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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

October 20, 2004 (3:15PM)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of

Docket No. 70-3103

Louisiana Energy Services, L.P.
National Enrichment Facility

ASLBP No. 04-826-01-ML

**RENEWED MOTION
FOR MODIFICATION OF
DEPOSITION SCHEDULE
ON BEHALF OF
PETITIONERS
NUCLEAR INFORMATION AND RESOURCE SERVICE
AND PUBLIC CITIZEN**

Preliminary statement

Petitioners Nuclear Information and Resource Service and Public Citizen ("NIRS/PC"), regret the circumstances that require them to request again the concurrence of the Atomic Safety and Licensing Board ("Board") in an extension of the deadline for deposition discovery to accommodate a family emergency affecting a key witness, Dr. Arjun Makhijani.

Counsel for NIRS/PC have discussed this motion with counsel for Applicant Louisiana Energy Services, L.P. ("LES"), Commission Staff, the New Mexico Environment Department, and the New Mexico Attorney General's Office. All parties concur in this motion, except the Applicant, LES.

Factual background

Under the Board's Order dated August 16, 2004, depositions were scheduled to be completed by October 18, 2004. Originally, Dr. Makhijani's deposition was scheduled to be

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SECY-02

taken on October 5 and 6, 2004, in Washington, D.C. He had planned to prepare for his deposition on September 27 through October 4. He estimated that his preparation time will be at least 40 hours. However, as the Board is aware, in late September Dr. Makhijani learned that his mother had become seriously ill. Dr. Makhijani promptly flew to Mumbai, India, on September 27. Dr. Makhijani was in India with his mother and could not do work until after his return to the United States on October 4. Meanwhile, counsel for NIRS/PC conferred with opposing counsel, without reaching agreement. NIRS/PC moved on October 5 for a change in the deposition schedule to enable Dr. Makhijani to return, prepare, and give his deposition. NIRS/PC requested that Dr. Makhijani be allowed to give his deposition in the week of November 15, 2004.

Late in the day on Friday, October 8, 2004, counsel for NIRS/PC learned that Dr. Makhijani's mother had, unfortunately, died. Dr. Makhijani was required to return to India, and his schedule was again upset. Counsel for NIRS/PC prepared pleadings to inform the parties and the Board of these unfortunate facts. However, on the next business day, October 12, before NIRS/PC filed its pleading, the Board issued its decision, setting out a schedule for Dr. Makhijani's deposition.

Counsel for NIRS/PC have conferred again with counsel for the Applicant and for the Commission Staff in an attempt to schedule Dr. Makhijani's deposition so that he has time to complete matters in India arising from his mother's death and return and take up his work in the United States. Regrettably, in this situation of family tragedy, opposing counsel have not seen fit to agree to such a schedule. Therefore, counsel for NIRS/PC must bring the matter to the Board a second time.

Argument

NIRS/PC submit that the schedule for this proceeding will not be endangered by extending a measure of compassion to a man who has just undergone the illness and death of a parent. Specifically, a reasonable way to deal with this very sad circumstance would be to schedule a deposition by Dr. Makhijani in the week of November 15 on all subjects. Such a schedule would enable Dr. Makhijani to complete the matters that fall to his responsibility as a son, to return to the United States within approximately a week, to prepare for his deposition, and to manage some, but far from all, of the other obligations that he has had to neglect during the family crisis. Dr. Makhijani will set aside numerous matters to give precedence to this case. The important deadlines in this case will be maintained in the proposal advanced by NIRS/PC.

NIRS/PC wish to emphasize that, with this proposal, Dr. Makhijani would give high priority to the discovery tasks in this case. Dr. Makhijani will, of necessity, set aside his work on the Hanford site litigation. He will defer work on two reports and a presentation for the Presidential Advisory Committee on the Energy Employees Compensation Act. He will not work on the Savannah River Site pollution issues that he had agreed to do. His work with the staff of the Institute for Energy and Environmental Research will be postponed. Several presentations will be cancelled. He would attend the Advisory Committee meeting on October 25-26, for which he is responsible, and a commitment to speak at the United Nations. He is required to complete a Superfund analysis of the Cotter Corp. uranium mill, which has a deadline of a meeting on October 30, and he would meet, as promised, with investigators of nuclear weapons stewardship at Los Alamos and a National Academy of Sciences panel about weapons testing and fallout. Simultaneously, he will prepare for his deposition in this case.

Clearly, it is best if Dr. Makhijani takes the time to prepare before presenting his testimony. As noted above, he estimates that he will need about 40 hours to prepare for his deposition. No purpose would be served by scheduling his deposition for an earlier time, when he would not be prepared to express his opinions. With the items he has cancelled or postponed, Dr. Makhijani believes that he can prepare, so that his deposition can be completed with an extension of the discovery deadline to no later than November 17.

If Dr. Makhijani's deposition is taken in the week of November 15, the extension will be within the limits set by the Commission's January 30, 2004, order and will not require a special report to the Commission. It should be possible to preserve the schedule that all parties have invested in and to bring this matter to hearing on schedule. It must also be borne in mind that most of the matters on which Dr. Makhijani will testify at hearing are technical/safety contentions, which are not scheduled for hearing until October 24, 2005. (Memorandum and Order, August 16, 2004). The Board may wish to set conditions that allow parties to make any motions they wish to present without upsetting the present plans for hearing of both the environmental and the technical/safety contentions.

Conclusion

NIRS/PC sincerely regret the circumstances that necessitate this request for a schedule change. We wish to point out that this witness has been required in the last month to take two 20,000 mile airplane trips to visit his sick parent and then to attend to matters arising from her unfortunate death. The circumstances are worthy of the Board's sympathy. It should be sufficient in this situation to allow a witness to manage his new obligations as best he can and to participate in this litigation in such a way that the structure of its schedule is not seriously affected.

Respectfully submitted,



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October 20, 2004

CERTIFICATE OF SERVICE

Pursuant to 10 CFR § 2.305 the undersigned attorney of record certifies that on October 20, 2004, the foregoing Renewed Motion for Modification of Deposition Schedule on behalf of Petitioners Nuclear Information and Resource Service and Public Citizen was served by electronic mail and by first class mail upon the following:

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