

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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

INTRODUCTION

Pursuant to 10 C.F.R. 2.705(h), the Nuclear Regulatory Commission Staff ("Staff") hereby files a motion to compel Nuclear Information and Resource Service ("NIRS/PC") to respond to interrogatories and requests that the Board establish a deadline for the supplementation of interrogatory responses. Additionally, Staff responds to a request filed by NIRS/PC to modify the deposition schedule and discovery deadline due to the unavailability of one of its expert witnesses¹. The Staff does not object to a limited extension of the deposition and discovery schedule due to the circumstances described by NIRS/PC . However, as explained below, circumstances in the conduct of discovery thus far indicate that further action by the Board is necessary to ensure that the parties are provided with adequate information to prepare properly for the upcoming hearing.

DISCUSSION

- I. The Board Should Compel NIRS/PC to Respond to the Interrogatory Regarding the Substance of Its Expert Testimony for Michael Sheehan.

On September 9, 2004, the Staff served interrogatories on NIRS/PC requesting, among

¹ "Motion for Modification of Deposition Schedule on Behalf of Petitioners Nuclear Information and Resource Service and Public Citizen," October 5, 2004, ("Motion for Modification")

other things, information regarding the subject matter of the expert witness testimony NIRS/PC expected to rely on in the hearing². Specifically, in Interrogatory No. 3, the Staff requested the following:

Identify any person you will use as a witness in this proceeding to testify regarding the admitted NIRS/PC contentions. If you rely on any such person as an expert witness, state the details of each witness's education, professional qualifications, and employment history; state the subject matter on which each of the witnesses is expected to testify at the hearing; describe the facts and opinions to which each witness is expected to testify, including a summary of the grounds for each opinion; and identify all documents, data, or other information which each witness has reviewed and considered or is expected to rely on for his or her testimony.

Staff Discovery at 3.

NIRS/PC objected to providing the information requested as burdensome and unproductive on the grounds that depositions of those experts were scheduled to be conducted by the applicant and Staff and prefiled testimony would be submitted in advance of the hearing³. However, in the subsequent deposition of NIRS/PC expert Michael Sheehan on September 19, 2004, Dr. Sheehan stated that he was not prepared to provide opinions on the matter he will be testifying to at the hearing.

Thus, while NIRS/PC has objected to providing the requested information in response to this interrogatory on the ground that the requested information would be provided during deposition, it has nevertheless failed to provide the information during the deposition of its expert witness. Under the circumstances, the Staff has no alternative but to request that the Board compel NIRS/PC to provide the information in response to its interrogatory with respect to Dr. Sheehan. In this regard, the Staff notes that it is not sufficient for NIRS/PC to provide this information for the first time in its prefiled testimony. In order for the Staff to provide prefiled

² "NRC Staff's First Set of Interrogatories and Requests for Admission to NIRS/PC" ("Staff Discovery").

³ "Responses on Behalf of Petitioners Nuclear Information and Resource Service and Public Citizen to Interrogatories by Commission Staff," September 23, 2004, ("NIRS Response").

testimony which is relevant and addresses the specific issues which will need to be decided by the Board, it is necessary for the Staff to have an understanding of the nature of the testimony NIRS/PC intends to present.

The Staff has contacted NIRS/PC in an attempt to resolve this issue, but has been unable to successfully come to resolution. Should the Staff continue to be unsuccessful in reaching resolution with NIRS, and the remaining expert witnesses presented by NIRS also come unprepared to provide opinions at depositions, the Staff will file further motions as necessary.

II. The Board Should Establish a Reasonable Deadline for Any Permitted Extension, But in No Event Should Permit Modification of the Deposition Schedule Beyond November 12, 2004.

