

October 12, 2005

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

**DOCKETED
USNRC**

October 13, 2005 (7:45am)

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.

ASLBP No. 04-826-01-ML

**MEMORANDUM ON BEHALF OF INTERVENORS
NUCLEAR INFORMATION AND RESOURCE SERVICE
AND PUBLIC CITIZEN ("NIRS/PC")
IN RESPONSE TO
MOTION IN LIMINE ON BEHALF OF LOUISIANA ENERGY SERVICES, L.P.
CONCERNING THE EXHIBITS OF NIRS/PC
AND
STAFF MOTION IN REGARD TO OBJECTIONS TO NIRS/PC HEARING EXHIBITS**

Preliminary statement

This memorandum is filed on behalf of Intervenor Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") in response to the Motion in Limine on Behalf of Louisiana Energy Services, L.P. ("LES") Concerning the Exhibits of NIRS/PC, and Staff Motion in Regard to Objections to NIRS/PC Hearing Exhibits, both served on October 7, 2005.

Factual background

On the eve of the hearings scheduled for October 24, 2005, Applicant LES and Commission Staff have filed additional companion motions, seeking to reduce the litigated matters to a minimum number by eliminating adverse evidence from the record. The premise of LES's motion and Staff's motion, both herein addressed, is that the Atomic Safety and Licensing Board (the "Board") should consider only a few issues in the process toward swift issuance of a

SEC4041

SEC402

license and that the Government should not be preoccupied with the actual costs and risks of the project envisioned by LES.

Argument

The exhibits offered in the forthcoming hearing are not only relevant to issues presented by NIRS/PC and admitted by the Board but critical for the Board's consideration in this licensing proceeding. As has been pointed out, the issues before the Board involve whether LES has presented a plausible strategy for tails dispositioning (including deconversion, transportation, and disposal) and has presented a credible estimate of the cost, on the basis of which decommissioning financial assurance can be determined. The Board on October 4 excluded certain of Dr. Makhijani's testimony on such matters; however, the Board at that time made clear that certain issues are definitely presented for determination, including, among others:

1. Cost of effectuating LES's proposed strategy for deconversion, transportation, and disposal (Memorandum and Order, Oct. 4, 2005, at 5-6);
2. Cost estimates for a strategy for deconversion, transportation, and disposal that would, in the view of NIRS/PC experts, be "plausible" (id. 5-6);
3. Elements of decommissioning or disposal costs not included in DOE's cost estimates for the DOE disposal option (id. 7-8);
4. Whether near-surface disposal for depleted uranium from the NEF will ultimately be appropriate (Memorandum and Order, Oct. 4, 2005, at 11-12);
5. The need for additional environmental analyses before a disposal option for depleted uranium could be selected (id. 11);
6. The acceptability of shallow-land burial of depleted uranium from the NEF (id. 12);

7. Reasonableness of LES reliance on cost information from WCS and Envirocare (id. 13);
8. The need for geologic repository disposal (id. 14).

The exhibits that LES and Commission Staff object to are all relevant and admissible in connection with such issues.

To simplify the Board's consideration of the numerous objections interposed by LES, NIRS/PC have prepared a Response, consisting of the NIRS/PC exhibit list with annotations, specifying the nature of the objections interposed by LES and Commission Staff and showing the grounds on which each disputed exhibit is, nonetheless, admissible. It is attached hereto. A few general observations are in order:

LES's lengthy discussion of the supposed differences between NIRS/PC's identification of relevant documents in interrogatory answers and testimony (LES Mot. 2-4) omits the main point—that each presentation by NIRS/PC referred to and incorporated the reports by Dr. Makhijani and Dr. Smith, filed in this case on November 24, 2004, and July 5, 2005, which in turn rely upon numerous of the documents presented as exhibits. See Responses on Behalf of NIRS/PC to Applicant's Interrogatories dated July 8, 2005, at 2, July 19, 2005; Responses of NIRS/PC to Commission Staff Interrogatories dated July 8, 2005, at Responses 1, 6, 9-13, 15, 17-19, 21-23, July 19, 2005; NIRS/PC Disposal, Deconversion, Contingency, and Transportation direct testimony at 5-6 (Sept. 16, 2005). Thus, the alleged variation in lists of documents relied upon does not exist. Neither can there be an objection to the deposition exhibits identified by NIRS/PC, since they are independently identified and qualified in deposition testimony, which has been designated pursuant to 10 CFR 2.704(c)(1)(ii).

LES objects that the “performance history” of third parties should not be considered (LES Mot. 6). NIRS/PC offer the history of certain entities with respect to environmental cleanup principally as it relates to the contingency allowance that should be added to a cost projection. The Board has stated that it will entertain evidence of items missing from the calculation of costs of tails dispositioning by DOE. (Memorandum and Order, Oct. 4, 2005, at 7-8). Such evidence bears directly upon the contingency allowance applicable to DOE’s estimate.

LES complains of documents concerning the cost of deconverting depleted uranium hexafluoride to depleted uranium dioxide, as was once the Commission’s preferred strategy. (See NIRS/PC Ex. 248). NIRS/PC recognize that this question has been placed outside the scope of this proceeding. However, to reconcile Dr. Makhijani’s testimony in support of the estimates contained in his October 11, 2005 rebuttal testimony with the earlier estimates contained in his November 2004 report, the documents referring to deconversion to uranium dioxide and ceramic encapsulation should remain in the record.

