in the prefiled direct testimony presented on December 30, 2004. The Board has set no earlier date for the presentation of complete direct testimony. There is no basis in the existing schedule for excluding his testimony.
4. As to the testimony of Dr. Makhijani, LES and Commission Staff assert that only a small portion of the report which he filed on November 24, 2004 relates to contention NIRS/PC EC-4. Of course, when Dr. Makhijani’s direct testimony is filed on December 30, it will be possible to address any relevancy concerns in a far more

focused manner. In fact, facts relevant to the impact of construction and operation of a deconversion plant appear at several points in Dr. Makhijani's report. (See Makhijani and Smith, Costs and Risks of Management and Disposal of Depleted Uranium from the National Enrichment Facility, at 8-19, 40-42 (regarding health risks of depleted uranium), 30-34 (deconversion methods and impacts), 36-38, 47-49 (economics of deconversion methods), Nov. 24, 2004). A section appears at pages 30 through 34 on "considerations relative to the environmental impacts of DUF₆ deconversion and depleted uranium disposal." (Makhijani Report 30-34, Nov. 24, 2004). The text explains the various alternative waste forms for disposal of depleted uranium and the relationship between disposal strategy and selection of deconversion process (at 30). It is also stated that some waste forms would have a low leach rate, but their manufacture in a deconversion plant might generate additional contaminants (id.). There is discussion of releases of hydrofluoric acid and calcium fluoride and applicable limits (at 32), the likely need to dispose of, as waste, any calcium fluoride produced after enrichment (at 33), accident scenarios with anhydrous and aqueous hydrofluoric acid (id.), and the timing of ultimate disposal (and thus storage prior thereto) (at 34). All of these subjects are relevant to "the environmental impacts of the construction and operation of a conversion plant for the depleted uranium hexafluoride waste." (NIRS/PC contention EC-4). LES's and Staff's attempt to curtail, in advance, the scope of expert testimony on such impacts should be rejected.

Conclusion

LES's and Commission Staff's attempts to reduce the scope of prefiled direct and rebuttal testimony is based upon a series of mischaracterizations of the scope and purpose of such

testimony. The Board should not be drawn into an attempt to curtail improperly the relevant and well-founded testimony of experts for NIRS/PC. Neither should the Board set limits to NIRS/PC's rebuttal testimony before the opposing parties' direct testimony has been filed. There will be ample opportunity to review the admissibility of prefiled direct and rebuttal testimony after it is offered for the Board's consideration. That has not yet occurred, and to add an additional review process to apply evidentiary standards of admissibility to discovery documents would waste valuable resources. The motions should be denied.

Respectfully submitted,



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December 13, 2004

CERTIFICATE OF SERVICE

Pursuant to 10 CFR § 2.305 the undersigned attorney of record certifies that on December 13, 2004, the foregoing Response on Behalf of Nuclear Information and Resource Service and Public Citizen to Motion on Behalf of Louisiana Energy Services, L.P. to Restrict Scope of Prefiled Testimony on Environmental Contentions and to NRC Staff's Motion in Limine to Preclude NIRS/PC Testimony was served by electronic mail and by first class mail upon the following:

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