

RAS 10401

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

DOCKETED 09/02/05

SERVED 09/02/05

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

September 2, 2005

MEMORANDUM AND ORDER

(Regarding LES Motion to Dismiss/Narrow Scope;
Schedule for Prefiled Testimony and Related Filings)

In an August 31, 2005 motion, applicant Louisiana Energy Services, L.P., (LES) seeks to dismiss and/or narrow the scope of several admitted contentions of intervenors Nuclear Information and Resource Service and Public Citizen (NIRS/PC). Specifically, LES seeks (1) dismissal for failure to raise a genuine dispute of contention NIRS/PC EC-3/TC-1, by which NIRS/PC assert that LES lacks a plausible strategy for private sector disposal of large amounts of depleted uranium hexafluoride (DUF_6) waste relative to the deployment by COGEMA of a private deconversion facility; (2) dismissal as moot of the first subpart of contention NIRC/PC EC-5/TC-2 regarding the adequacy of the LES DUF_6 dispositioning cost contingency factor; and (3) dismissal of subpart I of contention NIRS/PC EC-6/TC-3 insofar as it constitutes an impermissible collateral attack on the waste classification provisions of 10 C.F.R. Part 61 as they relate to depleted uranium. Although the Licensing Board normally would await party responses before issuing any ruling regarding that motion, we find the circumstances in this instance dictate some action by the Board prior to receiving those filings.

We note in this regard that although labeled a motion to dismiss, in some respects this LES request closely resembles a summary disposition request, especially with respect to items one and three above, notwithstanding the fact the deadline for filing such a motion was over a month ago. See Licensing Board Memorandum and Order (Memorializing and Ruling on Matters Raised in Conjunction with August 3, 2004 Conference Call and Setting General Schedule for Proceeding) (Aug. 16, 2004) at App. A (unpublished). Additionally, items two and three above appear to rest upon the supposition that when NIRS/PC submit their prefiled testimony in several weeks, NIRS/PC will present certain information in support of their position on these contentions that will (a) contradict early rulings of this Board regarding the scope of contention NIRS/PC EC-5/TC-2, and/or (b) establish that, rather than seeking to challenge the use of near-surface disposal in the manner outlined by the Commission relative to contention NIRS/PC EC-6/TC-3, see CLI-05-5, 61 NRC 22, 35 & n.64 (2005), NIRS/PC seeks to challenge the agency's Part 61 regulations without requesting a waiver in accordance with 10 C.F.R. § 2.335(b).

At this point, only two weeks prior to the scheduled submission of prefiled testimony, the Board has a concern, previously reflected in the now-superseded language of section 2.749(a) as it existed prior to the February 2004 revisions to Part 2, that to require the parties to respond to this motion would "divert substantial resources from the hearing in order to respond adequately to the motion and thereby extend the proceeding." This, in conjunction with the recognized proposition that an intervenor can seek to make its case "defensively" by cross-examination alone, see Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, & 2B), ALAB-463, 7 NRC 341, 356 (1978), leads us to conclude that having the other parties, in particular NIRS/PC, respond to the LES motion at this juncture would not be appropriate. By the same token, to the degree NIRS/PC (or any other party) seeks to proffer

testimony that is outside the scope of this proceeding or otherwise inadmissible, as was the case in the environmental contention phase of this proceeding, a properly supported motion in limine may provide a basis for striking that testimony.

Accordingly, the Board concludes that at this point the substance of the LES motion would be most appropriately addressed following the filing of parties' prefiled direct testimony in the context of a motion in limine by LES relative to the prefiled testimony of NIRS/PC (or, possibly, a renewed dismissal motion). The Board thus declines to rule on the instant LES motion (and therefore does not require responses from NIRS/PC or the NRC staff relative to that motion) and instead directs that the issues raised by LES be brought before the Board, if appropriate, in the form of a motion in limine (and/or renewed dismissal motion) in connection with the NIRS/PC prefiled direct testimony.

In this regard, the Board establishes the following partially revised schedule for party filings relative to the October 2005 evidentiary hearing:

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|----------------------------|-------------------------------|
| Prefiled Direct Testimony | Friday, September 16, 2005 |
| Motions in Limine | Thursday, September 22, 2005 |
| Motion in Limine Responses | Wednesday, September 28, 2005 |

Thereafter, prefiled rebuttal testimony, along with a revised version of any prefiled direct testimony reflecting any Board in limine motion rulings, is to be filed within seven days of the

Board's ruling on any in limine motions, and cross-examination plans and party outline summaries should be filed within seven days thereafter.¹

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD²

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

September 2, 2005

¹ To the extent that the schedule for party filings in this memorandum and order differs from the general schedule set forth in the Board's August 16, 2004 memorandum and order, as modified by the Board's August 12, 2005 memorandum and order modifying that schedule, see Licensing Board Memorandum and Order (Memorializing Results of Prehearing Conference) (Aug. 12, 2005) (unpublished), the schedule established in the instant order governs.

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

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NUCLEAR REGULATORY COMMISSION

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| (National Enrichment Facility) |) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (REGARDING LES MOTION TO DISMISS/NARROW SCOPE; SCHEDULE FOR PREFILED TESTIMONY AND RELATED FILINGS) 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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(REGARDING LES MOTION TO
DISMISS/NARROW SCOPE; SCHEDULE
FOR PREFILED TESTIMONY AND RELATED FILINGS)

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[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 2nd day of September 2005