LES complains of evidence in the NIRS/PC exhibits of emerging uranium health risks (LES Mot. 7), but LES has opened the door to such evidence. LES’s own witness, Thomas Potter, in LES’s direct testimony on disposal, has testified that the dose from uranium is different and less harmful than the dose from transuranic elements. (LES disposal direct testimony at 14-15). LES seeks, by such evidence, to obtain approval of near-surface disposal of depleted uranium. Since LES has injected this question of health impacts of uranium into the case, NIRS/PC should be permitted to respond to Mr. Potter’s testimony, showing that it is based upon obsolete data and conflicts with the broad scientific consensus.

Similarly, some of the NIRS/PC exhibits concern the financial pressures that have shifted currency values as between the euro and the dollar. It is understood that the parties have agreed

to express cost estimates in 2004 dollars. However, LES's own witness, Thomas LaGuardia, stated that LES and Cogema have reached an agreement that expresses deconversion costs in dollars, so that "Euros don't affect it any longer." (LaGuardia dep. at 50-51, Aug. 26, 2005). NIRS/PC should be allowed to respond and to show that currency values do matter. Since the facts do not bear out the supposed agreement referred to by Mr. LaGuardia, NIRS/PC should be permitted to show the financial pressures that create an ongoing currency risk.

Again, licensing delays are brought out in several of the NIRS/PC exhibits, and these delays bear upon the likely schedule of availability of deconversion facilities and disposal facilities as well. Such delays show the need to apply a generous contingency allowance to the DOE cost estimate, given that no evidence in support of such allowance has been forthcoming from LES. The Board has specifically allowed presentations about matters that are omitted from the DOE cost estimate. (Memorandum and Order at 7-8, Oct. 4, 2005).

Further, the NIRS/PC exhibits contain information on the suitability of the Envirocare of Utah site and the Waste Control Specialists ("WCS") site for disposal of depleted uranium. The Board has specifically directed that the reasonableness of LES's reliance on cost estimates for disposal at such sites is an appropriate subject for evidence (Memorandum and Order at 13, Oct. 4, 2005), saying that it "goes to the heart of the matters at issue in the upcoming evidentiary hearing." (id.). Clearly, the capability of a site to contain radioactive waste is relevant to the reasonableness of LES's reliance on cost estimates for disposal at such site. Moreover, LES has again injected the issue into the proceeding. In its direct testimony on disposal, LES has expressly urged the Board to accept Envirocare as a suitable disposal site, stating that "[w]e have no reason to doubt the technical feasibility of near-surface disposal of large volumes DU308 at a licensed low-level radioactive disposal facility. By way of example, Envirocare of Utah

("Envirocare") has confirmed for LES that the existing licenses and permits for Envirocare's Clive, Utah facility currently allow Envirocare to dispose of DU3O8 . . . " (LES Disposal direct testimony at 15). Further, LES has cited the WCS facility as the basis for its estimate of disposal costs: "Specifically, in its January 14, 2005 Memorandum of Agreement ("MOA") with LES, WCS indicated that anticipated disposal prices for depleted uranium waste disposal at the WCS site would range from approximately [citing figures]. See LES Exhibit 105." (id. 16-17). Where LES has volunteered that specific facilities would serve well as disposal sites for depleted uranium from the LES enrichment plant, NIRS/PC cannot be precluded from showing that the facilities named by LES are, in fact, not suitable for such disposal.

LES and Commission Staff complain also that they do not understand the relevance of certain of the NIRS/PC exhibits. (LES Mot. 8-9, NRC Staff Mot. 3-4). The attached summary of NIRS/PC's position on each of the contested exhibits should enlighten LES and Staff and may assist the Board in ruling on objections. It should be noted that the exhibits that LES has objected to include items such as the DOE cost estimate (NIRS/PC Ex. 223) and the April 8, 2005 submission to Staff that explains the calculation of LES's cost estimates. (NIRS/PC Ex. 188). NRC Staff have objected to LES's submissions explaining the calculation of deconversion costs. (NIRS/PC Ex. 238, 239). The claim of inability to understand the relevance of the NIRS/PC exhibits should be considered in the light of such objections.

The objection is also made that some of the exhibits were stricken by the Board's Memorandum and Order dated October 4, 2005. (LES Mot. 10; NRD Staff Mot. 3). In fact, the great majority of the NIRS/PC exhibits are referred to and relied upon in the November 2004 and July 2005 reports by Dr. Makhijani and Dr. Smith. (NIRS/PC Ex. 190 and 225). The direct testimony by Dr. Makhijani that referred to and incorporated by reference those two reports has

not been stricken by the Board. (See NIRS/PC Disposal direct testimony at 5-6; Deconversion direct testimony at 5-6). Consequently, the testimony incorporating those exhibits has not been stricken.


It is dismaying to see LES and NRC Staff make requests that conflict with good scientific practice in judicial proceedings and other contexts—*viz.* to require that an investigator cite and make available the source materials underlying his work, as Dr. Makhijani and Dr. Smith have done here.

NIRS/PC have responded to each of LES's and Commission Staff's objections in the attached Response document. Where an exhibit is relevant to particular issues, it is so stated. NIRS/PC believe that a review of the attached Response will enable the Board to identify the relevance of each of the NIRS/PC exhibits to the matters in issue.

Conclusion

For the reasons set forth herein and in the attached Response document, the objections of LES and Commission Staff should be denied and the NIRS/PC Exhibits listed in the Response document should be admitted to the record in this case.

Respectfully submitted,


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October 12, 2005

CERTIFICATE OF SERVICE

Pursuant to 10 CFR § 2.305 the undersigned attorney of record certifies that on October 12, 2005, the foregoing Memorandum on behalf of Intervenor Nuclear Information and Resource Service and Public Citizen in Response to Motion in Limine on Behalf of Louisiana Energy Services, L.P. concerning the Exhibits of NIRS/PC and Staff Motion in Regard to Objections to NIRS/PC Hearing Exhibits was served by electronic mail and first class mail upon the following:

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