

RAS 8662

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

October 20, 2004

MEMORANDUM AND ORDER
(Discovery Rulings)

Pending with the Licensing Board are five different discovery-related motions.¹ We deal with each motion separately below:

- A. October 4, 2004 Nuclear Information and Resource Service/Public Citizen (NIRS/PC) Motion to Compel Louisiana Energy Services, L.P., (LES) Interrogatory Responses

Discussion: Motion to Compel Responses to Interrogatories by Applicant [LES] on Behalf of Petitioners [NIRS/PC] (Oct. 4, 2004) [hereinafter NIRS/PC Motion to Compel]; [LES] Opposition to [NIRS/PC] Motion to Compel Responses to Interrogatories (Oct. 12, 2004) [hereinafter LES Response to NIRS/PC Motion to Compel].

¹ Additionally, by motion dated September 29, 2004, applicant Louisiana Energy Services, L.P., (LES) sought to compel additional 10 C.F.R. § 2.704(a) responses from intervenors Nuclear Information and Resources Service/Public Citizen (NIRS/PC). See [LES] Motion to Compel Additional Section 2.704(a) Disclosures by [NIRS/PC] (Sept. 29, 2004) at 1. By letter to the Licensing Board dated October 6, 2004, NIRS/PC advised the Licensing Board that because on September 30 it had served on LES a section 2.704(a) supplemental disclosure and had produced additional documents, it was not filing a response to the September 29 LES motion. See Letter from Lindsay A. Lovejoy, Jr., NIRS/PC Counsel, to Licensing Board (Oct. 6, 2004). Under the circumstances, the Board considers that LES motion moot.

Rulings:

1. With regard to NIRS/PC Interrogatories 26, 30, 31, 32, 33 and 34, in several instances NIRS/PC seek financial information that would lead to an evaluation of the relative price-competitiveness of the proposed National Enrichment Facility (NEF). See NIRS/PC Motion to Compel at 5-9. In essence, this information relates to the viability of the business of NEF, not to the relative “need” for enrichment services. In admitting part of NIRS/PC EC7/TC4, the Licensing Board expressly noted that LES is under no obligation to present a “business case” or to demonstrate the profitability of its proposed facility relative to any National Environmental Policy Act (NEPA) “need” determination. See LBP-04-14, 60 NRC 40, 69 (2004). The concerns of the public and any intervening parties relative to such matters are protected through assuring that there are adequate financial resources devoted to operation of the facility in an environmentally sound manner and to decommissioning the proposed facility at any time during its development and operation, as well as at the end of its useful life. In this instance, however, those are matters that are the subject of another admitted contention. Therefore, we deny the NIRS/PC motion to compel with respect to interrogatories 30, 32, 33, and 34.

Relative to Interrogatories 26 and 31, although at least one portion of Interrogatory 26 (Subpart b) appears to run afoul of the concerns set forth above, the balance of that interrogatory and Interrogatory 31 seek information relative to the support LES has provided for statements about the production capability of the United States Enrichment Corporation’s Paducah gaseous diffusion plant that were put forth as supporting components of the LES claim in section 1.1 of its December 31, 2003 environmental report (ER) that there potentially is a “need” for its uranium enrichment capacity that will support its entry into the market. Nor do we see these requests as mandating additional research or analytical work in violation of

10 C.F.R. § 2.705(b)(ii) as claimed by LES, see LES Response to NIRS/PC Motion to Compel at 12-13. In each instance, given that NIRS/PC is seeking the underlying support LES has for these ER statements, see NIRS/PC Motion to Compel at 7, if LES is unable to provide any existing information to support the ER statements at issue, all it need do is inform NIRS/PC of that fact. We thus grant the NIRS/PC motion regarding these interrogatories, with the exception of Interrogatory 26, Subpart b, and direct that LES provide a response on or before Monday, November 1, 2004.

2. In Interrogatory 38, NIRS/PC requests information concerning the dates when the Department of Energy (DOE) may be in a position to accept depleted uranium hexafluoride (DUF₆). See NIRS/PC Motion to Compel at 11. In its response to the NIRS/PC motion to compel, LES declares that such information is a matter of public record by virtue of being in a DOE contract and supporting environmental impact statement and it has no other information relevant to this interrogatory. Given this response, we deny the NIRS/PC motion to compel relative to this interrogatory as moot.

