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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
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

RESPONSE BY PETITIONERS
NUCLEAR INFORMATION AND RESOURCE SERVICE
AND
PUBLIC CITIZEN
TO NRC STAFF MOTION TO COMPEL
NIRS/PC RESPONSES TO INTERROGATORIES AND
ESTABLISH DEADLINES FOR SUPPLEMENTARY RESPONSES

Preliminary statement

This memorandum is filed on behalf of Petitioners Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") in response to the NRC Staff Motion to Compel NIRS/PC Responses to Interrogatories and Establish Deadlines for Supplementary Responses, dated October 7, 2004, pursuant to the Order of the Atomic Safety and Licensing Board (the "Board") dated October 8, 2004.

Factual background

The Staff of the Nuclear Regulatory Commission ("NRC Staff") move to compel further interrogatory answers by NIRS/PC concerning the testimony of NIRS/PC's expert witnesses. In addition, NRC Staff request that a deadline be fixed for the filing of supplemental interrogatory answers. Some factual background is in order.

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SECY-02

The Memorandum and Order on August 16, 2004, contains a schedule for further proceedings in accordance with the hearing order of the Commission, dated January 30, 2004 (69 Fed. Reg. 5873)(Feb, 6, 2004). Under that schedule initial document production was set for September 2, 2004; interrogatories were to be propounded by September 9, 2004; and interrogatory responses were to be served on September 23, 2004. In addition, depositions are to be concluded by October 18, 2004.

Pursuant to the schedule, Applicant ("LES") produced certain documents on September 2, 2004. Many of these documents are marked as "proprietary" by LES; clearly, almost none of them were publicly available. These documents were needed for preparation of expert testimony. They were copied as quickly as possible, shipped by express, and arrived at the offices of the NIRS/PC expert witnesses on September 7. Thus, expert witnesses for NIRS/PC first received the documents produced by Applicant after the Labor Day weekend.

Two days later, on September 9, NRC Staff propounded interrogatories, among other things, asking NIRS/PC, with respect to each admitted contention, to state the entirety of NIRS/PC's testimony at the forthcoming hearing and to identify all exhibits in this case. Answers were due on September 23, 2004. NIRS/PC submit that to expect that all investigation would be conducted and opinions finalized between September 7 and 23, so that definitive statements of testimony and exhibits could be delivered by September 23, is unrealistic.

It should be noted that some information needed to complete expert investigations has not yet been produced by the Applicant. The Applicant has refused discovery about economic matters, and such information must be sought by motion, which NIRS/PC have done by Motions to Compel, filed on October 4, 2004, and October 8, 2004. The Applicant has also declined to answer several interrogatories about its claimed "plausible strategy" for disposition of depleted

uranium, and, again, such information must be obtained by motion. See NIRS/PC Motion to Compel, served October 4, 2004. Further, at the deposition of Applicant's experts, George Harper and Roger Peery, on September 17, 2004, counsel for NIRS/PC first learned that a geologic fault—a potential fast flow path—had been located close to the proposed site of the National Enrichment Facility. (Tr., Sept. 17, 2004, at 91). Counsel for the Applicant was asked to produce the report concerning the fault and said that it would be done. (id.) These materials have not been produced. In addition, NIRS/PC have been advised that Revision 3 to the Application has been filed, but it is not yet publicly available. Thus, expert witnesses for NIRS/PC do not yet have access to substantial information that is necessary for them to prepare their testimony.

In addition, Dr. Arjun Makhijani, a key witness for NIRS/PC has been required to travel to India on a family emergency; his mother, who was ill, has now passed away, and there are certain unavoidable duties which he must attend to. He is at present out of reach and not able to participate in this proceeding, although it is hoped that he will return to the United States by October 22. Dr. Makhijani has an important role in preparation of expert testimony on several contentions.

It should be borne in mind that the August 16 Memorandum and Order does not require that interrogatory answers served on September 23, 2004, contain final and definitive expert testimony. Neither does it require that all experts have finished all of their work by the date of their depositions.

Under the applicable rules, a party is under a duty to respond to an interrogatory with information thereafter acquired within a reasonable time after learning that the previous "response is in some material respect incomplete or incorrect." (10 CFR 2.705(e)). Under this

rule, NIRS/PC will be required to supplement its interrogatory answers when its expert witnesses form or modify their opinions.

