

February 21, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ORIGINAL
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

February 21, 2006 (12:38am)

In the Matter of:)
Louisiana Energy Services, L.P.)
(National Enrichment Facility))

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF
Docket No. 70-3103-ML
ASLBP No. 04-826-01-ML

**APPLICANT'S RESPONSE TO MOTION FOR LEAVE TO APPEAR, GIVE
EVIDENCE, AND CROSS EXAMINE ON BEHALF OF INTERVENORS
NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN**

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323, Louisiana Energy Services, L.P. ("LES") hereby responds to the motion for leave submitted on February 10, 2006 by Nuclear Information and Resource Service and Public Citizen ("NIRS/PC" or "Intervenors").¹ Specifically, NIRS/PC seek leave "to appear, give evidence, and cross-examine witnesses" at the upcoming mandatory hearing on one of the specific "areas of concerns" identified by the Licensing Board in its January 30, 2006 memorandum and order.² NIRS/PC Motion at 1. As set forth below, LES submits that the NIRS/PC motion should be denied in full. In short, contrary to Intervenors' claims, the Board-specified issue on which NIRS/PC seek to participate is an uncontested issue. Under applicable Commission precedent, NIRS/PC are precluded from participating in the uncontested mandatory hearing.

¹ See "Motion for Leave to Appear, Give Evidence and Cross-Examine on Behalf of [NIRS/PC]" (Feb. 10, 2006) ("NIRS/PC Motion").

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

II BACKGROUND

In its January 30th Order, the Board "memorialized" a series of questions upon which the Board has required presentations from LES and/or the NRC Staff in the context of the uncontested mandatory hearing in this proceeding. Question 4 states as follows:

4. 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?

January 30th Order at 3. During a February 6, 2006 telephone conference with counsel for LES and the Staff, the Board explained that Question 4 was based on the "general question" posed by the Board during the October 27, 2005 evidentiary hearing. Tr. at 3246. At that time, the Board queried how LES, through its proposed financial assurance mechanism, would address a possible increase in "one of the major elements" of LES's decommissioning-related costs. Tr. at 3168. During the February 6th conference call, however, the Board explained that it intended the "specific case" set forth in Question 4 (*i.e.*, a future amendment to Part 61) to be an example, so as to help LES and the Staff focus their presentations with respect to the generic financial assurance question posed by the Board. Tr. at 3246. Indeed, the Board added that it remains "interested in the general issue." *Id.* By virtue of their latest motion, NIRS/PC seek leave to participate in the mandatory hearing on Question 4.

III. ARGUMENT

A. The Commission Has Specifically Barred Intervenors From Participating in the Uncontested Mandatory Hearing

In CLI-05-17, the Commission addressed *sua sponte* the issue of whether intervenors have any right to participate in the uncontested mandatory hearing. The Commission's resolution of this issue in CLI-05-17 left no doubt. The Commission held:

The 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. Any other result would contravene the objectives of our "contention" requirements. . . . Similarly, our 1989 amendments to the Subpart G procedural rules limited both an intervenor's proposed findings and its appeals to *only* those *contentions* that the intervenor had itself placed in controversy. Our purpose there was "to ensure that the parties and adjudicatory tribunals focus their interests and adjudicatory resources on the contested issues as presented and argued by the party with the primary interest in, and concerns over the issues." This same purpose likewise justifies our limiting the scope of intervenor participation in mandatory hearings.

Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), *et al.*, 62 NRC 5, 49-50 (2005) (emphasis added). NIRS/PC are no exception to this rule. NIRS/PC have no right to participate in the mandatory portion of the proceeding. NIRS/PC's participation in the hearing is limited to the resolution of their admitted contentions, and NIRS/PC have already exercised that right through their participation in the three evidentiary sessions conducted to date on their *contested* issues. The Commission's decision should be applied consistent with its plain meaning.

B. NIRS/PC Have Had a Full Opportunity to Participate on Their Contested Issues

As the Commission stated in CLI-05-17, an "Intervenor's participation in adjudications is limited to their admitted contentions." *See id.* at 49. Intervenors' motion rests wholly on the erroneous argument that "the issues contained in paragraph 4 of the Board's January 30, 2006 order are not uncontested matters, suitable for a mandatory hearing," but rather, "are aspects of the contested issues advanced by NIRS/PC and admitted for hearing." NIRS/PC

Motion at 6. The necessary implication of the NIRS/PC argument, therefore, is that the Board is now seeking to hear *additional* testimony and evidence on contested issues previously litigated by the parties. As explained below, this is simply not the case. Moreover, NIRS/PC have had a full opportunity to pursue their contested issues.

