

RAS 9267

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 02/04/05
SERVED 02/04/05

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Paul B. Abramson
Dr. Charles N. Kelber

In the Matter of

LOUISIANA ENERGY SERVICES, L.P.
(National Enrichment Facility)

Docket No. 70-3103-ML

ASLBP No. 04-826-01-ML

February 4, 2005

MEMORANDUM AND ORDER

(Ruling on In Limine Motions Regarding Prefiled Direct and Rebuttal Testimony
and Providing Administrative Directives)

Pending before the Licensing Board is (1) a February 1, 2005 motion filed by applicant Louisiana Energy Services, L.P., (LES) seeking to strike portions of prefilled rebuttal testimony filed by intervenors Nuclear Information and Resource Service and Public Citizen (NIRS/PC) relating to three of the four environmental contentions -- NIRS/PC EC-1 (Impacts upon Ground and Surface Water), NIRS/PC EC-4 (Impacts of Waste Storage), and NIRS/PC EC-7 (Need for the Facility) -- that are scheduled to be the subject of evidentiary hearings beginning Monday, February 7, 2005; and (2) a February 3, 2005 motion filed by NIRS/PC to strike the testimony of NRC staff witness Alan Toblin on contention NIRS/PC EC-2 (Impacts Upon Water Supplies). Board rulings on these motions are set forth below, as well as administrative directives regarding further party filings to address these rulings and other matters.

I. LES In Limine Motion Rulings

A. LES Motion to Exclude Portions of Prefiled Rebuttal Testimony of George Rice

DISCUSSION: Motion In Limine on Behalf of [LES] To Exclude Certain Prefiled Rebuttal Testimony of NIRS/PC Witnesses George Rice, Arjun Makhijani, and Michael Sheehan (Feb. 1, 2005) at 2-4 [hereinafter LES Motion In Limine]; NRC Staff's Response to Motion in Limine on Behalf of [LES] to Exclude Portions of the Prefiled Rebuttal Testimony of NIRS/PC Witnesses George Rice and Arjun Makhijani and to Exclude Michael Sheehan Sheehan as a Witness in the Proceeding (Feb. 3, 2005) at 3-5 [hereinafter Staff Response to LES In Limine Motion]; Response on Behalf of [NIRS/PC] to LES Motion In Limine to Exclude Certain Rebuttal Testimony of NIRS/PC Witnesses George Rice, Arjun Makhijani, and Michael Sheehan (Feb. 3, 2005) at 2-4 [hereinafter NIRS/PC Response].¹

RULING: We deal first with the LES motion to exclude certain portions of George Rice's prefiled rebuttal testimony as to contention NIRS/PC EC-1. Questions 24 and 25 and the answers thereto as set out in Mr. Rice's rebuttal testimony repeat efforts to submit testimony regarding the need for the NRC staff and LES to investigate the possible existence of water-bearing units below the proposed NEF site. We agree with LES that our November 22, 2004 ruling denying a NIRS/PC request to permit late-filed amendment of contention EC-1 to include the matters discussed in what NIRS/PC denoted Basis E, and our repetition of that determination in our January 21, 2005 memorandum and order, are conclusive. Having been rejected at the pleading stage, and again in our January 21 order striking a similar portion of proposed direct testimony from Mr. Rice, this matter cannot now be resurrected by virtue of the prefiled rebuttal testimony (any more than it could have been so resurrected in prefiled direct testimony) of a witness who, for whatever reason, did not provide support (via affidavit or otherwise) for admission of the issue when it was previously proffered by NIRS/PC.

¹ Because citations to certain pleadings are based on the printed copies of the wordprocessing files they submitted via e-mail on the date of filing, those citations may vary from what is reflected in the actual hard copy versions of the pleadings, which may not have been received by the Board at the time this memorandum and order was issued.

Similarly, the final paragraph of the answer to Question 23 and Question 32 and the answer thereto are efforts to resurrect a challenge to the adequacy of certain staff calculations regarding groundwater flow rates and two water-bearing units located below the proposed LES facility. We denied a similar challenge in our January 21 order as this portion of the contention focused on the staff's purported failure to provide an explanation for certain computations in the DEIS, which omission the staff, in the evidentiary materials being presented to the Board, apparently is prepared to indicate has been corrected. As we have repeatedly ruled, NIRS/PC cannot use its prefilled testimony to cure pleading deficiencies relative to its contentions.