3. In Interrogatory 39, citing LES's stated reliance in its safety analysis report (SAR) on the experience of one of its owners, the European company Urenco, as the basis for the precision of the LES NEF decommissioning cost estimates, NIRS/PC asks for comparative cost information on decommissioning from three other facilities which would "qualify as templates to estimate the cost to decommission the NEF." NIRS/PC Motion to Compel at 11. Putting aside the fact that contention NIRS/PC EC-5/TC-2 was admitted only insofar as it challenges the sufficiency of LES decommissioning cost estimates relative to the contingency factor, cost of capital, and low-level waste costs used, given that the September 23, 2004 LES response to Interrogatory 40 detailed the basis for the Urenco experience upon which it relied, it is apparent the NIRS/PC question would require LES to perform additional research and analytical work

beyond that needed to explain its own computations and the uncertainties associated therewith. See 10 C.F.R. § 2.705(b)(5). Therefore, we deny the NIRS/PC motion to compel with respect to this interrogatory.

4. In Interrogatory 43, NIRS/PC requests information regarding the projected annual provision of funds for decommissioning accumulated tails that may be stored on site at the NEF and NEF equipment and buildings. See NIRS/PC Motion to Compel at 12-13. Putting aside the fact that contention NIRS/PC EC-5/TC-2 was admitted only insofar as it challenges the sufficiency of LES decommissioning cost estimates relative to the contingency factor, cost of capital, and low-level waste costs used, the LES response to Interrogatory 43 detailed the information contained in the SAR relative to providing financial assurances for decommissioning accumulated tails and equipment and buildings. See LES Response to NIRS/PC Motion to Compel at 14-15. Furthermore, it is apparent the NIRS/PC question would require LES to perform additional research and analytical work beyond that needed to explain its own computations and the uncertainties associated therewith. See 10 C.F.R. § 2.705(b)(5). Therefore, we deny the NIRS/PC motion to compel with respect to this interrogatory as well.

5. Interrogatory 45 asks LES to declare whether or not the DUF₆ (or its derivatives) constitute waste and its basis for that position. See NIRS/PC Motion to Compel at 13. LES notes that it has answered this query fully in filings before the Commission relative to the Board's referral of portions of its initial contention admission determination. See LES Response to NIRS/PC Motion at Compel at 15-16. Under the circumstances, we deny the NIRS/PC motion to compel with respect to this interrogatory, albeit without prejudice to its renewal within ten days after the Commission's ruling on the pending Board referral.

6. Interrogatories 46 through 48 seek information from LES regarding instances of prior determinations by other parties as to whether or not DUF₆ is "low level radioactive waste." See

NIRS/PC Motion to Compel at 13-15. To the extent LES has not previously identified documents in its possession that address these interrogatories, we grant the LES motion to compel and order LES to do so on or before Monday, November 1, 2004.

7. Interrogatory 49 seeks information regarding the chemical form and expected radioactive nuclide content of the DUF_6 expected to be produced at the NEF. See NIRS/PC Motion to Compel at 15. Although LES has replied that this information should be publically available in its ER and the staff draft environmental impact statement (EIS), it has not provided a page citation from those documents where the information can be found. See LES Response to NIRS/PC Motion to Compel at 16. Therefore, we grant the NIRS/PC motion to compel with respect to this interrogatory and direct that on or before Monday, November 1, 2004, LES provide the pertinent citations. See 10 C.F.R. § 2.705(b)(1).

8. With Interrogatory 50, NIRS/PC seeks information regarding the form of depleted uranium waste produced at other proposed facilities, asserting that a Licensing Board ruling in Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 443 (2001), supports such a disclosure. See NIRS/PC Motion at Compel at 16. Because the particular information sought has no relationship to any of the admitted contentions in this proceeding, we deny NIRS/PC motion to compel with respect to this interrogatory.

9. Interrogatories 51 and 52 ask LES to identify the regulatory standards that would be applicable to disposal of NEF waste at certain facilities or of waste expected to be produced at other proposed facilities. See NIRS/PC Motion to Compel at 16-17. NIRS/PC are fully capable of obtaining this legal information with facility and success equal to what would be expected of LES and, therefore, we deny NIRS/PC motion to compel with respect to these interrogatories.

