

RAS 10583

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

DOCKETED 10/13/05

SERVED 10/13/05

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 13, 2005

MEMORANDUM AND ORDER

(Regarding Motions to Exclude Certain NIRS/PC Exhibits)

Pending before the Licensing Board are two October 7, 2005 motions, filed separately by applicant Louisiana Energy Services, L.P., (LES) and the NRC staff, to exclude certain prefiled exhibits submitted by intervenors Nuclear Information and Resource Service and Public Citizen (NIRS/PC) in conjunction with the prefiled direct testimony of witness Dr. Arjun Makhijani relative to the remaining contentions in this proceeding -- NIRS/PC EC-3/TC-1 -- Depleted Uranium Hexafluoride Storage and Disposal; NIRS/PC EC-5/TC-2 -- Decommissioning Costs; and NIRS/PC EC-6/TC-3 -- Costs of Management and Disposal of Depleted UF₆. Because we find that it is necessary for NIRS/PC to provide us with a greater specificity regarding their reliance on their proffered exhibits, we direct that they (and the other parties, to the degree applicable), provide us with revised prefiled direct and rebuttal testimony in accord with the instructions below.

LES and the staff each object to several categories of NIRS/PC exhibits on various grounds, including (a) exhibits associated with those portions of Dr. Makhijani's prefiled direct testimony stricken by this Board's October 4, 2005 ruling on LES and staff in limine motions;

and (b) exhibits not specifically referenced in the balance of Dr. Makhijani's prefiled direct testimony. See Motion In Limine On Behalf of [LES] Concerning the Exhibits of [NIRS/PC] (Oct. 7, 2005); Staff Motion In Regard to Objections to NIRS/PC Hearing Exhibits (Oct. 7, 2005). NIRS/PC counters that each of their prefiled exhibits provide support for either Dr. Makhijani's prefiled direct testimony, or the November 2004 and July 2005 reports by Makhijani and Smith, which LES asserts are incorporated by reference in Dr. Makhijani's prefiled direct testimony. See Memorandum on Behalf of Intervenors [NIRS/PC] in Response to Motion In Limine on Behalf of [LES] Concerning the Exhibits of NIRS/PC and Staff Motion in Regard to Objections to NIRS/PC Hearing Exhibits (Oct. 12, 2005) [hereinafter NIRS/PC Response].

As LES and the staff both point out in their motions, 10 C.F.R. § 2.337(a) states that evidence is admissible only if it is "relevant, material, and reliable." To the extent a party fails to tie a prefiled exhibit to the prefiled testimony of any of that party's witnesses, the party arguably has failed to demonstrate the relevance or materiality of that exhibit. In this regard, this Board has, on several prior occasions, directed that parties submit revised prefiled testimony that includes appropriate references to evidentiary material. For example, in directing NIRS/PC, in the context of the February 2005 evidentiary hearing, to include in their prefiled exhibit list certain "conventional textbooks" and "discovery materials" referenced in their testimony, we further instructed NIRS/PC to provide revised copies of their prefiled testimony to incorporate appropriate references to those documents. See Licensing Board Memorandum and Order (Regarding NIRS/PC Prefiled Testimony and Exhibits) (Jan. 18, 2005) (unpublished). The inverse of this is also true; a party should not include in its prefiled exhibit list (or, for that matter, provide copies of) any materials that are not referenced in the prefiled direct or rebuttal testimony of any of that party's witnesses.

Neither the prefiled direct or rebuttal testimony of Dr. Makhijani on any of the four subject matter areas contain any reference to the specific exhibit numbers identified in NIRS/PC's prefiled exhibit list. Rather, Dr. Makhijani's testimony references other individual identifiers that presumably correspond to prefiled exhibits identified by NIRS/PC (or LES or the staff).¹ The Board therefore directs NIRS/PC to revise their prefiled direct and rebuttal testimony to incorporate the specific exhibit number associated with each referenced document.²