In its motion requesting modification of the deposition schedule, NIRS/PC explains that one of its essential witnesses, Dr. Arjun Makhijani, unexpectedly had to leave the country to aid his mother during the time he was planning to prepare for his deposition.⁴ In addition, NIRS/PC states that Dr. Makhijani has numerous other work commitments which will require his attention through November 8, 2004, after which he will have the opportunity to prepare for his deposition.⁵

The Staff is sympathetic to Dr. Makhijani's need to assist his mother. However, the requested extension is nearly a full month after the date on which discovery is scheduled to end. Further, it appears that NIRS/PC is not prepared to provide information regarding the opinions or facts which will be the subject of Dr. Makhijani's testimony until the deposition is conducted.⁶ Thus, the requested delay will also require in an extension of the discovery deadline which, in turn, will affect the ability of all parties to comply with the remaining deadlines scheduled within the next two months, including the filing of summary disposition motions, additional discovery on late-filed

⁴ Motion for Modification at 1-2.

⁵ *Id.* at 3-6.

⁶ In its motion, NIRS/PC states that Dr. Makhijani will require about 40 hours to prepare for his deposition and does not consider that it would be useful to have his deposition taken without sufficient preparation to enable him to present his opinions. Motion for Modification at 6.

contentions and against the Staff, and the filing of prefiled testimony. Accordingly, the establishment of any date for extension of the deposition and discovery schedule must take into account the views of all parties⁷. For its part, the Staff has determined that an extension beyond November 12, 2004, would significantly impair its ability to comply with the current hearing schedule and properly prepare its prefiled testimony.

III. The Board Should Establish a Deadline for Supplementing Discovery Responses.

In response to numerous interrogatories propounded by the Staff requesting information regarding the facts and assumptions which underlie its contentions, NIRS/PC stated that it could not present complete responses because it was continuing its investigation of the matters addressed. Specifically, NIRS/PC provided this response to Interrogatories 5, 6, 7, 8 and 9 concerning decommissioning costs and Interrogatories 10, 11, 12 and 13 concerning costs of management and disposal of DUF6. While NIRS/PC implies that its answers will be forthcoming by indicating that it objects to "answering further at this point,"⁸ the Staff is concerned that complete answers are provided sufficiently in advance of the prefiled testimony to allow the Staff to properly prepare testimony which is relevant to the issues which will be addressed by the Board. Accordingly, the Staff requests that the Board establish a deadline of no later than November 12, 2004,⁹ for the supplementation of all responses to discovery requests relating to the environmental contentions for which prefiled testimony is due by December 30, 2004. The Staff proposes that

⁷ In order to resolve this issue, the Staff suggests that a conference call with all parties may be helpful. The Staff was not advised in advance that NIRS/PC would be requesting an extension to the deposition and discovery schedule until November 15, 2004, and cannot speak to the position of any other party regarding the request.

⁸ NIRS Reply at 5-6, 7-9.

⁹ The Staff has proposed this date to be consistent with our position regarding NIRS/PC's request to extend the discovery and deposition deadline. Should the Board impose a different deadline, the Staff requests the deadline established by the Board also apply to supplemental discovery responses.

NIRS/PC should not be permitted to use expert testimony based on opinions and facts which have not been properly provided to all parties in response to discovery requests by that date. Regarding this issue as well, the Staff has contacted NIRS/PC but has been unable to reach resolution.

CONCLUSION

For the reasons stated above, the Staff requests that the Board compel NIRS/PC to respond to its interrogatory requesting the substance of the expert testimony to be submitted by Dr. Michael Sheehan. Further, the Staff requests that the Board not permit an extension of the deposition and discovery deadline beyond November 12, 2004, and that a deadline of no later than November 12, 2004, be established for the supplementation of all discovery responses.

Respectfully submitted,

/RA/

Lisa B. Clark
Counsel for NRC Staff

Date at Rockville, Maryland
this 7th day of October, 2004

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LOUISIANA ENERGY SERVICES, L.P.)	Docket No. 70-3103
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(National Enrichment Facility))	ASLBP No. 04-826-01-ML
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "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" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 7th day of October, 2004.

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