10. Interrogatory 53 seeks documents containing, or referring to, analysis of possible land disposal of certain DUF₆ under certain conditions. See NIRS/PC Motion to Compel at 17-18. In its response to the NIRS/PC motion to compel, LES declares that it has disclosed all documents it considers relevant to this interrogatory, specifying eight particular documents. See LES Response to NIRS/PC Motion to Compel at 18. Given this response, we deny the NIRS/PC motion to compel relative to this interrogatory as moot.

11. Interrogatory 54 asks for concurrence by LES regarding certain mortality factors and certain health-based reasons to not-dispose of certain radioactive waste. See NIRS/PC Motion to Compel at 18. In light of the LES response indicating its uncertainty about the reference to the “EPA Regulatory Guide” precluded any additional LES response, see LES Response to NIRS/PC Motion to Compel at 18-19, it appears neither party fully utilized the opportunity provided by 10 C.F.R. § 2.705(h) to resolve the dispute over this interrogatory. Accordingly, on or before Monday, November 1, 2004, counsel for NIRS/PC and LES shall confer and provide the Licensing Board with a joint report regarding their further discussions on resolution of this matter. Our ruling on this interrogatory is held in abeyance pending that report.

12. Interrogatory 55 seeks a statement of the basis for the LES position that shallow land disposal is safe. See NIRS/PC Motion to Compel at 18-19. In its response to the NIRS/PC motion to compel, LES declares that it has provided a response to this question as part of its filings in the referral matter before the Commission. See LES Response to NIRS/PC Motion to Compel at 19. Given this response, we deny the NIRS/PC motion to compel relative to this interrogatory as moot.

13. In Interrogatories 56, 57, 60 and 61, NIRS/PC seeks information regarding mine disposal of DU from the NEF and certain information regarding the chemical changes that could

be expected to take place in mine disposal. See NIRS/PC Motion to Compel at 19-21. In its answer to the NIRS/PC motion to compel, while referring NIRS/PC to a section of the ER and responding with detailed answers regarding chemical forms, LES argues that relative to the “plausible strategy” issue it has no obligation to define a site selection process or select any specific mine disposal site. See LES Response to NIRS/PC Motion to Compel at 19-22. In connection with these interrogatories, the Board notes as a result of LES’s position that, although it has an accepted (and preapproved) “plausible strategy” of transferral to DOE, it also retains the right to consider another disposal strategy. If LES wishes to do so, however, under admitted contention NIRS/PC EC-6/TC-3, the adequacy of that option is subject to further exploration. Unless LES notifies the Board and the other parties that it intends to proceed solely on the basis that it has a “plausible strategy” in the transfer to DOE and does not intend currently to pursue the SAR-referenced alternative of using a mine, then on or before Monday, November 1, 2004, it should respond to these interrogatories to the extent it has not done so already.

14. Interrogatory 62 seeks information within the knowledge of LES regarding other parties that have considered construction of a plant to convert DUF_6 . See NIRS/PC Motion to Compel at 21. This information request, which might produce information relevant to an assessment of the “plausibility” of a strategy relying upon a conversion process, is overly broad in that it seeks information going back twenty years. See LES Response to Motion to Compel at 22. Thus, we grant the motion to compel relative to this interrogatory and direct a response on or before Monday, November 1, 2004, but limit the scope of the interrogatory to information possessed by LES relating to the consideration of possible plant construction since 1990, which corresponds to the beginning of the first LES proceeding.

15. In interrogatory 63, NIRS/PC seeks detailed information regarding the process and byproducts of conversion of DUF₆. See NIRS/PC Motion to Compel at 21-22. LES responds that it has not selected any particular process, but also identifies certain portions of the discovery record and certain documents where relevant information is set forth. See LES Response to NIRS/PC Motion to Compel at 22-23. Given this response, as well as our directive in paragraph A.13 above, we deny the NIRS/PC motion to compel relative to this interrogatory as moot.

16. With Interrogatory 64, NIRS/PC seeks information regarding a Lawrence Livermore National Laboratory report regarding the projected cost of conversion and disposal of DUF₆. See NIRS/PC Motion to Compel at 22. LES in its response states that this specific question was expressly asked and answered in the deposition of certain LES witnesses. See LES Response to NIRS/PC Motion to Compel at 23. Given this response, we deny the NIRS/PC motion to compel relative to this interrogatory as moot.

B. October 4, 2004 Attorney General of New Mexico [AGNM] Motion to Compel LES Interrogatory Responses

Discussion: [AGNM] Motion to Compel Responses to Interrogatories by [LES] (Oct. 4, 2004) [hereinafter AGNM Motion to Compel]; [LES] Opposition to [AGNM] Motion to Compel Responses to Interrogatories (Oct. 12, 2004) [hereinafter LES Response to AGNM Motion to Compel].

