

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

G. Paul Bollwerk, III, Chairman
Dr. Richard F. Cole
Dr. Craig M. White

In the Matter of

STRATA ENERGY, INC.

(Ross In Situ Recovery Uranium Project)

Docket No. 40-9091-MLA

ASLBP No. 12-915-01-MLA-BD01

September 19, 2014

MEMORANDUM

(Responding to Motion for Clarification)

By motion dated September 16, 2014, Joint Intervenors¹ have requested clarification from the Licensing Board regarding the scope of the Board's September 10 ruling concerning Joint Intervenors' prefiled exhibit JTI005. See [Joint Intervenors's] Motion for Clarification of the Board's September 10, 2014 Order (Sept. 16, 2014) at 1-2 [hereinafter Clarification Motion]; see also Licensing Board Memorandum and Order (Clarifying Evidentiary Materials) (Sept. 10, 2014) at 2 (unpublished) [hereinafter Clarification Order]. Below we provide additional guidance regarding this exhibit.

As the Board indicated in its September 10 issuance, prefiled exhibit JTI005 consists "of a listing of three Internet universal resource locator (URL) citations that apparently represent an application." Clarification Order at 2. As described by Joint Intervenors, the URLs denote "two online NRC databases and two expert-created applications (called story maps)." Clarification

¹ Joint Intervenors are the Natural Resources Defense Council (NRDC) and the Powder River Basin Resource Council (PRBRC).

Motion at 2. In its September 10 order, relative to prefiled exhibit JTI005 the Board indicated that:

A reference to an internet website is not admissible evidentiary material to the extent a party wants to have the material on that website considered as part of the evidentiary record. If Joint Intervenors' wish to incorporate into the evidentiary record material from these websites, they will need to provide portable document format (.pdf) formatted screen shots of the appropriate pages from these sites that can be entered into the evidentiary record. In the absence of such a submission, all references to this exhibit and the websites it identifies must be deleted from Joint Intervenors' prefiled testimony.

Clarification Order at 2. According to Joint Intervenors, they took steps on September 16 to comply with the Board's order by providing "the entire set of .pdfs of the NRC spreadsheets at JTI005A-R, numbered 1-346. We also submit this day .pdfs of a representative sampling of the story maps at JTI005B-R, numbered 1-36." Clarification Motion at 2. Nonetheless, Joint Intervenors declare, this is not adequate for the purposes of their evidentiary presentation in that:

[U]nlike other websites, which are static text that can easily be turned into a .pdf document, the story maps referenced by the original .pdf JTI005 are interactive databases and maps, with accompanying text, compiled and created by Joint Intervenors' expert, Dr. Lance Larson. The story map applications are an integral part of Dr. Larson's testimony and are the work product of his expertise. In essence, the websites are akin to a diagram or chart prepared by an expert using primary data. . . .

As there are literally thousands of variations that could be created by the maps and text, it is impractical for Joint Intervenors (and, we believe, it would not assist the Board in its weighing of the evidence) to attempt to turn to every potential visual available in the story maps into .pdf documents for exhibits. . . . [A]ny one visual would be akin to depicting a chess board in the midst of a game. So along with submitting a representative set of story maps as .pdfs, Joint Intervenors believe that the entirety of the story map applications – and the database of information they contain – should be admitted as an exhibit accompanying Dr. Larson's testimony. Importantly, as Dr. Larson has also explained, while the storymaps allow display of myriad variations,

the underlying data cannot be altered by third parties, and thus in this respect the storymaps will remain fixed just as an exhibit submitted in .pdf form will remain unaltered in the future.

Id. at 2–3. As a consequence, while noting that both applicant Strata Energy, Inc., (SEI) and the NRC staff oppose the admission of the story map applications, Joint Intervenors ask that the Board “accept the entirety of Dr. Larson’s applications into evidence based on . . . the insurmountable obstacles to submitting a complete set of all potential visuals of the Story Maps in either .pdf or any other non-website application form.” Id. at 1, 5.

