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

November 23, 2004 (7:43am)

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ADJUDICATIONS STAFF

In the Matter of:)	
)	Docket No. 70-3103-ML
Louisiana Energy Services, L.P.)	
)	ASLBP No. 04-826-01-ML
(National Enrichment Facility))	

RESPONSE OF LOUISIANA ENERGY SERVICES, L.P. TO
MOTION ON BEHALF OF NUCLEAR INFORMATION AND
RESOURCE SERVICE AND PUBLIC CITIZEN TO ALLOW DISCOVERY
CONCERNING CONVERSION AND DISPOSAL OF DEPLETED URANIUM

I. INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board ("Licensing Board") Order (Schedule for Responses to Motion to Allow Discovery Concerning Conversion and Disposal of Depleted Uranium) of November 16, 2004, Louisiana Energy Services, L.P. ("LES") herein responds to the motion to compel discovery filed by Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") on November 12, 2004.¹ NIRS/PC seek leave "to conduct discovery of witnesses for [LES] concerning LES's strategy for the conversion and disposal of depleted uranium" in view of documents produced by LES on October 15 and November 1, 2004. Motion to Allow Discovery at 1, 9. In this regard, NIRS/PC contend that the documents were "produced after the date for completion of discovery," and "make it plain that further discovery is necessary." *Id.* at 1. NIRS/PC also seek to recover certain costs associated with depositions. *Id.* at 13.

¹ See "Motion on Behalf of Petitioners Nuclear Information and Resource Service and Public Citizen to Allow Discovery Concerning Conversion and Disposal of Depleted Uranium," dated November 12, 2004 ("Motion to Allow Discovery").

LES opposes NIRS/PC's overbroad demand for further discovery and its unfounded request for costs. LES believes that the relief sought by NIRS/PC in the motion is unreasonable in view of a more accurate and balanced portrayal of the circumstances prompting the motion and the issues in the case. That being said, LES recognizes the limited relevance of its ongoing discussions concerning private sector deconversion and disposal of depleted uranium to Contention NIRS/PC EC-3/TC-1. LES proposes below an alternative approach to ensure full and timely discovery on any new information germane to that contention.²

II. DISCUSSION

A. Timeliness of Discovery

The core argument advanced by NIRS/PC is that LES failed to provide "full and fair" disclosure by not producing certain documents "before NIRS/PC conducted depositions of LES witnesses on the issues." Motion to Allow Discovery at 12-13. LES strongly disagrees with this allegation, and maintains that it has complied with the discovery schedule for this proceeding.

First, as part of its mandatory initial disclosures of September 2, 2004, LES produced documents reflecting its interest in deconversion or disposal services that might be provided by Cogema, ConverDyn, Waste Control Specialists ("WCS"), and Envirocare.³ The fact that LES has had discussions with these entities is no secret; indeed, the potential roles of these commercial entities in LES's private sector deconversion and disposal strategy are reflected in the NEF license

² Contrary to their obligation under Section 2.705(h)(1), NIRS/PC did not confer with LES prior to filing their 14-page motion of November 12, 2004. However, counsel for LES, NIRS/PC, and the NRC Staff met on November 17, 2004, following the deposition of Arjun Makhijani, to discuss possible ways to address the NIRS/PC motion without requiring action by the Presiding Officer. During that session, counsel for LES proposed the alternative approach discussed below for consideration by NIRS/PC. Counsel for NIRS/PC, however, never responded to this proposal.

³ See, e.g., LES-01641 to LES-01645 (Envirocare, ConverDyn, and WCS), LES-01655 (ConverDyn), LES-01795 to LES-01798 (Envirocare), LES-01799 (ConverDyn), LES-01823 (ConverDyn), LES-01833 to LES-01834 (WCS), LES-01835 to LES-01838 (Envirocare), LES-02023 to LES-02040 (WCS), LES-02041 to LES-02052 (Envirocare), LES-04364 to LES-04366 (Cogema).

application and NRC Staff's draft environmental impact statement ("DEIS") for the NEF. *See* NEF Environmental Report, at 4.13-2, 4.13-8; DEIS at 2-29 to 2-33.

The documents cited by NIRS/PC as being produced in an untimely manner were produced by LES on October 15 and November 1, 2004. As counsel for LES stated in the transmittal letter, the documents produced on October 15, 2004 were provided "in accordance with [LES's] various discovery obligations," *i.e.*, in response to specific NIRS/PC discovery requests or pursuant to LES's continuing obligation to supplement its mandatory initial disclosures. The proprietary documents produced by LES to NIRS/PC on November 15, 2004, in turn, were provided pursuant to the Licensing Board's October 20, 2004 order ruling on the parties' various motions to compel discovery. Among other things, that order directed LES to supplement its responses to certain NIRS/PC interrogatories. LES obviously did not, in good faith, accept the need to produce those documents until compelled to do so by the Licensing Board (or was not able to produce certain documents for reasons explained below).⁴ In short, LES does not believe that it deviated from the schedule and procedures governing discovery in this proceeding.