Rulings:

1. In Interrogatory 6, the AGNM seeks to learn whether sources used by LES in computing disposal costs for DUF₆ take into account costs of long-term storage on premises. See AGNM Motion to Compel at 3-6. In response, LES accurately represents that the Board determined the issue of long-term storage of DUF₆ was inadmissible because it had been

asserted by AGNM in a reply pleading, a determination that was affirmed by the Commission. See LES Response to AGNM Motion to Compel at 2-3. Thus, as LES indicates, contention AGNM TC-ii was admitted but limited to challenges to LES cost estimates to the extent they are based on the Urenco contract and the LES cost estimates developed in connection with its Louisiana application. While acknowledging the Board's holding in this regard, LES nonetheless has responded to the interrogatory by indicating that the relevant components of its disposition cost are set out in its SAR section 4.13.3.1.6 and that those costs do not include any sums for long-term storage. Given this response, we deny the AGNM motion to compel relative to this interrogatory as moot.

2. In Interrogatory 7, the AGNM asks for the LES position regarding the need to consider costs of long-term (on site) storage of DUF₆ in determining the ultimate disposition of its DUF₆. See AGNM Motion to Compel at 7-8. While this inquiry again evidences the AGNM's primary concern that the public not be left with any cost of clean up or decommissioning if the plant is abandoned at any point, in this instance that concern is to be aired in the context of litigation over contention NIRS/PC EC-5/TC-2 - AGNM TC-i as admitted. Accordingly, for the reasons given in section B.1 above, we deny the AGNM's motion to compel with respect to this interrogatory.

3. In interrogatories No. 8 and No. 9, the AGNM seeks information regarding similarities and differences over an extended range of parameters (regulatory as well as operational) between the proposed NEF and (1) a Urenco facility in the Netherlands, and (2) the proposed Clairborne Enrichment Center (CEC) in Louisiana. See AGNM Motion to Compel at 9-12. It is not apparent how such a broad information request has any direct relevance to the AGNM's admitted contentions except as it might relate to the Urenco contract and the Louisiana application that are the focus of admitted contention AGNM TC-ii. Accordingly, to the degree it

has not done so, relative to contention AGNM TC-ii, the AGNM motion to compel is granted in that on or before Monday, November 1, 2004, LES is directed to disclose any information in its possession that was used by LES in estimating the cost of disposal at NEF based on a comparison with Urenco's experience with the plant in the Netherlands or the proposed CEC facility.

4. Interrogatory 10 asks LES to state whether or not it has currently in place a disposal contract for the DUF_6 to be generated at the NEF. See AGNM Motion to Compel at 13-15. LES in its response states that it does not have a disposal contract in place currently and indicates it previously disclosed to the AGNM communications relevant to the potential future procurement of such a contract. See LES Response to AGNM Motion to Compel at 5. Given this response, we deny the AGNM motion to compel relative to this interrogatory as moot.

5. As her motion explains, with Interrogatory 11 the AGNM again seeks information relating to the costs of long term on-site storage of DUF_6 . See AGNM Motion to Compel at 16-17. As we have repeatedly held, such an inquiry is outside the scope of the admitted AGNM contentions and therefore outside the scope of the hearing thereupon. We thus deny the AGNM motion to compel with respect to this interrogatory.

6. By Interrogatory 12, AGNM seeks information regarding the potential sale price of CaF_2 . See AGNM Motion to Compel at 18-19. Since LES has stated that their decommissioning and disposal costs assume that there will be no resale of CaF_2 and that CaF_2 may be disposed of in a commercial landfill, see LES Response to AGNM Motion to Compel at 6, this information cannot provide any support for a challenge to the disposal cost estimates. Moreover, in its response to the AGNM motion, LES provides citations to information that discusses the commercial CaF_2 market. See id. As a consequence, we deny the AGNM motion to compel with respect to this interrogatory.

