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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
)	Docket No. 70-3103-ML
Louisiana Energy Services, L.P.)	
)	ASLBP No. 04-826-01-ML
(National Enrichment Facility))	

ANSWER OF LOUISIANA ENERGY SERVICES, L.P. TO MOTION FOR
MODIFICATION OF DEPOSITION SCHEDULE ON BEHALF OF PETITIONERS
NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(c) and the Licensing Board's October 6, 2004 Order,¹ Louisiana Energy Services, L.P. ("LES") hereby files its response to a motion² filed by Nuclear Information and Resource Services and Public Citizen ("NIRS/PC") on October 5, 2004, requesting an extension of the deposition schedule to accommodate one of their expert witnesses in this proceeding. (NIRS/PC Mot. at 1, 6, 8.) Specifically, NIRS/PC "request a modification of the discovery schedule" so that the deposition of one of their expert witnesses, Mr. Arjun Makhijani, can be taken during the week of November 15, 2004. (*Id.* at 6.) The parties had originally scheduled Mr. Makhijani's deposition for October 5 and 6, 2004, insofar as the Licensing Board's General Schedule for this proceeding requires that depositions on all

¹ Licensing Board Order (Schedule for Responses to Motion for Deposition Schedule Modification) (Oct. 6, 2004) (unpublished).

² "Motion for Modification of Deposition Schedule on Behalf of Petitioners Nuclear Information and Resource Service and Public Citizen" (Oct. 5, 2004) ("NIRS/PC Motion").

admitted contentions -- environmental and technical -- be completed by no later than October 15, 2004.³

As discussed below, NIRS/PC have not demonstrated "good cause" for the requested extension of time, as required by 10 C.F.R. § 2.307 and section II.D of the Licensing Board's Initial Prehearing Order.⁴ LES believes the request is unwarranted given the potential impact of the requested time extension on the hearing schedule contemplated by the Commission in its Hearing Order⁵ and established by the Licensing Board in the General Schedule.⁶ Moreover, LES is concerned that the unavailability of Mr. Makhijani during the scheduled deposition period is symptomatic of a broader pattern of non-responsiveness on the part of NIRS/PC. Indeed, this pattern of non-responsiveness is beginning to appear to be part of a calculated strategy to drag out this procedure to achieve the acknowledged objective of NIRS/PC to stop the licensing of this facility.⁷ Further, such non-responsiveness -- which includes, in

³ See Memorandum and Order (Memorializing and Ruling on Matters Raised in Conjunction with August 3, 2004 Conference and Call and Setting General Schedule for Proceeding), App. A (General Schedule) at 1. The Licensing Board's General Schedule reflects a proposed discovery and hearing schedule submitted by all parties as part of a July 29, 2004 joint status report. This schedule provided that depositions would be conducted from September 13, 2004 through October 15, 2004. See "Joint Status Report Regarding the Parties' Proposed Discovery Plan and Other Adjudicatory Process Issues" (July 29, 2004), Attachment at 1.

⁴ Licensing Board Memorandum and Order (Initial Prehearing Order) (Apr. 15, 2004) (unpublished) at 7 ("Initial Prehearing Order").

⁵ In the Matter of Louisiana Energy Services, L.P. (National Enrichment Facility); Notice of Receipt of Application for License; Notice of Availability of Applicant's Environmental Report; Notice of Consideration of Issuance of License; and Notice of Hearing and Commission Order, 69 Fed. Reg. 5873 (Feb. 6, 2004) ("Hearing Order").

⁶ In its Hearing Order, the Commission, mindful of the need for "the timely completion of the proceeding," set forth an aggressive hearing schedule that calls for issuance of a final NRC decision on the pending LES Application within 30 months.

⁷ In their hearing petition, NIRS/PC indicated that their "members seek to protect their lives and health by opposing the licenses sought by LES." "Petition to Intervene by Nuclear Information and Resource Service and Public Citizen" (Apr. 6, 2004), at 4..

particular, the untimeliness of the NIRS/PC mandatory disclosures as well as the general failure of NIRS/PC to provide any meaningful information on the facts and opinions (and supporting bases) on which its various experts are expected to testify -- unfairly impairs LES's and the NRC Staff's ability to prepare for the evidentiary hearings on contested issues. Therefore, LES opposes the requested extension.

