

October 18, 2005

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

**DOCKETED
USNRC**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

October 18, 2005 (1:26pm)

**OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF**

In the Matter of

Docket No. 70-3103

Louisiana Energy Services, L.P.

ASLBP No. 04-826-01-ML

**MOTION ON BEHALF OF INTERVENORS
NUCLEAR INFORMATION AND RESOURCE SERVICE
AND PUBLIC CITIZEN ("NIRS/PC")
FOR EXTENSION OF TIME TO COMPLY WITH ORDER DATED OCTOBER 17, 2005**

Preliminary statement

This Motion is made on behalf of Intervenor Nuclear Information and Resource Service and Public Citizen ("NIRS/PC"), seeking an extension of time until 9:30 am on October 24, 2005 to comply with the Memorandum and Order entered by the Atomic Safety and Licensing Board (the "Board") on October 17, 2005, addressing the format of prefiled testimony. As NIRS/PC understand that order, significant redrafting of direct and rebuttal testimony is required to achieve compliance.

Factual background

On September 16, 2005, pursuant to the schedule contained in August 16, 2004 prehearing order, the parties filed prefiled direct testimony. The expert witness for NIRS/PC, Dr. Arjun Makhijani, submitted prefiled direct testimony on issues of deconversion, transportation, disposal, and contingency—the four pending issues related to "plausible strategy." In each filing, Dr. Makhijani put forth the substance of his conclusions and, to support his testimony,

expressly incorporated by reference two detailed reports that are filed in this proceeding and describe his investigations and the scientific underpinnings of his conclusions. (Makhijani and Smith, Costs and Risks of Management and Disposal of Depleted Uranium from the National Enrichment Facility Proposed to be Built in Lea County New Mexico by LES, Nov. 24, 2004 (NIRS/PC Ex. 190) and Makhijani and Smith, Update to Costs and Risks of Management and Disposal of Depleted Uranium from the National Enrichment Facility Proposed to be Built in Lea County New Mexico by LES, July 5, 2005 (NIRS/PC Ex. 224). See, e.g., NIRS/PC deconversion direct testimony at 5-6 (Sept. 16, 2005).

Opposing parties have not objected to this approach. On September 22, 2005, Applicant Louisiana Energy Services, L.P. ("LES") and Commission Staff filed motions in limine to restrict the scope of Dr. Makhijani's testimony. LES detailed its objections to various evidence¹. However, LES made *no objection* to Dr. Makhijani's incorporation by reference of the November 2004 and July 2005 reports and *did not ask the Board to strike* the portion of his testimony that made such reference. (*id.* 8-11) (except in requesting that all testimony on contingency factors be deleted). On September 22, 2005 Commission Staff also moved in limine. Staff made various objections² but made *no objection* to Dr. Makhijani's incorporation by reference of the November 2004 and July 2005 reports and *did not ask the Board to strike* the portion of his testimony that made such reference.

¹ LES objected to evidence on "performance history," conversion to DUO₂, currency risks, emerging uranium health risks, licensing delays, inadequacies of DOE cost estimates, and the viability of the WCS and Envirocare sites. (LES Motion in Limine, Sept. 22, 2005, at 2-7).

² Staff presented objections to testimony about the Final EIS discussion of CaF₂ disposal, cost of deconversion to DUO₂, repository disposal, DOE cost estimates, Staff's treatment of transportation costs, emerging evidence of uranium health impacts, performance of the WCS site, and performance of the Envirocare site. (NRC Staff Motion in Limine at 3-13).

On October 4, 2005 the Board ruled upon both motions in limine. The October 4 order did not require amendment of Dr. Makhijani's testimony incorporating the two reports by reference. (Memorandum and Order, Oct. 4, 2005).

On October 7, 2005, LES and Commission Staff filed additional motions in limine regarding the exhibits identified by NIRS/PC in their filing dated September 23, 2005.³ However, LES *did not complain* about NIRS/PC testimony that incorporated by reference the November 2004 report or the July 2005 report. Staff likewise *did not complain* about NIRS/PC testimony that incorporated by reference the November 2004 report or the July 2005 report. Indeed, in responding on October 12, 2005, NIRS/PC specifically pointed out that the prefiled direct testimony had incorporated by reference the two reports dated November 2004 and July 2005. (NIRS/PC memorandum in response to motions in limine, at 3 (Oct. 12, 2005)).

On October 13 the Board directed, in connection with the pending motions in limine, that NIRS/PC "revise their prefiled direct and rebuttal testimony to incorporate the specific exhibit number associated with each referenced document." (Memorandum and Order at 3, Oct. 13, 2005). The Board on October 13 also required that references to lengthy exhibits be made specific as to the relevant pages. (*id.* 4). Further, the Board on October 13 directed that "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." (*id.* 4 note 3).

³ LES raised objections to evidence of "performance history," deconversion to DUO₂, currency risk, uranium health risks, licensing delays, the viability of the WCS and Envirocare sites, and various items claimed to have been stricken by the October 4 order. Commission Staff sought exclusion of exhibits claimed to be related only to stricken testimony and challenged the relevancy of many exhibits. (LES Motion in Limine, Oct. 7, 2005; Commission Staff Motion in Limine, Oct. 7, 2005).

Since the October 13 Memorandum and Order NIRS/PC have revised not only Dr. Makhijani's prefiled direct and rebuttal testimony in response to that order but have also revised the November 2004 and July 2005 reports to contain exhibit references to assist the Board.

