

February 21, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
LOUISIANA ENERGY SERVICES, L.P.)	Docket No. 70-3103
)	
(National Enrichment Facility))	ASLBP No. 04-826-01-ML
)	

NRC STAFF ANSWER TO MOTION FOR LEAVE TO APPEAR, ARGUE,
GIVE EVIDENCE AND CROSS-EXAMINE ON BEHALF OF INTERVENORS
NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN

INTRODUCTION

On February 10, 2006, Nuclear Information and Resource Service and Public Citizen (“NIRS/PC”) filed a motion for leave appear, argue, give evidence and cross-examine witnesses¹ regarding an issue the Board has asked the Staff to address in the mandatory hearing.² For the reasons set forth below, the Staff opposes NIRS/PC’s motion.

DISCUSSION

The Board has conducted three evidentiary hearings³ on NIRS/PC’s admitted contentions in this proceeding, during which NIRS/PC was afforded ample opportunity to appear, argue, give evidence and cross-examine witnesses on the subject-matter of those admitted contentions. Nonetheless, NIRS/PC now argues that because the Board has asked

¹ “Motion for Leave to Appear, Argue, Give Evidence and Cross-Examine on Behalf of Intervenors Nuclear Information and Resource Service and Public Citizen,” (February 10, 2006) (“Motion”).

² *Memorandum and Order* (Memorializing Board Questions/Areas of Concern for Mandatory Hearing), January 30, 2006.

³ These hearings took place on February 7-10, 2005 in Hobbs, New Mexico, October 24-27, 2005 in Rockville, MD, and February 13, 2006 in Rockville, MD.

the Staff to address a question relating to decommissioning funding for the mandatory hearing that relates to issues raised by NIRS/PC in its contentions,⁴ the Board must transform a portion of the mandatory hearing to a contested hearing and permit NIRS/PC to participate. Presumably, NIRS/PC envisions that it would be permitted another opportunity to appear, argue, give evidence and cross examine witnesses to address any additional matters raised by the Board but not addressed in its specific contentions. This result would be directly contrary to the Commission's recent direction on this subject that "[t]he scope of the intervenors' participation in adjudications is limited to their admitted contentions, i.e., they are barred from participating in the uncontested portion of the hearing. *Exelon Generation Company, et. al.*, CLI-05-017, 62 NRC 5, 49 (2005) and the Commission's regulations that limits the participation of intervenors to their admitted contentions.

The essence of NIRS/PC's argument is that since the issue of decommissioning funding was included with the questions in the Board's January Order, and this issue is allegedly "within the scope" of the contentions litigated in the October 2005 evidentiary hearing, the Board is barred from considering any decommissioning funding issues in the mandatory hearing.⁵ Motion at 8. NIRS/PC premises this argument on the Commission's guidance in *Exelon* that differing standards of review apply in the mandatory and contested portions of the hearing, alleging that the Board cannot consider a matter raised by an intervenor in the

⁴ In the *Memorandum and Order*, the Board addressed decommissioning funding in Question 4 which states, in part, "[i]f the Commission determines, at a future date, that near surface disposal of depleted uranium from an enrichment facility such as the NEF is no longer appropriate, how will the bond be modified to accommodate the accompanying change in decommissioning costs? What mechanisms will be put in place at the issuance of the license to ensure that LES, which is a "single purpose" entity with no assets outside it ownership of the NEF, has the wherewithal to, and actually provides, the increased bond amount? Slip op. at 3. .

⁵ NIRS/PC did not identify specific contentions to which it is referring, but, rather, referred generally to contentions litigated during the October 2005 evidentiary hearings. Motion at 6. While the question from the Board relates to the sufficiency of decommissioning funding it does not, as NIRS/PC claims, come with the scope of the admitted contentions.

mandatory hearing because the improper, i.e. lower, standard of review would be applied. Motion at 7-8.

This argument, however, ignores the fact that NIRS/PC's contentions relating to decommissioning funding were fully litigated during the contested portion of the hearing and that resolution of those contentions will be subject to the higher, *de novo* standard of review. Therefore, any consideration of questions regarding decommissioning funding during the mandatory portion of the hearing will not deny NIRS/PC the right to fully litigate its admitted contentions or to consideration of those contentions under the appropriate standard of review. The bottom line is that NIRS/PC's contentions have been fully litigated in this case, and the merits of those contentions will be reviewed *de novo* by the Board. The fact that the Board may consider issues related to NIRS/PC's contentions during the mandatory portion of the proceeding does not alter the Board's responsibility to apply the *de novo* standard in deciding the merits of NIRS/PC's contentions. Therefore, the inequity to which NIRS/PC alludes is non-existent. The differing standards of review for contested versus uncontested portions of NRC hearings simply do not create a constraint on the Board's ability to consider evidence during the uncontested portion of a bifurcated hearing.

NIRS/PC's argument also ignores the plain meaning of the Commission's statement that "[t]he scope of the intervenors' participation in adjudications is limited to their admitted contentions, i.e., they are barred from participating in the uncontested portion of the hearing," *Exelon*, CLI-05-017, 62 NRC 5, 49 (2005). While NIRS/PC asks the Board to interpret this statement as constraining the scope of the Board's review in the mandatory hearing, Motion at 8, the Commission prefaced this statement by noting that it was addressing the issue of the extent of intervenor participation in mandatory hearings. *Id.* The Commission went on to observe that allowing intervenors to participate in mandatory hearings would contravene the objective of the contentions requirements in the Commission's procedural rules which were

designed to limit both an intervenor's proposed findings and appeals to only those contentions that the intervenor had placed in controversy. *Id.* at 49-50. In making the statement on which NIRS/PC relies, therefore, it is clear that the Commission was placing a constraint on the scope of an *intervenor's right* to participate in NRC adjudications, *not on the Board's ability* to hear issues during the uncontested portion of a hearing.

The flaw in NIRS/PC's argument is apparent when taken to its logical conclusion. Following NIRS/PC's logic, an intervenor who has offered a specific, admissible contention concerning an issue relating to an application which is subject to a mandatory hearing would not only have the right to litigate that contention but would also have the right to litigate, under the *de novo* standard, any related issues in the subsequent mandatory hearing. Such a result would contravene the Commission's explicit purpose in limiting the scope of an intervenor's participation in hearings to admitted contentions. *Exelon*, 62 NRC 5, 50 (2005), *citing* Final Rule: "Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,178 (Aug. 11, 1989). Allowing an intervenor to transform a mandatory hearing into a contested hearing simply by showing that an issue being heard is relevant to a contention that has already been fully litigated would contravene any efficiency created by the Commission's contention requirements. By admitting a contention raising a very specific issue on one aspect of an application (in this case decommissioning funding) the Board should not be precluded from considering any other issue regarding that aspect of the application in the mandatory hearing and instead be required to reopen the contested proceeding and allow intervenors to investigate issues beyond those in the admitted contentions. This attempt to circumvent the Commission's intent in establishing the framework for mandatory hearings should be denied.

CONCLUSION

For the reasons set forth above, NIRS/PC's motion for leave to appear, argue, give evidence and cross-examine witnesses at the mandatory hearing should be denied.

Respectfully submitted,

/RA/

Lisa B. Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
this 21st day of February, 2006

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO MOTION FOR LEAVE TO APPEAR, ARGUE, GIVE EVIDENCE AND CROSS-EXAMINE ON BEHALF OF INTERVENORS NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 21st day of February, 2006.

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