II. BACKGROUND

On February 6, 2004, the Commission published its Hearing Order in the *Federal Register* for the hearing to be held on the licensing of LES's proposed gas centrifuge uranium enrichment facility, to be located in Lea County, New Mexico. In the Hearing Order, the Commission set forth specific guidance on both procedural and substantive matters. Among other things, the Commission directed the Licensing Board to set a schedule for the hearing consistent with that set forth in the Hearing Order, which "establishes as a goal the issuance of the final Commission decision on the pending application within two and a half years (30 months) from the date that the application was received." 69 Fed. Reg. at 5876. The Commission specifically expressed its belief that such a schedule "may be reasonably achieved under the rules of practice contained in the new 10 C.F.R. part 2 and the enhancements directed by this order." *Id.* In addition, the Commission stated its expectation that the Licensing Board would "use the techniques specified in this order and in the Commission's policy statement on the conduct of adjudicatory proceedings [] to ensure prompt and efficient resolution of the contested issues." *Id.* (citing *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998); *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (1981)).

The Licensing Board, for its part, has sought to comply with the Commission's directive by establishing a General Schedule that incorporates the schedular milestones set forth in the Hearing Order. As noted above, the General Schedule also reflects the consensus input of the parties, as presented in a July 29, 2004 joint status report to the Board. The parties specifically agreed, among other things, that depositions on all admitted contentions would take place from September 13, 2004 through October 15, 2004, and that discovery against LES and the intervenors on those contentions would conclude on October 18, 2004. These dates have been reflected by the Board in the General Schedule for this proceeding.

NIRS/PC now seek an extension of the discovery period by almost a month, citing the unavailability -- until the week of November 15, 2004 -- of an "essential witness," *i.e.*, Mr. Makhijani. (NIRS/PC Mot. at 1, 8.) NIRS/PC note that Mr. Makhijani had intended to prepare for his planned October 5-6, 2004 deposition from September 27th through October 4th, but was unable to do so due to the need to visit his seriously ill mother in India. (*Id.* at 2.) NIRS/PC further indicate that Mr. Makhijani's unavailability for depositions in this case between now and the week of November 15, 2004 is attributable to his "suffering from jet lag and a heavy set of responsibilities." (*Id.* at 5.) In this regard, NIRS/PC set forth a lengthy list (almost four pages in length) of Mr. Makhijani's "already scheduled commitments" to "numerous parties and organizations that are relying upon his assistance," including business development activities for Mr. Makhijani's own research institute. (*Id.* at 4, 8.) NIRS/PC maintain that, because Mr. Makhijani's testimony principally relates to "technical/safety" contentions, which are scheduled for hearing in October and November of 2005, "counsel for all parties will have ample opportunity to study his testimony and to incorporate it in their planning for litigation of the technical/safety contentions." (*Id.* at 7.) In addition, NIRS/PC suggest that the filing dates for

summary disposition motions and responses can be adjusted to accommodate the extended discovery period. (*Id.*)

III. DISCUSSION

The request of NIRS/PC for an extension of the discovery period through the week of November 15, 2004 does not meet the "good cause" standard set forth in 10 C.F.R. § 2.307(a). Section 2.307(a) provides, in relevant part, that such time limits "may be extended or shortened either by the Commission or the presiding officer for *good cause*, or by stipulation approved by the Commission or the presiding officer." 10 C.F.R. § 2.307(a) (emphasis added). Consistent with this requirement, the Licensing Board provided in its initial prehearing order that "[a] motion for extension of time must . . . demonstrate appropriate cause that supports permitting the extension." Initial Prehearing Order at 7. Finally, the Commission stated in the Hearing Order for this proceeding that "to avoid unnecessary delays in the proceeding, the Licensing Board should not grant requests for extensions of time absent *unavoidable and extreme circumstances*." 69 Fed. Reg. at 5877 (emphasis added).⁸

LES fully appreciates and respects Mr. Makhijani's desire and decision to assist his ailing mother. The abrupt and unfortunate decline in the health of a seriously ill parent is no doubt a special and extenuating circumstance; LES would not think or suggest otherwise. It appears, however, that Mr. Makhijani's unavailability in the coming weeks is due primarily to his involvement in a slew of other activities, which none of appears to be more pressing than his commitment to be a witness in this proceeding. From LES's perspective, those other activities do not provide "good cause" for a month-long delay of Mr. Makhijani's deposition. In this regard, it

⁸ See also CLI-98-12, 48 NRC 18, 21 (1998) (stating that licensing boards should grant extensions of time "only when warranted by unavoidable and extreme circumstances"); *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 342.

is well-established that personal or other obligations of the sort enumerated by NIRS/PC in their motion (*see* NIRS/PC Mot. at 3-7, ¶¶ a.-r.) are *not* "unavoidable and extreme circumstances" for the purpose of showing "good cause" for a time extension in an NRC adjudicatory proceeding. *See, e.g., Texas Utils. Generating Co. (Comanche Peak Steam Electric Station Units 1 and 2), LBP-82-18, 15 NRC 598, 599 (1982) (quoting CLI-81-8, 13 NRC 452, 454 (1981)) (stating "the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations")*.