In asking for clarification of our September 10 issuance and this relief, Joint Intervenors attempt to distinguish/downplay two previous directions given by the Board regarding evidentiary exhibits. One is our admonition that “information referenced as a hyperlink, a hypertext markup language (HTML) document, or a hyperlinked [.pdf] document, must be accompanied by a [.pdf] evidentiary exhibit, submitted with its own exhibit number, that includes the relevant portions of the referenced supporting material.” Licensing Board Memorandum and Order (Providing Administrative Directives Associated with Evidentiary Hearing and Limited Appearance Session) (July 25, 2014) at 3 n.6 (unpublished) [hereinafter Administrative Order]. The other is the Board’s direction that to the degree any of the parties contemplated submitting “non-documentary material or any physical items (e.g., rock sample) as prefiled evidentiary material, it should contact [the Board’s law clerk] at least 10 days before the filing date to discuss arrangements for the submission and service of that material.” Id. at 4 n.7. While referencing this directive as evidence that the Board contemplated “that parties may put into evidence material that is not from a .pdf, [Administrative] Order at 4 n.7 (discussing audio and visual files),” Joint Intervenors also declare that they

assumed that the applications would be considered here, given the substantial evidentiary foundation supplied in Dr. Larson’s pre-filed direct testimony . . . [and] so did not seek advance approval for the submission because, unlike physical objects such

as a geological sample, or even audio or visual files, it was possible to provide the Board with this evidence via the original .pdf filed as JT1005. Further, a story map application is not an item that we could submit via digital video disc or other form of electronic storage media. Rather, its functional integration with Geographic Information Systems makes it functional only when utilized in an internet application.

Clarification Motion at 4.

Initially, we note that it strains credulity for Joint Intervenors to assert, given the Board's directives outlined above, that Joint Intervenors did not need to contact the Board prior to the filing of prefiled materials to advise the Board of its intended use of an internet-based application as an evidentiary exhibit.

Even putting this aside, however, Joint Intervenors' own statement regarding this application/exhibit makes clear why the Board cannot accept JT1005 in the web application form Joint Intervenors prefer. Among a Board's most important responsibilities is to ensure the integrity of the evidentiary record upon which the Board must base its initial decision(s) regarding any admitted contentions and upon which any later appellate proceedings will rely. In this instance, Joint Intervenors declare that "while the storymaps allow display of myriad variations, the underlying data cannot be altered by third parties, and thus in this respect the storymaps will remain fixed just as an exhibit submitted in .pdf form will remain unaltered in the future." Clarification Motion at 3. Yet, Dr. Larson indicates in his prefiled testimony that "I am the only person that can alter the Storymaps or how the underlying source data can be imported into the program." Pre-filed Testimony of Dr. Lance Larson on Contentions 2 and 3, Prefiled Ex. JTI003-R at 23 (Sept. 16, 2014). To be sure, as Joint Intervenors recognize, expert witnesses as part of their presentations routinely prepare non-documentary evidentiary material, such as diagrams and charts. See Clarification Motion at 2. But this is not, as Joint Intervenors assert, the same as with Dr. Larson's story map website. What is crucially different about

evidentiary presentations such as charts and diagrams is that, once prepared and admitted, they are taken into custody by the Board (and later the NRC Office of the Secretary), which preserves them for the record so that they cannot be further altered by anyone, including the expert that created them. In this instance, as he indicated in his prefiled testimony, Dr. Larson retains the power to revise the websites. And while we have no grounds at this juncture to believe that Dr. Larson would take any action in that regard, the possibility that such an action could occur means that we cannot accept the web-based applications as an evidentiary exhibit in this proceeding, except to the degree that the applications' output can be "locked down" via .pdf screen shots or otherwise.

If it were the case that Dr. Larson's applications could, in fact, be utilized as a stand-alone program on a CD/DVD that could be provided to, and run/played by, the Board and the other parties (as would be the case with a video or audio file) then, particularly given the lack of timely objection by SEI and the staff to the substance of the website information, see Administrative Order at 3, the Board might be willing to admit that CD/DVD package into evidence. But, as we quoted earlier, Joint Intervenors have declared that such a package is a technological impossibility at this point. See supra p. 4.