Accordingly, we grant the LES motion to strike the aforesaid questions and answers, or portions thereof.²

B. LES Motion to Exclude Portions of Prefiled Rebuttal Testimony of Arjun Makhijani

DISCUSSION: LES Motion In Limine at 4-5; Staff Response to LES In Limine Motion at 5-6; NIRS/PC Response at 4-7.

RULING: At issue are portions of the prefilled rebuttal testimony of Arjun Makhijani regarding contention NIRS/PC EC-4. LES contends that the Board should exclude those portions of the testimony that relate to an alleged need to deconvert depleted uranium to UO₂, as opposed to the U₃O₈ form proposed by LES in its application. Questions 3, 6, and 7, and the answers thereto, all relate singularly to the proposition that LES must analyze deconversion into the UO₂ form, a proposition that this Board has previously rejected on more than one occasion,

² In its February 3 response, the staff also seeks to have additional portions of Mr. Rice's rebuttal testimony stricken, including portions of Answer 14, additional portions of Question and Answer 23, and the second paragraph of Answer 36. Since we are unwilling to treat the staff's response as a motion in limine, we decline to do so.

most recently in our January 21 order. Therefore we grant the LES motion to strike the aforesaid questions and answers from the prefilled rebuttal testimony of Dr. Makhijani.³

C. LES Motions to Exclude Prefiled Rebuttal Testimony of Michael Sheehan

DISCUSSION: LES Motion In Limine at 5-7; Staff Response to LES In Limine Motion at 6-7; NIRS/PC Response at 7-9.

RULING: LES requests that the Board exclude the prefilled rebuttal testimony of Michael Sheehan in its entirety as outside the scope of contention NIRS/PC EC-7 and therefore irrelevant. We agree that the vast majority of Dr. Sheehan's prefilled rebuttal testimony does indeed fall outside the scope of this proceeding and/or the contention for which it is offered. For example, his testimony regarding the effect of the construction and operation of the NEF upon the ability of the proposed USEC facility to be financially successful, and his testimony regarding how the NEF might be expected to behave competitively in the marketplace are outside the scope of this contention as admitted. Similarly, as we have previously held on more than one occasion, testimony regarding economic projections and economic competitiveness of various participants in this market are outside the scope of this proceeding. As the Commission noted in the context of a similar proceeding, “[t]he NRC . . . is not in the business of regulating the market strategies of licensees,” but instead looks at whether the applicant can safely conduct operations and leaves to the applicant such business decisions relating to cost and profit. See Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 48-49 (2001).

Nevertheless, as the NEF has, in part, based its “needs” posture upon a United States and an international need for enrichment capacity and upon the need for diversity of supply of

³ In its February 3 response, the staff also seeks to have additional portions of Dr. Makhijani's rebuttal testimony stricken, specifically, the answer to Question 9. Because we are unwilling to treat the staff's response as a motion in limine, we decline to do so.

enrichment services within the United States, we are not inclined to strike all of Dr. Sheehan's prefilled rebuttal testimony. We therefore grant the LES motion to strike the prefilled rebuttal testimony of Dr. Sheehan to the extent that we find that only the following portions of Dr. Sheehan's are to be submitted:

1. Section I.A, in its entirety
2. Section I.B, in its entirety
3. Section I.D, in its entirety
4. Section II, only:
 - a. Questions 13 through 16 and the answers thereto;
 - b. Question 17 and the first sentence of the answer thereto;
 - c. Questions 26 and 27 and the answers thereto;
 - d. Question 29 and the answer thereto;
 - e. Questions 35 and 36 and the answers thereto (except that the phrase "more cost effective" is stricken from the answer to Question 36).
5. Section III, only Questions 39 through 42 and the answers thereto
6. Section IV, only:
 - a. Questions 45 through 54 and the answers thereto;
 - b. Question 57 and the answer thereto;
 - c. Question 59 and the answer thereto.