NIRS/PC and Mr. Makhijani had ample notice and time to ensure that Mr. Makhijani's deposition would be conducted during the time period agreed to by the parties in late July and subsequently endorsed by the Board. The parties began discussing the availability of witnesses for deposition purposes over three months ago. Indeed, on June 28, 2004, counsel for LES contacted the other parties, informing them that "the timeframe for conducting depositions will likely fall in the mid-September to early-October window." *See* E-mail from J. Curtiss to T. Fox, D. Pato, L. Lovejoy, and L. Clark, "Subject: Deposition Schedule" (June 28, 2004) (Attachment 1). Counsel for LES added that, "[i]n the interest of providing ample notice of such possibility for scheduling purposes, I would ask if you could identify dates during this period when the following individuals would be available for depositions." *Id.* Among the individuals listed were Mr. Makhijani. It is noteworthy that NIRS/PC indicated that Mr. Makhijani would not be available for depositions until October due to competing obligations in the mid to late-September timeframe. Now, similar competing obligations also purportedly preclude Mr. Makhijani's availability for preparation and depositions through mid-November of 2004. Notably, counsel for LES expressed his concern regarding the delay of Mr. Makhijani's deposition in an October 5, 2004 e-mail to counsel for NIRS/PC. *See* E-mail from J. Curtiss to L. Lovejoy (Oct. 5, 2004) (Attachment 2).

In view of Commission policy and precedent, Mr. Makhijani's "already scheduled commitments" simply do not constitute "unavoidable and extreme circumstances" for purposes of a "good cause" showing. Indeed, when confronted with "already scheduled commitments," LES expert witnesses, including one witness from Britain and two witnesses from France, rescheduled those commitments specifically to make themselves available for depositions during the time period specified by the Board. Additionally, in two instances in which LES witnesses proved to be unavailable, LES proceeded to identify and/or present alternate witnesses in order to meet the Board's deposition schedule. These efforts stand in stark contrast to those of NIRS/PC.⁹ Obligations of the parties and witnesses in this case cannot be subjugated to other potential obligations.

Mr. Makhijani's unavailability is of substantial concern to LES in several respects. First, the Commission has made clear its expectation that the Licensing Board will adhere to the schedular milestones set forth in the Commission's Hearing Order. This necessitates adherence to an aggressive schedule that provides little room or opportunity for delay. In this regard, LES is concerned that extending the discovery period by a month solely to accommodate Mr. Makhijani's "already scheduled commitments" could adversely impact the abilities of the parties and the Board to meet their respective obligations under the General Schedule.

Second, Mr. Makhijani will be testifying on behalf of NIRS/PC with respect to four of the eight admitted NIRS/PC contentions. Three of the contentions on which Mr. Makhijani will testify relate to the disposition of the depleted uranium tails to be generated by

⁹ Ironically, Mr. Makhijani plans to "deliver a paper on *uranium enrichment*" at an October 14, 2004 meeting (sponsored in part by NIRS) in Chicago, and to assist other public interest groups in October and early November, yet he cannot seem to find time for a deposition on behalf of NIRS/PC in this uranium enrichment licensing proceeding. (See NIRS/PC Mot. at 4, ¶ g.) Additionally, he has allocated time for business development activities on behalf of the Institute for Energy and Environmental Research that he heads. (See *id.* at 3, ¶ d.), yet he avers that he lacks sufficient time to support preparation and a deposition for his NIRS/PC.

the proposed facility (*i.e.*, the plausibility and cost associated with the disposition of such tails). In particular, Mr. Makhijani has been identified by NIRS/PC as their expert on the proper waste classification of depleted uranium under 10 C.F.R. Part 61, an issue which is central to the NIRS/PC tails-related contentions. It is imperative that LES become acquainted with the opinions and conclusions regarding this issue as soon as practicable (*i.e.*, within the designated deposition period). Indeed, NIRS/PC will have had the benefit and advantage of probing, through the deposition process, the expert opinions and conclusions of LES's witnesses on *all* admitted NIRS/PC contentions by October 15, 2004. As a matter of fairness, therefore, LES must have the same opportunity. While NIRS/PC are correct in noting that the evidentiary hearing on technical/safety contentions is scheduled for late-2005, this does not excuse their failure to comply with the schedular obligations imposed by the Commission and Licensing Board. Given the tight time constraints under which the parties are operating, and the other intervening obligations the parties must meet between now and late-2005, such compliance is essential.