7. With Interrogatory 13, the AGNM asks for information regarding disposition of conversion products and, in her motion to compel, states she is seeking information on whether or not costs of long-term on-site storage are incorporated into the LES cost estimates. See AGNM Motion to Compel at 20-21. As LES indicated in response to item B.6 and stated in its initial reply to this interrogatory, if LES were to decide to utilize a deconversion process, it will provide the necessary information. See LES Response to AGNM Motion to Compel at 6-7. We read this latter response to indicate that LES has no current plans for deconversion. Thus, the an answer to the AGNM challenge to LES disposal costs as embodied in contention AGNM TC-ii would require inquiry into a process LES has indicated it does not intend to use (and which, therefore, is not currently part of its application). We thus deny the AGNM motion to compel with respect to this interrogatory.

C. October 4, 2004 LES Motion to Compel NIRS/PC Interrogatory Responses

Discussion: [LES] Motion to Compel Response to Interrogatories by [NIRS/PC] (Oct. 4, 2004) [hereinafter LES Motion to Compel]; Response by Petitioners [NIRS/PC] to Applicant's Motion to Compel Responses to Interrogatories (Oct. 12, 2004) [hereinafter NIRS/PC Response to LES Motion to Compel].

Rulings:

1. With its Interrogatory EC-1, Question 4, LES requests relative to contention NIRS/PC EC-1 regarding the environmental impacts of the NEF project upon ground and surface water, that it be provided with the substance of the facts and opinions to which each NIRS/PC witness will testify, and a summary of the grounds for that opinion, including identification of documents upon which the witness will rely or use for his/her testimony. See LES Motion to Compel at 2-3. In their response, NIRS/PC asserts that their answer referencing the extensive information given in support of the original contention was a sufficient response to this interrogatory. See

NIRS/PC Response to LES Motion to Compel at 4-7. This answer would be sufficient, however, only if the NIRS/PC witness on this subject currently intends to provide no more information in support of their position on this contention than what was set forth six months ago in its initial petition. Since we doubt that is the case, we grant the LES motion to compel relative to this interrogatory and direct a response on or before Monday, November 1, 2004.

2. In Interrogatory EC-2, Question 4, LES requests in connection with contention NIRS/PC EC-2 regarding environmental impacts of the NEF project upon area water supplies that it be provided with the substance of the facts and opinions to which each NIRS/PC witness will testify, and a summary of the grounds for that opinion, including identification of documents upon which the witness will rely or use for his/her testimony. See LES Motion to Compel at 3-5. In their response, NIRS/PC maintain that their answer pointing out that the NEF needs a substantial uninterrupted supply of water for a number of years, that others will be drawing from the local underground water basin, and that LES in its ER has not analyzed the effects of this confluence of events, is sufficient given this contention asserts an LES failure of analysis. See NIRS/PC Response to LES Motion to Compel at 7. We agree and deny the LES motion to compel relative to this interrogatory.

3. With Interrogatory EC-2, Question 5, LES requests relative to contention NIRS/PC EC-2 that NIRS/PC provide the basis for their intervention petition statement that the NEF will have significant water needs by defining the terms “significant” and “uninterrupted priority.” See LES Motion to Compel at 4. In their response to the LES motion, NIRS/PC notes that the ER characterization of the specific amount of water needed daily at the NEF would be “significant” and that the term “uninterrupted” is well known in the utility business and means service that must be continued regardless of the needs of others. See NIRS/PC Response to LES Motion

to Compel at 7-8. Given this response, we deny the LES motion to compel relative to this interrogatory as moot.

4. LES requests with Interrogatory EC-2, Question 6, that in connection with contention NIRS/PC EC-2 that NIRS/PC provide the basis for their petition statement that there is a projected water shortage or a severe long-term water shortage in the area, including any documentation supporting such statements. See LES Motion to Compel at 4-5. NIRS/PC responds that the Lea County Regional Water Plan, which projects a doubling of water usage by 2040 without enough water in the local underground water basin to support this usage, is the basis for that statement. See NIRS/PC Response to LES Motion to Compel at 8. Given this response, we deny the LES motion to compel relative to this interrogatory as moot.