NIRS/PC submitted their petition to intervene on April 6, 2004.³ Of the proposed contentions NIRS/PC submitted, not one mentioned LES's surety bond instrument. Indeed, of *all* the contentions offered in this proceeding, including those submitted by the New Mexico Environment Department⁴ and the New Mexico Attorney General,⁵ no contention was admitted into this proceeding that challenged the adequacy of LES's proposal to employ the surety bond mechanism for financial assurance or the process by which that bond would be adjusted if unforeseen events dictate the need for change in the future.⁶ While the Attorney General did seek to challenge how the disposal security will be calculated, the Board rejected this proposed contention, ruling that it was inadmissible because it lacked adequate support; failed to properly challenge LES's Environmental Report; and/or presented an impermissible challenge to the Commission's decommissioning regulations.⁷ Clearly the issues NIRS/PC sought to litigate, as expressed in Contentions NIRS/PC EC-3/TC-1, EC-5/TC-2, and EC-6/TC-3, and on which the Board received evidence in October 2005 and February 2006, did not encompass any challenges to the mechanics of LES's proposed financial assurance method.

³ See "Petition to Intervene by Nuclear Information and Resource Service and Public Citizen" (Apr. 6, 2004).

⁴ See "The New Mexico Environment Department's [*sic*] Request for Hearing and Petition for Leave to Intervene" (Mar. 24, 2004).

⁵ See "The New Mexico Attorney General's Request for a hearing and Petition for Leave to Intervene" (Apr. 5, 2004).

⁶ See *Louisiana Energy Servs., L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40 (2004) (ruling on proposed contentions).

⁷ See *id.* at 64-65.

The relevant admitted NIRS/PC contentions specifically challenge (1) the *plausibility* of LES's "private sector" strategy for dispositioning DU from the NEF (in particular, the plausibility of commercial deconversion in the U.S. and near-surface disposal of DU), (2) the reasonableness of LES's related *base cost estimate*, and (3) the adequacy of the *contingency factor* applied to that cost estimate. Nowhere, do those contentions explicitly challenge the acceptability of the specific financial assurance mechanism, or the means by which that mechanism is to be adjusted to account for increased decommissioning costs, as described in the NEF license application. The issues NIRS/PC sought to, and did in fact litigate, all deal with *substantive* challenges to the amount of LES's initial decommissioning/DU disposal funding cost estimate. In particular, as far as NIRS/PC have challenged the classification of depleted uranium and the impact on the initial funding amount, the Commission has outright addressed that issue by determining that depleted uranium is low level waste. *See* CLI-05-05, 61 NRC 22, 34-35 (2005).

The issue identified in paragraph 4 of the Board's January 30th Order is not the same as NIRS/PC's contested issues. The Board is quite simply seeking additional information from LES and the Staff regarding: (a) the process by which LES would modify its surety bond to accommodate potential future increases in necessary decommissioning funding levels, and (b) the specific licensing "mechanisms" by which the NRC will ensure that LES has both an obligation and the capability to provide any significantly increased bond amounts. The dividing line between the discrete issues the Board now seeks to examine and the contested issues raised by NIRS/PC is, in reality, quite clear.

In seeking to obscure that line, NIRS/PC argue that "LES has placed the periodic cost adjustments in the center of the dispute over decommissioning costs." NIRS/PC Motion at 4. In this same vein, NIRS/PC state that "LES's latest prefiled testimony concerning cost of capital relies *entirely* on the assertion that LES's deconversion cost estimate will be repeatedly

updated, and financial assurance provided, assertedly resulting in an adequate allowance for deconversion at the end of the NEF's operating life." *Id.* (emphasis in original). Finally, NIRS/PC submit that "[t]he prospect of a future change in disposal strategy, requiring funding for deep disposal, has specifically been litigated within the scope of NIRS/PC's pending contentions." *Id.* 4-5. Each of these arguments lacks merit and reflects Intervenor's disregard for the plain distinction that exists between an applicant's initial decommissioning funding cost estimate (the subject of the contested issue) and the mechanics of the proposed financial assurance method (the subject of the Board question). Indeed, the decommissioning funding estimate and the proposed financial assurance method are discussed in separate sections of the Applicant's SAR and the NRC Staff's SER, respectively. The mere mention of the need for periodic updates to the estimate within the context of the October 2005 and February 2006 evidentiary sessions does not render that process a "contested issue."⁸ Moreover, Intervenor's participation -- even on contested issues -- is ultimately limited by the scope of their contentions and arguments. Intervenor's apparent desire to challenge belatedly LES's proposed financial assurance mechanism, based on a Board question, is simply too late.