Finally, the unavailability of Mr. Makhijani until mid-November reflects a broader pattern of non-responsiveness on the part of NIRS/PC to date. To begin with, NIRS/PC failed to meet their mandatory disclosure obligations under 10 C.F.R. § 2.704(a), a fact which required LES to file a motion to compel all required Section 2.704(a)(1) disclosures by NIRS/PC.¹⁰ In addition, in depositions conducted and interrogatory responses supplied to date,

¹⁰ In their motion, NIRS/PC state that they "have until this instance sought no extensions of the Commission's and Board's schedule and have met every applicable date called for by such schedule." (NIRS/PC Mot. at 7.) The fact of the matter is that NIRS/PC did not comply with their mandatory disclosure obligations -- which required them to disclose all relevant documents by September 3, 2004 -- until the day after LES filed a motion to compel on September 29, 2004 requesting: (1) all individuals likely to have information relevant to any admitted NIRS/PC contention; (2) all relevant documents not previously identified or produced by NIRS/PC; and (3) a privilege log. See "Applicant's Motion to Compel

NIRS/PC witnesses have almost uniformly indicated that they are still reviewing relevant materials, and that their analyses and opinions are still "in development."¹¹ Again, because of the non-responsiveness of the NIRS/PC witnesses to their obligations, LES was required to file yet another motion to compel identification of the facts and opinions on which NIRS/PC witnesses are expected to testify.¹² Consistent with this trend, NIRS/PC now comes before this Board with the instant request for an extension.

By contrast, in depositions conducted to date, LES expert witnesses have been able and willing to speak to the facts, opinions, and conclusions on which they expect to testify. Again, this is an issue of fundamental fairness. NIRS/PC should not be permitted to "pick the brains" of LES witnesses (based in large part on the substantial documentation provided by LES as part of its mandatory disclosures), while the analyses and conclusions of their own expert witnesses (and the materials on which they rely) remain undisclosed or otherwise are "in development."

IV. CONCLUSION

For the reasons stated above, NIRS/PC have not demonstrated "good cause" for the requested extension of the deposition period and discovery schedule. LES, therefore, opposes the NIRS/PC motion, and submits that the Licensing Board should compel NIRS/PC to

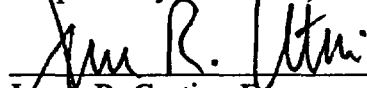
Additional Section 2.704(a) Disclosures by Nuclear Information and Resource Service and Public Citizen" (Sept. 29, 2004).

¹¹ See, e.g., "Responses on Behalf of Petitioners Nuclear Information and Resource Service and Public Citizen to Interrogatories By Applicant Louisiana Energy Services, L.P." (Sept. 23, 2004) at 6, 13, 17 (failing to provide the substance of the facts and opinions, in addition to summaries of the grounds for those opinions, of three NIRS/PC witnesses, and noting that the witnesses' opinions are "in development" or incomplete).

¹² See "Applicant's Motion to Compel Response to Interrogatories By Nuclear Information and Resource Service and Public Citizen" (Oct. 4, 2004).

make Mr. Makhijani available for depositions during the specified time period (*i.e.*, by October 15, 2004). LES is willing to make any accommodations reasonably necessary to ensure that Mr. Makhijani's deposition is taken during this timeframe (*i.e.*, LES is prepared to take the deposition at a time and place specified by NIRS/PC so long as it occurs within the agreed-upon schedule).¹³ If NIRS/PC elect to provide an alternate witness, as LES has done on more than one occasion, LES is willing to make the same accommodations to ensure the timely deposition of that witness.