Revised testimony was due on October 18, 2005 and has been served and filed pursuant to the October 13 order. However, on the afternoon of October 17, with the revised testimony due at noon the following day, the Board issued a further order, stating that "incorporation by reference of a document or documents as purported testimony or as evidentiary exhibits, including the incorporation by reference of documents cited in another document, is not an acceptable practice." (Memorandum and Order at 2, Oct. 17, 2005).

Discussion

The Memorandum and Order dated October 17 creates some confusion as to the format of the testimony that NIRS/PC should submit. Although the October 13 order directed NIRS/PC to "reference specific portions" of the November 2004 and July 2005 reports on which they would rely, the October 17 order states that "incorporation by reference of a document or documents as purported testimony" is not acceptable.

As has been recognized, the NIRS/PC prefiled testimony does, in fact, incorporate by reference the detailed reports submitted in November 2004 and July 2005. Those reports contain the underlying scientific work supporting Dr. Makhijani's conclusions. Neither LES nor Commission Staff have sought to exclude such testimony in their motions in limine. The Board did not delete such testimony containing incorporation by reference in its order dated October 4, 2005. Indeed, in its order dated October 13, the Board appeared to accept that usage but directed that references be made more specific. Now, however, by the order of October 17, references

appear to be banned. In this situation, the October 17 order—unlike the October 13 order—seems to require drastic revision of the testimony heretofore filed.

NIRS/PC wish to present testimony in the format that the Board requires. However, with all respect, NIRS/PC cannot make the revisions required by the October 17 order and serve the revised testimony by the time required by the October 13 order—noon on October 18—less than 24 hours after receipt of the latest order. The time allowed is not adequate in any circumstances to make significant revisions. Moreover, at present Dr. Makhijani is attending meetings of a Presidential advisory committee concerned with radioactivity-related diseases of workers in the uranium industries. He would not be able even to discuss revised testimony until, at the earliest, sometime on Thursday, October 20. At that time NIRS/PC counsel will be traveling to the Washington area for the forthcoming hearings.

In this situation, NIRS/PC respectfully request that the Board allow an extension of sufficient time to enable Dr. Makhijani's testimony to be revised to meet the new requirements of the October 17 order. NIRS/PC request that they be permitted to file revised testimony on October 24, 2005, with cross-examination of Dr. Makhijani to be conducted that day or the following day. Such a schedule may allow the testimony to be put into the form called for by the October 17 order without unduly affecting the hearing schedule.

Counsel for NIRS/PC have sought the concurrence of counsel for LES and for Commission Staff to this extension. Counsel for LES and Commission Staff oppose the requested extension. Therefore, NIRS/PC make this request of the Board.

Conclusion

For the reasons set forth herein, and to enable testimony to be prepared and submitted in the form required by the Board's Memorandum and Order dated October 17, 2005, without

seriously affecting the schedule already set for hearings, NIRS/PC request that the Board grant an extension of time to and including 9:30 am on October 24, 2005, to allow NIRS/PC to submit revised prefiled testimony and a corresponding exhibit list in conformity with the Board's Memorandum and Order dated October 13, 2005, as amended by the Memorandum and Order dated October 17, 2005.

Respectfully submitted,



Lindsay A. Lovejoy, Jr.
618 Paseo de Peralta, Unit B
Santa Fe, NM 87501
(505) 983-1800
(505) 983-0036 (facsimile)
E-mail: lindsay@lindsaylovejoy.com

Counsel for Petitioners
Nuclear Information and Resource Service
1424 16th St., N.W. Suite 404
Washington, D.C. 20036
(202) 328-0002

and

Public Citizen
1600 20th St., N.W.
Washington, D.C. 20009
(202) 588-1000

October 18, 2005

CERTIFICATE OF SERVICE

Pursuant to 10 CFR § 2.305 the undersigned attorney of record certifies that on October 18, 2005, the foregoing Motion on behalf of Intervenors Nuclear Information and Resource Service and Public Citizen for Extension of Time to Comply with Order dated October 17, 2005 was served by electronic mail and first class mail upon the following:

G. Paul Bollwerk, III
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: gpb@nrc.gov

Dr. Paul B. Abramson
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: pba@nrc.gov

Dr. Charles N. Kelber
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: CKelber@att.net

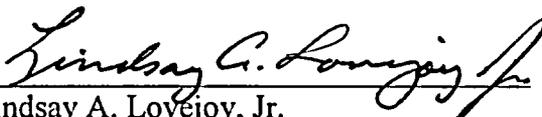
James R. Curtiss, Esq.
David A. Repka, Esq.
Martin J. O'Neill, Esq.
Winston & Strawn
1700 K St., N.W.
Washington, D.C. 20006
e-mail: jcurtiss@winston.com
drepka@winston.com
moneill@winston.com
aroma@winston.com

John W. Lawrence, Esq.
National Enrichment Facility
100 Sun Avenue, N.E.
Albuquerque, NM 87109
e-mail: jlawrence@nefnm.com

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Associate General Counsel for Hearings, Enforcement, and Administration
e-mail: OGCMailCenter@nrc.gov
lbc@nrc.gov
mjb5@nrc.gov;
jth@nrc.gov

Office of Commission Appellate Adjudication
Mail Stop O-16C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications Staff (original and two copies)
e-mail: hearingdocket@nrc.gov


Lindsay A. Lovejoy, Jr.
618 Paseo de Peralta, Unit B
Santa Fe, NM 87501
(505) 983-1800
(505) 983-0036 (facsimile)
e-mail: lindsay@lindsaylovejoy.com