Second, NIRS/PC group the documents identified in their motion into five categories, *i.e.*, documents concerning: (1) Urenco and NEF planning for deconversion; (2) contacts between LES and an unnamed company⁵ concerning deconversion and disposal; (3) contacts between LES and WCS concerning waste disposal; (4) contacts between Urenco, LES and Cogema concerning waste disposal; and (5) contacts between Urenco, LES, and Framatome ANP. *See* Motion to Allow Discovery at 9-12. In fact, many of these documents did not exist, did not become

⁴ Although the Licensing Board appears to have construed NIRS/PC Interrogatory No. 62 as pertaining to LES's knowledge of the plans of "other parties" to construct a deconversion plant, LES also provided information related to its own discussions with other parties.

⁵ As reflected in the NIRS/PC motion, the identity of the unnamed party is proprietary.

relevant, and/or did not become available for production prior to LES's mandatory initial disclosures, or even before the October 8, 2004 deposition cited by NIRS/PC.

The Urenco documents identified by NIRS/PC in categories (1), (4), and (5) above did not become relevant until LES began to consider those documents for purposes of further evaluating private sector deconversion/disposal options and costs in the United States. This effort did not begin in earnest until after LES's September 2, 2004 mandatory initial disclosures (*i.e.*, in the early to mid-September timeframe), and was still very much in its incipient stages at the time of the October 8, 2004 deposition. As counsel for NIRS/PC correctly noted, efforts on this front are ongoing. Indeed, counsel for LES did not receive and review the proprietary Urenco documents at issue until after the October 8, 2004 deposition.⁶ In view of these circumstances, LES believes that disclosure of these documents by November 1, 2004 was not untimely.

As for the WCS-related documents, LES reiterates that NIRS/PC had knowledge of LES's interest in WCS as a possible disposal site well before the October 8, 2004 deposition of Mr. Krich. The fact that one of the documents produced by LES on October 15, 2004 contains a reference to potential "business opportunities in the near future" involving LES and WCS is not a new revelation that could not have been pursued at the October 8, 2004 deposition. In fact, during his deposition, Mr. Krich acknowledged that "[t]here have been commercial discussions between LES and WCS," but that he had "not been directly involved in the discussions" and was not aware of any memoranda or notes of these discussions. Krich Dep. Tr. 49-50 (Oct. 8, 2004). The WCS-

⁶ In particular, the presentation materials referred to by NIRS/PC on pages 9-10 of their motion (which NIRS/PC describe as demonstrating LES's "ongoing project to make a deal with a conversion supplier by December") were prepared for an LES management committee meeting held on October 5, 2004, *i.e.*, only three days before the October 8, 2004 deposition of Mr. Krich. Mr. Krich was unable to attend this management meeting, and, therefore, lacked any direct knowledge of discussions held during the meeting, as reflected in his deposition testimony.

related documents produced by LES on October 15, 2005 simply describe services provided by WCS (a subject on which LES has previously disclosed information) or are publicly available.

Finally, LES provided the communication with the unnamed company identified by NIRS/PC in a timely manner. Mr. Krich indicated during his October 8, 2004 deposition that LES was engaged in discussions with another company regarding deconversion and disposal of depleted uranium. Krich Dep. Tr. 63-64 (Oct. 8, 2004). LES in no way sought to withhold disclosure of this fact. However, Mr. Krich explained that he “had been asked that the name [of that company] be held in confidence.” *Id.* LES did not disclose the identity of the company until it received authorization to do so, *i.e.*, just prior to the November 1, 2004 document production.

In short, NIRS/PC has not accurately portrayed the circumstances associated with LES’s document disclosures of October 15, 2004 and November 1, 2004. LES has made very diligent efforts to adhere to the procedures governing discovery in this proceeding. As such, LES submits that “full and fair” disclosure *has been LES’s performance*. This is particularly evident in view of the highly expedited schedule for this proceeding and the “performance” of NIRS/PC themselves. NIRS/PC state that “[t]his case is on a fast track,” and audaciously assert that, for this reason, “there is no room in the schedule for withholding discovery on this subject.” Motion to Allow Discovery at 13. Yet NIRS/PC ignore their own failure to timely comply with their mandatory initial disclosure obligations under Section 2.704(a).⁷

LES’s good-faith responses also can be contrasted with the egregious failure of the NIRS/PC expert witnesses – during their respective depositions – to disclose fully the facts and opinions on which they will testify at hearing. Indeed, NIRS/PC did not provide this information