II. NIRS/PC In Limine Motion

DISCUSSION: Motion on Behalf of [NIRS/PC] to Strike Testimony of Commission Staff Witness Concerning NIRS/PC Contention EC-2 (Feb. 3, 2005); NRC Staff Response to Motion on Behalf of [NIRS/PC] to Strike Testimony of Commission Staff Witness Concerning NIRS/PC Contention EC-2 (Feb. 3, 2005).

RULING: By motion dated February 3, 2005, NIRS/PC request that the Board strike the testimony of Alan Toblin, the sole staff witness regarding contention NIRS/PC EC-2. According to NIRS/PC, this sanction is appropriate because they did not receive or otherwise learn of his direct prefiled testimony until they received a January 28, 2005 letter from staff counsel stating that the testimony had been revised to reflect changed exhibit numbers. The staff responds that there is no basis for striking the testimony. According to the staff, on January 7, 2005, it sent an electronic version of the testimony by e-mail to two different e-mail addresses for NIRS/PC counsel as well as a hard copy version by first class mail with a cover letter that indicated testimony relating to all four of the NIRS/PC contentions at issue was enclosed. Relative to the e-mail service of the testimony, the staff acknowledges that it received a "bounce back" with respect to one of the two e-mail addresses, but did not attempt to resend the testimony.

While there are a number of factual questions extant regarding this dispute, including the question of why NIRS/PC counsel did not inquire about the testimony when he received the January 7 staff cover letter that indicated testimony on all four NIRS/PC environmental contentions – including contention NIRS/PC EC-2 -- was attached, it is not apparent that any useful purpose would be served by attempting to resolve them at this juncture. Under the circumstances, we believe this matter can be most equitably addressed by providing NIRS/PC with an opportunity, when their witness Mr. Rice testifies relative to this contention, to present his rebuttal testimony "live." Accordingly, we deny the February 3 NIRS/PC motion to strike, but will permit Mr. Rice to provide "live" rebuttal testimony relative to Mr. Toblin's prefilled testimony at the time NIRS/PC makes its evidentiary presentation on contention NIRS/PC EC-2.

III. Administrative Matters

With the above rulings, certain revisions to and exclusions from NIRS/PC prefilled rebuttal testimony are required. In accordance with section A.3.a of the Board's January 18, 2005 memorandum and order on administrative matters, NIRS/PC should submit revised versions of their prefilled rebuttal testimony that omit all of the text (and associated footnotes) we have stricken by the above rulings, and an exhibit list that reflects the removal of any associated exhibits.⁴ This is not an opportunity to rephrase, add to, or otherwise alter previously submitted prefilled direct or rebuttal testimony, but should be used only to eliminate stricken testimony.

Additionally, to the degree the rulings in this issuance cause counsel to revise his/her cross-examination plan relative to any witness, a revised plan should be resubmitted at the time counsel begins his/her cross-examination.

Finally, we take this opportunity to remind the parties that it is the Board's intent to conduct one continuous hearing on the contentions at issue, and that, while we will follow the order for hearing contentions that the parties have suggested, the timing of initiation and completion of the portion of the hearing dedicated to each contention is likely to vary from the parties' suggested schedule. With that in mind, we advise the parties to be prepared, at the conclusion of the hearing portion dedicated to a particular contention, to proceed immediately with the next contention on the agenda. Parties should make all appropriate arrangements with

⁴ At this juncture, NIRS/PC should not renumber any of the exhibits NIRS/PC will present at the hearing in its exhibit list or otherwise, but simply delete any stricken exhibits and associated exhibit numbers.

their witnesses to enable this process to proceed unimpeded by unavailability of witnesses or other disruptions.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁵

/RA/
G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

February 4, 2005

⁵ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant LES; (2) intervenors New Mexico Environment Department, the Attorney General of New Mexico, and NIRS/PC; and (3) the staff.

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON IN LIMINE MOTIONS REGARDING PREFILED DIRECT AND REBUTTAL TESTIMONY AND PROVIDING ADMINISTRATIVE DIRECTIVES) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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LB MEMORANDUM AND ORDER
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[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 4th day of February 2005