

ATOMIC SAFETY AND LICENSING BOARD

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

December 15, 2004

MEMORANDUM AND ORDER**(Ruling on Applicant Motion to Restrict Scope and Staff Motion In Limine)**

On December 6, 2004, applicant Louisiana Energy Services, L.P., (LES) and the NRC staff filed separate motions to limit the scope of and/or preclude testimony by intervenors Nuclear Information and Resource Service and Public Citizen (NIRS/PC) in this proceeding.¹ By its motion, LES seeks to restrict the scope of prefiled testimony to be offered by witnesses for NIRS/PC in this proceeding's upcoming evidentiary hearing on environmental contentions NIRS/PC EC-1, EC-2, EC-4, and EC-7. Specifically, LES avers that portions of the expert reports of witnesses George Rice, Michael Sheehan, Charles Komanoff, and Arjun Makhijani, contained in a November 24, 2004 filing of NIRS/PC, contain facts and opinions outside the scope of the admitted environmental contentions in this proceeding, and the Board should therefore direct NIRS/PC to limit the scope of prefiled testimony to those issues specifically

¹ Also pending with the Board is a December 6, 2004 NIRS/PC motion to compel LES compliance with the discovery schedule. In light of the December 13, 2004, LES/NIRS/PC joint report regarding that motion, we see no reason to take further action on that NIRS/PC request.

within the scope of admitted environmental contentions and exclude certain portions of the November 24 expert reports.

For its part, the staff's motion in limine requests that the Board preclude certain prefiled testimony by NIRS/PC witnesses Rice, Sheehan, Komanoff, and Makhijani on matters outside the scope of the admitted environmental contentions. In essence, both the applicant and the staff request that the Board issue a ruling prohibiting NIRS/PC from incorporating into their prefiled testimony immaterial or irrelevant portions of the NIRS/PC November 24 expert reports.

In its December 13, 2004 response, NIRS/PC advised that the material contained in the subject expert reports (which are discovery-type documents) relates to both the upcoming evidentiary hearing on environmental contentions and to a future evidentiary hearing on technical contentions. NIRS/PC go on to acknowledge that it is their "intent" to offer in the upcoming hearing only testimony within the scope of those environmental contentions at issue. NIRS/PC further asserts that relevancy should be addressed only after the parties have submitted their prefiled direct and rebuttal testimony, as the Board would risk improperly excluding relevant evidence should it issue an anticipatory ruling.

The Board agrees that it would be inadvisable to issue a "peremptory" ruling prohibiting whole categories of testimony. For the benefit of the parties, however, we note that, based on our prior rulings in this proceeding, the following subjects are the matters obviously relevant to the admitted environmental contentions to be considered at the February 2005 evidentiary hearing:

NIRS/PC EC-1 — IMPACTS UPON GROUND AND SURFACE WATER

Adequacy of environmental report (ER) relative to its assessment of ground and surface water impacts.

Adequacy of draft environmental impact statement (DEIS) relative to

- Calculations regarding leakage from stormwater detention basin and septic leach fields that may cause formation of perched groundwater bodies, and estimates of such water bodies, leakage rates, and discharge areas
- Probability and rate of leakage from stormwater detention basin and septic leach field
- Precipitation recharge and presence of moisture in site borings
- Measurements of permeability on Chinle Formation at or near National Enrichment Facility (NEF) site
- Identification and monitoring of contaminants in runoff from stormwater basin

NIRS/PC EC-2 — IMPACTS UPON WATER SUPPLIES

Adequacy of ER assessment of project impacts upon area water supplies.

Adequacy of DEIS analysis of

- Impact of proposed NEF on Lea County underground Water Basin and Ogallala Aquifer
- Daily and annual water supply capacities
- Impact of the proposed NEF on other water users

NIRS/PC EC-4 — IMPACTS OF WASTE STORAGE

- Whether the ER and DEIS discuss the environmental impacts of constructing and operating a conversion plant
- DEIS reliance on Paducah and Portsmouth final EISs for evaluation of environmental impacts

NIRS/PC EC-7 — NEED FOR THE FACILITY

Relative to ER analysis of NEF environmental impacts

- Whether there is a shortage of uranium enrichment capacity
- Uranium enrichment supply-demand balance
- Whether statements of “enrichment need” focus on need in the United States or global need
- Whether LES can effectively enter the uranium enrichment market in the face of existing and anticipated competitors, as relates to environmental considerations

We take NIRS/PC at their word that they intend to address only relevant matters in their prefiled direct testimony, and would expect the other parties to do the same. To the extent that any party provides prefiled testimony that addresses subjects outside these topics, it may well be that a motion in limine directed to those items would be successful. Further, should any party seek to introduce irrelevant material during the evidentiary hearing itself, the Board will restrict such material as appropriate.

Finally, we note that the filing deadline for prefiled direct testimony on the above environmental contentions remains December 30, 2004, as established by the general schedule for this proceeding found in Appendix A to our August 16, 2004 memorandum and order. While NIRS/PC suggest that any in limine motions should await the filing of both the prefiled direct and rebuttal testimony, we believe it would be more efficient if in limine motions addressed the prefiled direct testimony, with any prefiled rebuttal prepared based on a Board ruling regarding the direct testimony. To this end, any party motions in limine regarding the prefiled direct testimony should be filed on or before Wednesday, January 5, 2005. Responses relative to such motions in limine should be filed on or **before Monday, January 10, 2005**. **Thereafter, prefiled rebuttal testimony, along with a revised version of any prefiled direct testimony reflecting any Board in limine motion rulings, should be filed within seven days of the Board's ruling on any in limine motions, and cross-examination plans and party outline summaries should be filed within seven days thereafter.**²

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD³

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

December 15, 2004

² The existing schedule would be applicable if no in limine motions are filed.

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 Attorney General of New Mexico, 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 (RULING ON APPLICANT MOTION TO RESTRICT SCOPE AND STAFF MOTION IN LIMINE) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
G. Paul Bollwerk, III, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Paul B. Abramson
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Charles N. Kelber
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Lisa B. Clark, Esq.
Angela B. Coggins, Esq.
John T. Hull, Esq.
Darani M. Reddick, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Tannis L. Fox, Esq.
Deputy General Counsel
Office of General Counsel
New Mexico Environment Department
1190 St. Francis Drive
Santa Fe, NM 87502-6110

Docket No. 70-3103-ML
LB MEMORANDUM AND ORDER
(RULING ON APPLICANT MOTION TO
RESTRICT SCOPE AND STAFF MOTION IN LIMINE)

James R. Curtiss, Esq.
David A. Repka, Esq.
Martin J. O'Neill, Esq.
Winston & Strawn LLP
1400 L Street
Washington, DC 20005-3502

David M. Pato, Esq.
Stephen R. Farris, Esq.
Christopher D. Coppin, Esq.
Assistant Attorneys General
Glenn R. Smith, Esq.
Deputy Attorney General
Office of the New Mexico Attorney General
P.O. Box Drawer 1508
Santa Fe, NM 87504-1508

Lindsay A. Lovejoy, Jr.
618 Paseo de Peralta, Unit B
Santa Fe, NM 87501

Lisa A. Campagna, Esq.
Assistant General Counsel
Westinghouse Electric Company LLC
P.O. Box 355
Pittsburgh, PA 15230-0355

John W. Lawrence, Esq.
Louisiana Energy Services, L.P.
2600 Virginia Ave., NW, Suite 610
Washington, DC 20037

[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of December 2004