5. Interrogatory EC-5/TC-2, Question 4, is an LES request regarding contention NIRS/PC EC-5/TC-2 - AGNM TC-i concerning decommissioning costs that it be provided with the substance of the facts and opinions to which each NIRS/PC witness will testify, and a summary of the grounds for that opinion, including identification of documents upon which the witness will rely or use for his/her testimony. See LES Motion to Compel at 5-6. NIRS/PC declares that their response indicating an answer was in development because Dr. Charles Komanoff was still preparing his testimony was true as of the date of their response and is sufficient in light of potential supplementation under 10 C.F.R. § 2.705(e). See NIRS/PC Response to LES Motion to Compel at 8-9. For the reasons given in section D below, we grant the LES motion to compel relative to this interrogatory and direct a response on or before Monday, November 1, 2004.²

² Relative to this interrogatory and that discussed in the section C.6, LES requested in its October 4 motion to compel that the Board issue a ruling prior to the scheduled October 12 deposition of Dr. Komanoff. Unfortunately, this request (which came the full ten days provided for in 10 C.F.R. § 2.323(a) after the interrogatory answers in question were submitted) did not provide for sufficient time for party responses to the motion even under the accelerated

6. With Interrogatory EC-7, Questions 4-8, relative to contention NIRS/PC EC-7 concerning the discussion of the need for the NEF facility in the LES ER, LES seeks information from NIRS/PC witness Komanoff regarding the facts and opinions about which he will testify regarding this contention. See LES Motion to Compel at 6-7. NIRS/PC declares that their response indicating an answer was in development because Dr. Charles Komanoff was still preparing his testimony because he was awaiting document disclosures by LES was true as of the date of their response and is sufficient in light of potential supplementation under 10 C.F.R. § 2.705(e). See NIRS/PC Response to LES Motion to Compel at 9. For the reasons given in section D below, we grant the LES motion to compel relative to this interrogatory and direct a response on or before Monday, November 1, 2004.

D. October 7, 2004 NRC Staff Motion to Compel NIRS/PC Interrogatory Responses and Establish Deadlines for Supplementary Responses

Discussion: NRC Staff Motion to Compel NIRS/PC Responses to Interrogatories and Establish Deadlines for Supplementary Responses and Response to Motion for Modification of Deposition Schedule on Behalf of NIRS/PC (Oct. 7, 2004) [hereinafter Staff Motion to Compel]; Answer of [LES] To NRC Staff Motion to Compel and to Establish Deadlines for Supplementary Responses (Oct. 13, 2004) [hereinafter LES Response to Staff Motion to Compel]; Response by Petitioners [NIRS/PC] to NRC Staff Motion to Compel NIRS/PC Responses to Interrogatories and Establish Deadlines for Supplementary Responses (Oct. 14, 2004) [hereinafter NIRS/PC Response to Staff Motion to Compel].

response schedule provided for by the Board (i.e., responses to the pending motions to compel were required in seven days rather than the ten days provided in 10 C.F.R. § 2.323(c)). In the future, in instances when a party wants an expedited ruling, it should anticipate the need to provide for adequate response time by opposing counsel in determining how promptly to file its own motion.

Ruling: In its motion to compel, the NRC staff raises two related concerns. First, with regard to Interrogatory 3, which asks that NIRS/PC identify any witnesses it intends to use and provide, among other things, the facts and opinions to which the witness is expected to testify, the staff asserts that NIRS/PC should be compelled to answer this question relative to its witness Dr. Michael Sheehan. According to the staff, NIRS/PC declined to answer the question in full, citing the upcoming deposition of Dr. Sheehan, but when Dr. Sheehan was deposed, he stated he was not prepared to provide opinions on the matter he will be testifying to at the hearing. See Staff Motion to Compel at 1-2. Additionally, the staff states that in response to at least nine other interrogatories, NIRS/PC declared that it could not present complete responses because it was continuing its investigation into the matters addressed. This, the staff asserts, raises a concern about having responses sufficiently in advance of the submission of prefiled testimony to allow the staff properly to prepare its prefiled testimony. As a consequence, the staff asks that the Board set a November 12, 2004 deadline for the supplementation of all responses to discovery requests relating to the environmental contentions that are the subject of the prefiled testimony due on December 30, 2004. See id. at 4-5.

In an October 13 response, LES declares that the NIRS/PC interrogatory response relative to Dr. Sheehan is indicative of a pattern of non-responsiveness on their part. To address this problem, LES asserts that the staff's supplementation deadline request should be granted and the deadline established as October 18, 2004, which under the Board-established general schedule for this proceeding is the date on which discovery closes against all parties other than the staff. See LES Response to Staff Motion to Compel at 2-4. In their October 14 response, NIRS/PC declares that because of the short time available for their witnesses to obtain and review relevant documentary material, some of which they assert has still not been provided, some NIRS/PC witnesses have been unable to complete their opinions. NIRS/PC

indicates, however, that if the staff's suggestion regarding a supplementation deadline is to be adopted, that deadline should be set on November 30, 2004. See NIRS/PC Response to Staff Motion to Compel at 4-6.