Respectfully submitted,



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Dated at Washington, District of Columbia
this 7th day of October 2004

¹³ For example, upon review of the ostensible conflicts cited by Mr. Makhijani, it appears that, following his presentation on October 15, 2004 in Chicago (at an event co-sponsored by NIRS), which concludes at 12:30 p.m., Mr. Makhijani would be available for deposition that afternoon. A deposition of Mr. Makhijani could be scheduled at the Chicago offices of Winston & Strawn beginning at 2:00 p.m. that afternoon and, if necessary, continuing on October 16th or 17th. Indeed, while the NIRS/PC motion states that Mr. Makhijani is scheduled to fly to San Francisco on the evening of October 15th, the motion indicates that the Presidential Advisory Committee to which Mr. Makhijani is to help make a presentation is not scheduled to meet until October 19, 2004. Further, there appears to be sufficient flexibility in Mr. Makhijani's schedule prior to October 15th to allow him prepare for a deposition on that date.

Stovall, Martha

From: Curtiss, James
Sent: Monday, June 28, 2004 5:32 PM
To: Tannis Fox (E-mail); David Pato (E-mail); Lindsay A. Lovejoy Jr. (E-mail)
Cc: Lisa Clark (E-mail)
Subject: Deposition Schedule

It is likely that LES will want to schedule depositions for those experts identified, respectively, in the NMED, NMAG, and NIRS/PC petitions/replies. Understanding that a final determination on conducting such depositions cannot be made until the Board issues its Order on the admissibility of contentions, and further understanding that we have not yet discussed a proposed discovery plan, it appears that the timeframe for conducting depositions will likely fall in the mid-September to early-October window. In the interest of providing ample advance notice of such a possibility for scheduling purposes, I would ask if you could identify dates during this period when the following individuals would be available for depositions:

NMED	Robert Alvarez George Anastas
NMAG	Allen L. Messenger
NIRS/PC	William J. Weida George Rice David Osterberg Arjun Makhijani Paul Fenn

Thank you in advance.

Jim Curtiss

Curtiss, James

From: Curtiss, James
Sent: Tuesday, October 05, 2004 12:24 PM
To: Lindsay A. Lovejoy Jr. (E-mail)
Cc: Christopher D. Coppin (E-mail); David Pato (E-mail); Steve Farris (E-mail); Glenn Smith (E-mail); Tannis Fox (E-mail); Lisa Clark (E-mail); Angela Coggins (E-mail)
Subject: Availability of Makhijani for Deposition; Document Disclosures

Lindsay:

I am concerned about our inability to schedule a deposition of Arjun Makhijani. It has been over a week since you indicated that he was unavailable for the previously-agreed deposition dates (October 5 and 6). You further indicated on numerous occasions over the past week that you were endeavoring to contact him to reschedule the deposition. That apparently has not occurred. The Board has clearly stated its intent that all depositions be completed by October 18th. If Mr. Makhijani is unavailable to be deposed during this period, we would object to his being called as a witness. If you have an alternate witness, please advise as to his availability to be deposed prior to October 18th. As we discussed when Messrs. Makhijani and Komanoff were scheduled for depositions in the last 2 weeks of the deposition period, we were concerned about pushing these key depositions so late in the process, and the current difficulty in arranging Mr. Makhijani's deposition was precisely the reason for our concern.

We also expect all relevant documents identified during the depositions to be provided promptly. The deposition of Mr. Rice on September 16 identified several such documents, including the "blue book" that he brought with him to the meeting, that are relevant to his contention. We expect these documents to be timely provided, and in no event not later than the 14-day schedule that we agreed upon this week for updating document disclosures.

Please contact me if you wish to discuss this further. If we cannot reach a resolution of the foregoing issues, we will have no choice but to bring the matter to the Board for resolution.

Jim Curtiss

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	Docket No. 70-3103-ML
)	
Louisiana Energy Services, L.P.)	ASLBP No. 04-826-01-ML
)	
(National Enrichment Facility))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "ANSWER OF LOUISIANA ENERGY SERVICES, L.P. TO MOTION FOR MODIFICATION OF DEPOSITION SCHEDULE ON BEHALF OF PETITIONERS NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN" in the captioned proceeding have been served on the following by e-mail service, designated by **, on October 7, 2004 as shown below. Additional service has been made by deposit in the United States mail, first class, this 7th day of October 2004.

Chairman Nils J. Diaz
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Washington, DC 20555-0001

Commissioner Edward McGaffigan, Jr.
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Commissioner Jeffrey S. Merrifield
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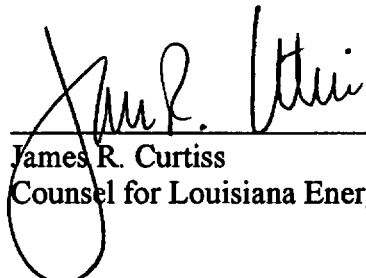
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