That leaves only one option if events during the hearing suggest that a story map other than the ones covered by the screenshots already included in prefiled exhibit JT1005B-R needs to be generated, displayed, and admitted into evidence. Initially, the witness seeking to generate such a story map in response to a Board question would need to have at the witness table an internet-connected computer (supplied by the witness or counsel for the party sponsoring the witness) that can be connected to the audio-visual (AV) display system that the

Board will be utilizing for the evidentiary hearing.² To connect to the AV system, the computer would have to be equipped with a video graphics array (VGA) output connector. Using that computer, the individual would show how he/she generates the story map in question. Once completed, that story map would be memorialized immediately via a .pdf screen shot generated from that computer. This .pdf file, which should have a file name that includes the exhibit number assigned by the Board (e.g, JT1005C), will be marked for identification by the Board and should be e-mailed promptly by the party whose witness generated the story map to joseph.deucher@nrc.gov as well as to each of the Board members and to counsel for both of the other parties to the proceeding. Thereafter, by midnight Eastern Time that same day, the .pdf screen shot bearing the party exhibit number in the upper right hand corner should be submitted for the evidentiary record by the party via the agency's E-Filing system, along with a revised exhibit list. Assuming the exhibit is timely submitted by E-Filing, at the next day's hearing session the Board will admit the exhibit into evidence or, if the hearing has adjourned, by a subsequently issued Board order.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland

September 19, 2014

² Licensing Board Panel information technology specialist Joseph Deucher will be available at the hearing to provide guidance on how to connect a computer with a VGA output port to the AV display system that will be utilized during the hearing and how to convert a story map to a .pdf file.

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NUCLEAR REGULATORY COMMISSION

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(Ross In Situ Recovery Uranium Project))
)
(Materials License Application))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Memorandum (Responding to Motion for Clarification)** have been served upon the following persons by Electronic Information Exchange.

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

G. Paul Bollwerk, III, Chair
Administrative Judge
paul.bollwerk@nrc.gov

Dr. Richard F. Cole
Administrative Judge
richard.cole@nrc.gov

Dr. Craig M. White
Administrative Judge
craig.white@nrc.gov

Kathleen Schroeder, Law Clerk
kathleen.schroeder@nrc.gov

Alana Wase, Law Clerk
alana.wase@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop O-7H4
Washington, DC 20555-0001
OCAAMAIL@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555-0001

Catherine Scott, Esq.
Carrie Safford, Esq.
Christopher Hair, Esq.
Emily Monteith, Esq.
Richard Harper, Esq.
Sabrina Allen, Paralegal
catherine.scott@nrc.gov
carrie.safford@nrc.gov
christoper.hair@nrc.gov
emily.monteith@nrc.gov
richard.harper@nrc.gov
sabrina.allen@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16H12
Washington, DC 20555-0001
Hearing Docket
hearingdocket@nrc.gov

STRATA ENERGY, INC., Ross In Situ Recovery Uranium Project, Docket No. 40-9091-MLA
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Strata Energy, Inc.
Thompson & Pugsley, PLLC
1225 19th Street, NW, Suite 300
Washington, DC 20036
Anthony J. Thompson, Esq.
Christopher S. Pugsley, Esq.
Cindy Seaton, Paralegal
ajthompson@athompsonlaw.com
cpugsley@athompsonlaw.com
cseaton@thompsonlaw.com

Winston & Strawn, LLP
1700 K Street, NW
Washington, DC 20006-3817
Tyson R. Smith, Esq.
Carlos L. Sisco, Paralegal
E-mail: trsmith@winston.com
csisco@winston.com

Natural Resources Defense Council, Inc.
1152 15th Street, NW, Suite 300
Washington, DC 20005
Geoffrey H. Fettus, Esq.
Senior Attorney
gfettus@nrdc.org

Powder River Basin Resource Council
934 N. Main Street
Sheridan, WY 82801
Shannon Anderson, Esq.
sanderson@powderriverbasin.org

Natural Resources Defense Council
Powder River Basin Resource Council
Meyer, Glitzenstein & Crystal
1601 Connecticut Avenue, N.W., Suite 700
Washington, DC 20009
Howard M. Crystal, Esq.
hcrystal@meyerqlitz.com

[Original signed by R. Giitter _____]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 19th day of September, 2014