⁷ See Letter from Lindsay A. Lovejoy, Jr. (NIRS/PC) to the Licensing Board, dated October 6, 2004 (apprising the Licensing Board that NIRS/PC was not filing a response to LES’s September 29, 2004 motion to compel because NIRS/PC had made supplemental disclosures pursuant to Section 2.704(a) on September 30, 2004).

with respect to witnesses Rice, Sheehan, and Komanoff until November 1, 2004 (well after their September 16, September 29, and October 13, 2004 depositions, respectively). Moreover, the information provided by NIRS/PC on November 1, 2004 regarding the testimony of Mr. Komanoff was not complete.⁸ Finally, LES was not able to depose NIRS/PC witness Arjun Makhijani until November 16 and 17, 2004. Significantly, at that time, LES learned that Dr. Makhijani is preparing dose and cost analyses related to the disposition of depleted uranium, analyses which will not be provided to LES until November 24, 2004.

At bottom, the disclosures made by NIRS/PC to date have been far from “full and fair,” as evidenced by the need for LES and the NRC Staff to file motions to compel discovery.⁹ However, despite the clear discovery shortcomings of NIRS/PC, LES has yet to formally propose additional depositions of NIRS/PC witnesses, or to seek reimbursement for the costs associated with depositions. It borders on hypocrisy for NIRS/PC to now request that the Licensing Board “rectify the unfairness” imposed by LES’s ostensibly dilatory document production.

B. Scope of Discovery of LES Commercial Negotiations

Turning to the discovery requests made by NIRS/PC, LES submits that such broad and intrusive requests are not reasonable. NIRS/PC maintain that they “are entitled to discovery from LES about the *ongoing negotiations* and *any agreements* that arise from them.” Motion to Allow Discovery at 13 (emphasis added). NIRS/PC are seeking, in effect, to inject themselves into the day-to-day business operations of LES. LES, however, is under no obligation to provide a regular accounting of its business discussions or negotiations with commercial entities that are

⁸ See “Supplemental Responses on Behalf of Petitioners Nuclear Information and Resource Service and Public Citizen to Interrogatories by Applicant Louisiana Energy Services, L.P.,” dated November 1, 2004, at 9.

⁹ See *Louisiana Energy Services, L.P.* (National Enrichment Facility), Memorandum and Order (Discovery Rulings) (unpublished) (Oct. 20, 2004), slip op. at 11-15.

interested in providing deconversion and disposal services to LES. Such interactions are ongoing, highly confidential, and sensitive in nature. The disclosure of the existence and substance of these discussions on a virtually “real-time” basis is unrealistic and conceivably could interfere with the discussions themselves. Likewise, further depositions cannot reasonably be expected every time a new business or negotiation development occurs.

To the extent NIRS/PC are seeking additional discovery in connection with Contention NIRS/PC EC-3/TC-1, LES rejects any assertion that all business discussions are discoverable or that LES must reach formal “agreements” with potential providers of deconversion and disposal services to demonstrate the “plausibility” of LES’s strategy for private sector disposal of depleted uranium. For purposes of Bases A and B of that contention, it is sufficient to demonstrate the existence of private commercial entities that are capable of providing the necessary deconversion and disposal services, and that such entities have manifested a clear and substantive interest in providing such services to LES. Some of the documents that LES provided support the point that negotiations have reached a stage beyond mere speculation, and it is LES’s intent to continue to provide documents that meet this standard. LES recognizes and has applied the Commission’s proviso in CLI-04-25 that, while a “plausible strategy” for private sector deconversion of depleted uranium tails “must represent more than mere speculation,” it “does *not* mean a *definite or certain strategy*, to include completion of all necessary contractual arrangements.”¹⁰ However, not all business discussions meet this standard.

Notably, in LBP-97-3, the *Claiborne* licensing board found LES’s private sector deconversion and disposal strategy to be plausible.¹¹ The *Claiborne* licensing board stated that

¹⁰ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC __ (Aug. 18, 2004), slip op. at 5 (emphasis added).

¹¹ *See Louisiana Energy Service, L.P.* (Claiborne Enrichment Center), LBP-97-3, 45 NRC 99, 108 (1997), vacated by CLI-98-5, 47 NRC 113 (1998).

“[t]he conversion of DUF_6 to U_3O_8 , as the COGEMA experience in France demonstrates, is a commercially feasible process using known chemical processes that could be readily employed in the United States by COGEMA or another entity without first having to overcome difficult technical hurdles.” LBP-97-3, 45 NRC at 108. The board then concluded:

[C]ontrary to the Intervenor’s assertion, the fact that there is no currently operating [deconversion] facility in the United States, or a firm commitment by COGEMA or some other entity to build such a facility does not somehow make it unlikely, or unreasonable to assume, that one will be built here in the future to convert DUF_6 tails to U_3O_8 .