The August 16, 2004 Memorandum and Order also provides for the filing of prefiled direct testimony on December 30, 2004, at which time experts will express their opinions in support of the environmental contentions. The order still does not require that experts discontinue their investigations at that date.

Argument

Interrogatory No. 3 of the NRC Staff interrogatories, filed on September 9, 2004, inquires as follows:

“Interrogatory No. 3: Identify any person you will use as a witness in this proceeding to testify regarding the admitted NIRS/PC contentions. If you rely on any such person as an expert witness, state the details of each witness’s education, professional qualifications, and employment history; state the subject matter on which each of the witnesses is expected to testify at the hearing; describe the facts and opinions to which each witness is expected to testify, including a summary of the grounds for each opinion; and identify all documents, data, or other information which each witness has reviewed and considered or is expected to rely on for his or her testimony.” NRC Staff interrogatories and request for admissions to NIRS/PC, Sept. 9, 2004, at 3.

On September 23, 2004, NIRS/PC filed interrogatory answers, stating that, in view of the forthcoming depositions, the schedule for submission of prefiled direct testimony, and the previous identification of the documents to be relied upon by the NIRS/PC experts, NIRS/PC object to responding further at this time. As deposition testimony has shown, some NIRS/PC experts have not yet completed their opinions. Even today, the experts have only had the Applicant’s documents for about a month, and NIRS/PC are still seeking to obtain some important items.

NRC Staff request that the Board set a deadline for supplementation of interrogatory answers with regard to expert testimony, suggesting the date November 12. (NRC Staff Mot. 4-5). However, Rule 705(e) calls for supplementation by any party at any time when new information is forthcoming, and NIRS/PC suggest that it would be a backward step to eliminate that requirement.

The Board, however, may deem it appropriate to set a time for the delivery by all sides of interrogatory answers, stating in substance the anticipated testimony of the expert witnesses. Such an order, we submit, should not direct that the experts may not continue their work and develop their views further, but should call for a good-faith statement of opinions as they stand at the date specified.

To fix such a date requires projection of some difficult factors. After consulting with the NIRS/PC experts (except Dr. Makhijani), NIRS/PC suggest that such an order could be usefully applied with a filing date of November 30, 2004. Any earlier date might give inadequate time to obtain disputed discovery documents. Any later date may come too close to the existing date for prefiled direct testimony.

We have received a memorandum from the Applicant, LES, supporting the motion by NRC Staff but requesting that a deadline be set at October 18—even earlier than the date sought by NRC Staff, which is November 12. LES accuses NIRS/PC of “pernicious non-compliance.” (LES Br. 3). However, the noncompliance cannot all be laid at NIRS/PC’s doorstep. Dr. Makhijani’s absence is unavoidable, and counsel have been advised that he is not scheduled to return until October 22. Thus, the October 18 date sought by LES would create an impossible requirement. Moreover, the other expert witnesses are still awaiting materials from LES, and the September 30 version of the license application remains unavailable from NRC. To propose a

response date of November 30 still requires the assumption that these disclosure issues are all resolved well before that date, so that NIRS/PC's experts can do their work.

Conclusion

The interrogatory answers filed by NIRS/PC under the schedule for this proceeding conform to the rules. The rules also require supplementation when the experts' testimony has further developed. If the Board should deem it appropriate to fix a date for the supplementation of NIRS/PC's responses to interrogatories stating the substance of expert testimony, NIRS/PC request that the date be November 30, 2004.

Respectfully submitted,



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October 14, 2004

CERTIFICATE OF SERVICE

Pursuant to 10 CFR § 2.305 the undersigned attorney of record certifies that on October 14, 2004, the foregoing Response by Petitioners Nuclear Information and Resource Service and Public Citizen to NRC Staff Motion to Compel NIRS/PC Responses to Interrogatories and Establish Deadlines for Supplementary Responses was served by electronic mail and by first class mail upon the following:

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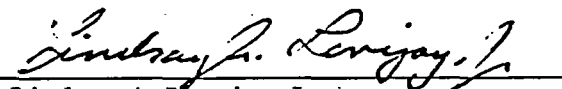
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