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

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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 24, 2006

MEMORANDUM AND ORDER
(Regarding NIRS/PC Motion for Leave
to Participate in Mandatory Hearing)

Pending before the Licensing Board is a February 10, 2006 motion by intervenors Nuclear Information and Resource Service and Public Citizen (NIRS/PC) for leave to appear, argue, present evidence, and cross-examine witnesses with regard to certain issues on which applicant Louisiana Energy Services, L.P., (LES) and the NRC staff are scheduled to give presentations in the context of the upcoming mandatory hearing in this proceeding on the LES application for a 10 C.F.R. Part 70 license to construct and operate the proposed National Enrichment Facility (NEF) at a site near Eunice, New Mexico. LES and the staff each oppose the NIRS/PC motion. For the reasons set forth below, the Board denies the NIRS/PC motion.

I. BACKGROUND

On February 10, 2006, NIRS/PC filed with the Board a motion for leave to appear, argue, present evidence, and cross-examine staff and LES witnesses with regard to certain issues scheduled to be heard at the upcoming March 6-8, 2006 mandatory hearing in this

proceeding. See Motion for Leave To Appear, Argue, Give Evidence and Cross-Examine on Behalf of Intervenors [NIRS/PC] (Feb. 10, 2006) at 1 [hereinafter NIRS/PC Motion]. NIRS/PC asserts that certain matters identified by the Board as an “area of concern” relative to the mandatory findings the Board must make as to uncontested matters in this proceeding in fact “go[] to the heart of contentions advanced by NIRS/PC,” and therefore constitute contested issues that cannot be further considered without NIRS/PC participation. See id. at 6. Specifically, NIRS/PC points to a January 30, 2006 Board issuance that memorialized for the staff and LES certain questions and areas of concern identified by the Board during a conference call with LES and the staff with regard to the presentations those parties are to make in the context of the mandatory hearing, and contends that Question 4,¹ as presented by the Board, raises issues related to the LES surety bond intended to cover the estimated cost for

¹ Question 4 reads as follows:

The Commission has directed the staff to investigate whether amendment of 10 C.F.R. Part 61 is required to properly address the issue of disposal of depleted uranium from an enrichment facility. In the context of its decommissioning funding plan, LES will be providing a surety, in the form of a bond, covering all decommissioning costs expected during the term of that bond. The size of that bond will be determined a priori upon the basis of conditions at the time of issuance or renewal. The current sizing of that bond is proposed to be based upon near-surface disposal of depleted uranium. If 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 its ownership of the NEF, has the wherewithal to, and actually provides, the increased bond amount?

decommissioning the NEF, issues that, in NIRS/PC's estimation, cannot be segregated from the cost-related contentions litigated by NIRS/PC in this proceeding. See id. at 5-8.

In its response, LES opposes the NIRS/PC motion, maintaining that (1) the matters identified by NIRS/PC are uncontested issues on which NIRS/PC has no right to participate, (2) NIRS/PC has had a full opportunity to litigate its contested issues in this proceeding, contentions that did not include challenges to the specific Board-identified matters now at issue, and (3) the Board has repeatedly recognized that matters related to the decommissioning funding mechanisms and proposed financial assurance methods are outside the scope of any admitted NIRS/PC contention. See [LES] Response to Motion for Leave To Appear, Give Evidence, and Cross Examine on Behalf of Intervenors [NIRS/PC] (Feb. 21, 2006) at 3-8. The staff likewise opposes the NIRS/PC motion, but takes a slightly different tack in its response. See NRC Staff Answer to Motion for Leave To Appear, Argue, Give Evidence and Cross-Examine on Behalf of Intervenors [NIRS/PC] (Feb. 21, 2006). The staff appears to interpret the NIRS/PC motion as seeking to place an improper restraint on the Board's ability to "consider[] any decommissioning funding issues in the mandatory hearing" on the basis that a less rigorous standard of review will be applied by the Board relative to the matters discussed in the uncontested portion of this proceeding, i.e., the mandatory hearing, while it is in fact the intervenors' right to participate in a mandatory hearing that is restricted, not the Board's ability to hear issues at that hearing. See id. at 3-4.

II. ANALYSIS

As each of the parties points out in its respective pleading, in CLI-05-17, 62 NRC 5 (2005), the Commission addressed numerous issues related to the appropriate conduct of so-called mandatory hearings in this and other proceedings in which a licensing board is

required to make certain mandatory findings relative to the adequacy of the staff's environmental and safety review of a given license application. In particular, the Commission made two specific findings relative to the matters before the Board here. First, the Commission found that a different review standard applies to contested issues, which the Board is to resolve by bringing its de novo judgment to bear on the merits of those issues, as opposed to uncontested matters, which the Board is to address by conducting a simple "sufficiency" review, i.e., decide whether the safety and environmental record is sufficient to support issuing the applied-for license.² See id. at 38-43. Second, the Commission indicated that intervenors "are barred from participating in the uncontested portion" of a hearing. Id. at 49.

None of the parties disputes that these differing standards of review apply, nor that the Commission has ruled that intervenors may not participate in hearings on uncontested matters. Rather, NIRS/PC contends that it should be permitted to participate in any hearing on the issues contained in Question 4 of the Board's January 30 memorandum and order because those issues are, in fact, contested issues, rather than uncontested matters appropriate for the mandatory hearing portion of this proceeding. As LES points out, this misconstrues the nature of the matters the Board raises in Question 4. While several of NIRS/PC's contentions related directly or peripherally to decommissioning costs and funding, those challenges focused on substantive costing issues, including actual cost figures for the LES decommissioning cost estimates and the uncertainties which might arise and necessitate changes to those cost estimates. With Question 4, however, the Board is seeking information, primarily from the staff, as to the process or mechanisms by which the staff would ensure that the LES surety bond

² The Commission did distinguish this "sufficiency" review from the review the Board must make for certain uncontested National Environmental Policy Act "baseline" questions, with regard to which the Board must reach its own "independent determination," see CLI-05-17, 62 NRC at 45, but this distinction is not relevant to the motion now before us.

covers the actual cost of decommissioning the NEF, whatever that cost may be, at any particular time. In fact, during the October 2005 evidentiary hearings on the admitted contentions NIRS/PC now asserts form the basis for their right to participate as to the matters raised by Question 4, the Board made clear that the question of the LES decommissioning funding mechanism was not before the Board in the context of those NIRS/PC contentions. See Tr. at 3147-48. The Board did not, contrary to NIRS/PC's assertions in its motion, "inquire[] as to the operation of regulations under which the decommissioning costs may be adjusted and financial assurance augmented." See NIRS/PC Motion at 5.

In sum, the matters raised by the Board in Question 4 are outside the scope of any admitted contentions. Accordingly, we deny the February 10, 2006 NIRS/PC motion to participate in the mandatory hearing on these matters.³

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁴

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

February 24, 2006

³ In fact, the Board does not encourage or solicit any written or oral presentations from the staff or LES in the context of the mandatory hearing that might arguably address the substantive aspects of issues within the scope of any admitted contentions. As LES and the staff each noted in their respective responses, all of the contested issues in this proceeding have been litigated by NIRS/PC, the staff, and LES, and the Board does not require any further evidentiary presentations as to any of those issues at this juncture.

⁴ 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; (3) the New Mexico Environment Department and the Attorney General of New Mexico; and (4) the staff.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (REGARDING NIRS/PC MOTION FOR LEAVE TO PARTICIPATE IN MANDATORY HEARING) 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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Dated at Rockville, Maryland,
this 24th day of February 2006