Id. The licensing board, noting “the numerous existing uranium and other mines in the United States,” reached a similar conclusion with respect to the potential mine disposal of depleted uranium. *See id.* Moreover, the Commission, in remanding LBP-97-3 for clarification of a technical finding by the board, did not question the board’s plausible strategy finding.¹² In fact, the Commission’s order expressly states that “the Board noted that no particular mine has been selected or identified as a potential deep-disposal site” CLI-97-11, 46 NRC at 50. In view of this approach, LES provided responsive documents on the “plausible strategy” issue. However, the NIRS/PC demands for further recurring discovery and depositions on ongoing business discussions are overbroad and unreasonable. And, ultimately, formal agreements should not be required to support the necessary finding on the contention.

C. Schedule for Discovery and Costs

Notwithstanding the foregoing, LES reiterates the proposal it made to counsel for NIRS/PC on November 17, 2004. Specifically, LES is willing to make witnesses available for limited depositions on these issues, but proposes that such depositions, if necessary, take place in mid-April 2005. The NRC Staff has indicated that it is amenable to conducting such depositions in this timeframe. LES would provide the relevant documents to NIRS/PC sufficiently far in advance

¹² *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-11, 46 NRC 49, 49 (1997).

of the April depositions to allow adequate time for review by NIRS/PC. LES, however, does not believe that the weekly supplementation proposed by NIRS/PC is warranted.

LES believes this approach to be more reasonable in at least two respects. First, the issues that would be the subject of depositions are not germane to the contentions scheduled for hearing in February 2005. Although NIRS/PC have attempted to establish a link between the information at issue in their motion and Contention NIRS/PC EC-4, no such nexus exists. *See* Motion to Allow Discovery at 2, 12. The information sought by NIRS/PC in its motion to compel discovery relates to the *plausibility* of LES's private sector deconversion/disposal option, *i.e.*, to "EC/TC" contentions scheduled for hearing in October 2005. In contrast, Contention NIRS/PC EC-4, as presently admitted, is a contention of omission that alleges that LES failed to consider the environmental impacts of a deconversion facility in its Environmental Report. As LES explained in its response to the amended contentions of NIRS/PC, LES (and the NRC Staff in its DEIS) has since cured this omission. Regardless, LES is under no obligation to select a specific deconversion process (nor has it yet, contrary to the claims of NIRS/PC), and takes the position that the DOE and NRC analyses incorporated by reference in its Environmental Report are bounding, irrespective of the specific deconversion process used. The information at issue in the NIRS/PC motion relates only to contentions slated for hearing in October 2005. Thus, holding additional depositions in the mid-April timeframe would not prejudice NIRS/PC or adversely impact the schedule.

Second, holding additional deposition discovery in April is more pragmatic. By then, the parties will have completed their proposed findings and reply findings on environmental contentions set for hearing in February. There would be a lesser likelihood of overlap with other party obligations. Moreover, any discussions between LES and the commercial entities identified by NIRS/PC (or any new entities) are likely to be more advanced by April 2005. Presumably, this

would be of greater benefit to NIRS/PC, as they seek information that shows that LES's private sector deconversion/disposal strategy represents more than "mere speculation."

With respect to the costs of the October 8, 2004 deposition, LES is not willing to reimburse NIRS/PC for such costs, particularly given that LES has expended considerable time and money in deposing ill-prepared NIRS/PC witnesses. At a minimum, if LES is to reimburse NIRS/PC for the costs of the October 8, 2004 deposition, then NIRS/PC must provide assurance that they will pay the costs of any re-opened depositions of NIRS/PC witnesses.

III. CONCLUSION

For the foregoing reasons, LES opposes the broad motion to allow additional discovery relative to LES's "ongoing negotiations" concerning private sector deconversion and disposal of depleted uranium and the unwarranted demand for costs. LES requests that, should the Licensing Board order any additional discovery on these matters, such discovery be conducted in accordance with the approach proposed by LES herein.

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

In the Matter of:

Louisiana Energy Services, L.P.

(National Enrichment Facility)

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Docket No. 70-3103-ML

ASLBP No. 04-826-01-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the "RESPONSE OF LOUISIANA ENERGY SERVICES, L.P. TO MOTION ON BEHALF OF NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN TO ALLOW DISCOVERY CONCERNING CONVERSION AND DISPOSAL OF DEPLETED URANIUM" in the captioned proceeding have been served on the following by e-mail service, designated by **, on November 22, 2004 as shown below. Additional service has been made by deposit in the United States mail, first class, this 22nd day of November 2004.

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