At bottom, the *admitted* NIRS/PC contentions do *not* challenge LES's use of a surety bond as its financial assurance instrument, LES's use of an incremental funding approach, LES's proposed schedule for updating its cost estimate and funding instrument, or the mechanism for updating the surety bond. The time to raise any litigable challenges to these aspects of LES's license application -- as part of any contested proceeding -- is long past. As

⁸ To the extent NIRS/PC are seeking an opportunity to contest LES's ability to address potential increases in decommissioning/DU dispositioning costs through the periodic update process, they are pursuing an impermissible collateral attack on the Commission's regulations. *See* 10 C.F.R. § 2.335(a); *Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974) (barring attacks on applicable statutory requirements and challenges to the basic structure of the Commission's regulatory process). Sections 30.35(e), 40.36(d), and 70.25(e) specifically require enrichment facility license applicants to include "means for adjusting cost estimates and associated funding levels periodically over the life of the facility," and to adjust cost estimates "at intervals not to exceed 3 years."

noted above, LES identified its intent to use a surety bond and an incremental financial assurance approach in its original December 2003 license application. The Staff approved the aforementioned exemption request in its June 2005 SER. See SER at 1-9 to 1-10, 10-14. If NIRS/PC had wished to contest LES's proposed financial assurance method, then NIRS/PC should have submitted a timely and properly pled contention to that effect. The forthcoming mandatory hearing does not give rise to a new opportunity for NIRS/PC to expand their own issues.

C. The Licensing Board Has Consistently Recognized that the Financial Assurance Issue Raised in Question 4 Falls Outside the Scope of Any Admitted NIRS/PC Contention

Contrary to Intervenors' suggestion, the Board has, on more than one occasion, stated that issues pertaining to the adequacy of LES's proposed financial assurance method are outside the scope of any admitted NIRS/PC contention. On page 5 of their motion, NIRS/PC state blankly that "the Board itself inquired as to the operation of regulations under which decommissioning costs may be adjusted and financial assurance augmented." NIRS/PC Motion at 5 (citing Tr. at 3148). This NIRS/PC statement mischaracterizes the record and ignores the context in which the Board's comments were made. First, it was counsel for NIRS/PC who sought to "inquire as to the operation" of the NRC's financial assurance regulations. See Tr. at 3146 (stating that "I'm inquiring as to the application of the regulations in this specific case."). The Board, in response to objections by LES and Staff counsel, drew a clear distinction between the contested cost estimate issues then being litigated and the specific manner in which an applicant's/licensee's estimated decommissioning costs are financially assured and updated over time. The record states:

JUDGE ABRAMSON: It seems to me what's been challenged is the decommissioning costs and what's been challenged is the contingency factor. *I have not heard and I don't recall that there was a challenge and a contention to whether the decommissioning funding mechanism was adequate.*

* * *

JUDGE ABRAMSON: What I don't see is the connection between that and a challenge to either the underlying cost estimates, which you've challenged and we appreciate --

JUDGE ABRAMSON: -- that there's that question about whether -- what is the right cost to be associated with deep -- with disposal, and for that matter with deconversion. We understand those challenges. And we understand that you're addressing the question of the contingency. And to the extent that questions about contingency go to what they are to cover, that's one thing. *But I don't think that it's appropriate in this hearing, because I don't think it's before us, the question of the funding mechanics.*

Tr. at 3147-48 (emphasis added). Similarly, when counsel for NIRS/PC sought to delve into the "mechanics" of LES's proposed funding approach during the February 2006 hearing session, the Board quickly interjected. The Board noted again that this issue falls outside the scope of the admitted NIRS/PC contentions, and that NIRS/PC had, as a procedural matter, failed to timely raise it:

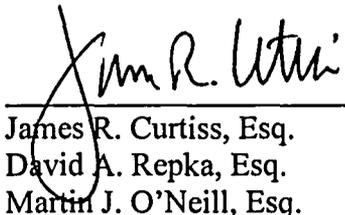
JUDGE ABRAMSON: We'd like to caution the parties again, again, again, please don't continue to rehash what's going to happen with the decommissioning fund or with the trust. We understand that. It's not at issue here. If you had a problem about how decommissioning funding was to have been dealt with, it should have been dealt with in a proper procedural manner earlier in this proceeding.

Tr. at 3380-81. To the extent NIRS/PC disagree with the Board's prior evidentiary rulings, a motion for leave to participate in the forthcoming mandatory hearing on uncontested issues is not the proper procedural vehicle to challenge those rulings.

IV. CONCLUSION

For the foregoing reasons, LES respectfully requests that the Board deny in full the NIRS/PC motion to appear, give evidence, and cross-examine witnesses at the March 6, 2006 mandatory hearing. The Commission has explicitly held that the Intervenors are barred from participating in the uncontested portion of the hearing.

Respectfully submitted



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Dated at Washington, District of Columbia
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "APPLICANT'S RESPONSE TO MOTION FOR LEAVE TO APPEAR, GIVE EVIDENCE, AND CROSS EXAMINE ON BEHALF OF INTERVENORS NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN" in the captioned proceeding has been served on the following by e-mail service, designated by **, on February 21, 2006 as shown below. Additional service has been made by deposit in the United States mail, first class, this 21st day of February 2006.

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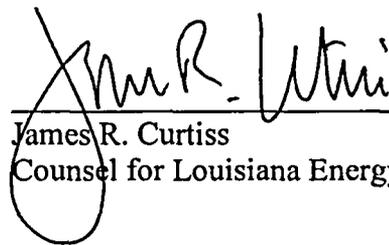
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