Under 10 C.F.R. § 2.705(e), parties are under a duty to supplement or correct a discovery disclosure (1) if ordered by the presiding officer; or (2) in any instance in which the party learns that in some material respect the information previously disclosed is incomplete or incorrect and the additional or corrective information has not otherwise been made known. In this instance, notwithstanding the NIRS/PC concerns about the ability of its witnesses to absorb the documentary material provided by other parties and reach conclusions/opinions about the matters at issue, it seems apparent that those witnesses must at some point in the near future go on the record with whatever conclusions they have reached, subject to whatever qualifications they must provide. To that end, we grant the staff's motion to compel and to establish a deadline for supplementing discovery requests to the extent that we establish the following schedules:

NIRS/PC Response to Staff Interrogatory 3 Relative to Dr. Michael Sheehan	Monday, November 1, 2004
(1) Party Supplementation of All Discovery Materials; and (2) Filing of Section 2.704(b) Expert Testimony Disclosures Relating to General Schedule Environmental Contentions	Wednesday, November 24, 2004

Thereafter, the parties remain under a continuing duty to supplement their discovery materials and section 2.704(b) disclosures in accordance with sections 2.704(e)(1)-(2) and 2.705(e).

E. October 8, 2004 NIRS/PC Motion to Compel Discovery Concerning Uranium Enrichment Market

Discussion: Motion to Compel Discovery Concerning Market for Uranium Enrichment on Behalf of Petitioners [NIRS/PC] (Oct. 8, 2004) [hereinafter NIRS/PC Motion to Compel Market Discovery]; [LES] Opposition to [NIRS/PC] Motion to Compel Responses (Oct. 15, 2004) [hereinafter LES Response to NIRS/PC Motion to Compel Market Discovery].

Ruling: NIRS/PC seeks specific economic testimony from LES witnesses regarding the issue of “need” for the NEF as part of its challenge to the sufficiency of the LES ER, asserting that the NEPA “cost-benefit” analysis requires attention to the particular queries it would pose. In particular, NIRS/PC seeks information regarding “the price at which enrichment would be sold or the cost of enriching uranium,” arguing this information is critical to determining the costs and benefits of the proposed NEF. NIRS/PC Motion to Compel Market Discovery at 2. NIRS/PC goes on to state that “NIRS/PC are attempting to project the market impact of the introduction of the NEF.” Id. at 9.

As we noted in section A.1 above, in admitting contention NIRS/PC EC-7/TC-4, the Board limited its scope, declaring that “the Applicant is under no obligation to present either a ‘business case’ or to demonstrate the profitability of the proposed facility.” LBP-04-14, 60 NRC at 69. In this regard, the particular bases which the Board found supported admission of this contention were narrowly focused upon whether (1) there is a shortfall of enrichment capacity as LES asserts (Basis A); (2) LES statements of need depend primarily on projections of global rather than United States enrichment needs (Basis B); and (3) LES can effectively enter the market in the face of existing and anticipated competitors, albeit without examination of the “business case” or profitability of the NEF venture. In contrast, the remaining two contested

bases for this particular contention were expressly disallowed by the Board because they focused upon these business case/profitability aspects.

In response to this motion LES has pointed out all of the foregoing as well as asserted that the Board's ruling is consistent with the Commission's approach to the "need" analysis, which LES asserts is much broader than merely the economic competitiveness/profitability of the facility. See LES Response to NIRS/PC Motion to Compel Market Discovery at 4 (citing Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-93-8, 47 NRC 77, 95 (1998)). Further, LES indicates it will demonstrate the market need by introduction of specific contracts to purchase enrichment services from the NEF, noting that "it has already entered secured commitments for over 50% of the NEF's output for the first 10 years of operation". Id. at 7 n.6.

In contrast, the only information that could be garnered from answers to the requested NIRS/PC queries would relate specifically to projecting the profitability of the NEF, an area of

inquiry that is foreclosed by reason of our admissibility ruling. In light of the foregoing, we deny the NIRS/PC motion to compel market discovery.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD³

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

October 20, 2004

³ 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 AGNM, and NIRS/PC; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DISCOVERY RULINGS) 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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Docket No. 70-3103-ML
LB MEMORANDUM AND ORDER (DISCOVERY
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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of October 2004