In addition, however, as is the case generally with the information required to provide a basis for the contentions being litigated in this proceeding, see, e.g., 10 C.F.R. § 2.309(f)(1)(v); Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 & 2), LBP-76-10, 3 NRC 209, 216 (1976) (petitioner not permitted to incorporate massive documents by reference as basis for contentions), a party should not submit in connection with its prefiled testimony voluminous documents without some indication of how that document provides support for that testimony. Accordingly, each reference provided in the prefiled direct or rebuttal testimony of any of the witnesses/panels providing testimony on behalf of LES, the staff, or NIRS/PC to a prefiled exhibit with a length greater than five (5) pages shall be modified to refer, along with the citation to the specific exhibit, the specific pages or other distinct portion of that exhibit that directly support the specific testimony. In that vein, any such references that include evidence on

¹ Indeed, recently updated versions of NIRS/PC's prefiled exhibit list contain, under the "description" heading, certain identifying words or phrases that we presume correspond to references provided in Dr. Makhijani's prefiled testimony. See, e.g., Attachment to NIRS/PC Response (entitled Response on Behalf of [NIRS/PC] to Motions of LES and Commission Staff to Exclude NIRS/PC Exhibits).

² In the alternative, NIRS/PC may provide both the specific exhibit number reference and the separate individual identifier already provided in Dr. Makhijani's prefiled testimony. This is consistent with the approach utilized by NIRS/PC witnesses in the context of prefiled testimony submitted in conjunction with the February 2005 evidentiary hearing in this proceeding.

subject matters previously excluded by this Board as outside the scope of any remaining contested issue in this proceeding (e.g., uranium health effects to women, licensing delays) or that provide information on matters not within the scope of the issues being adjudicated would be considered by the Board only to the extent they provide context for the specifically-referenced, relevant portions of that exhibit. Thus, to the extent that LES, the staff, or NIRS/PC have not already done so, their prefiled direct and rebuttal testimony should be revised to include references to such specific portions of prefiled party exhibits.³

Upon receipt of this revised testimony, the Board will rule upon the LES and staff motions.

Accordingly, the Board directs each of the parties to submit, on or before noon Eastern Time, on Tuesday, October 18, 2005, revised copies of their prefiled direct and rebuttal testimony that conform to the Board's rulings above. In addition, at the time they submit their revised prefiled direct and rebuttal testimonies, each party should provide to the Board electronic and hard copy versions of their prefiled exhibit lists, which should exclude any exhibits not specifically referenced in their revised prefiled testimony.⁴

³ In this regard, to the extent it has not already done so, NIRS/PC should revise the prefiled direct and rebuttal testimony of Dr. Makhijani to reference those specific portions of the Makhijani and Smith November 2004 and July 2005 reports on which they intend to rely. Such testimony should not reference any portions of that report that discuss subject matters previously excluded by this Board (e.g., uranium health effects to women, licensing delays) and should reference only the specific pages where the relied upon material is found.

⁴ If, however, as a result of the duplicative exhibit review requested by the Board in section A.3.a of the September 14 order, see Licensing Board Memorandum and Order (Regarding Administrative Matters Relative to October 2005 Evidentiary Hearing) (Sept. 14, 2005) at 4-5 (unpublished), any party has identified any excluded exhibit that they were scheduled to introduce first that will also be relied upon later by another party to the proceeding, they should advise that party on or before Monday, October 17, 2005, so that the party can add that item to its exhibit list. Also, if any party wishes to use one of their excluded exhibits during cross-examination, and that exhibit will not be first introduced by another party, it should utilize the number it originally assigned to the exhibit when it was intended to accompany their prefiled
(continued...)

Finally, as an administrative matter we note that NIRS/PC needs to remove the “protected material” designation from its prefiled direct and rebuttal testimony on contingency factor.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁵

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

October 13, 2005

⁴(...continued)
testimony.

⁵ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant LES; (2) intervenors NIRS/PC; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (REGARDING MOTIONS TO EXCLUDE CERTAIN NIRS/PC EXHIBITS) 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.
John T. Hull, Esq.
Margaret J. Bupp, 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
Ron Curry, Secretary
New Mexico Environment Department
1190 St. Francis Drive
Santa Fe, NM 87502-6110

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LB MEMORANDUM AND ORDER (REGARDING
MOTIONS TO EXCLUDE CERTAIN NIRS/PC EXHIBITS)

James R. Curtiss, Esq.
David A. Repka, Esq.
Martin J. O'Neill, Esq.
Amy C. Roma, Esq.
Tyson R. Smith, Esq.
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006

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 Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 13th day of October 2005