RAS 11197

February 10, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	Docket No. 70-3103
Louisiana Energy Services, L.P.	ASLBP No. 04-826-01-ML

MOTION FOR LEAVE TO APPEAR, ARGUE, GIVE EVIDENCE AND CROSS-EXAMINE ON BEHALF OF INTERVENORS NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN

Preliminary statement

This motion is presented on behalf of Intervenors, Nuclear Information and Resource Service and Public Citizen ("NIRS/PC"), seeking leave to appear, argue, give evidence, and cross-examine witnesses testifying on behalf of Applicant, Louisiana Energy Services, L.P. ("LES"), and Commission Staff on certain issues scheduled for the mandatory hearing on March 6, 2006, in Hobbs, New Mexico.

Factual background

NIRS/PC have vigorously contested the appropriateness of LES's proposed strategies for dispositioning depleted uranium and LES's estimates of the costs of such strategies. The Atomic Safety and Licensing Board (the "Board") has admitted several contentions addressing the appropriateness of such strategies and the asserted costs thereof. The Board has broadly stated that "to the extent NIRS/PC takes issue with cost estimate information provided by LES since January 7, 2005, having already admitted a contention amendment on this subject, the Board will evaluate any relevant information placed before it on that matter, including material relating to

post-January 7, 2005 LES submissions." (Memorandum and Order, June 30, 2005, at 16). In addition, on October 19, 2005, the Commission issued a decision, specifically directing that the environmental impacts of LES's proposed disposal strategies be scrutinized. (CLI-05-20, at III).

The need is great to establish an accurate decommissioning cost estimate. Under applicable regulations, the estimate establishes the amount of LES's decommissioning financial assurance. (10 CFR 70.25(c)(1), (d)). Other than such security, LES itself has extremely limited assets, apart from the proposed enrichment plant. As the Atomic Safety and Licensing Board in the Claiborne case stated, LES's lack of assets places a premium on accurately estimating disposal costs *before* a license is issued:

> As we detailed in LBP-96-25, 44 NRC at 378-80, LES is a newly formed entity created to build and operate the CEC. It is structured as a limited partnership and LES has no significant independent assets. Id. at 398-99. Similarly, none of the LES general or limited partners are corporations of worth. Id. Further, under the LES Partnership Agreement, as well as general principles of corporate and partnership law, the corporate parents and other affiliates of the LES general and limited partners have no liability for the obligations of the partnership. Id. at 402 n. 30. In these circumstances, we cannot conclude that the Applicant's tails disposal estimate need only be a rough approximation that can be adjusted in the future upon periodic reviews by the Applicant. (*Louisiana Energy Services,* LBP-97-3, 45 NRC 99, 119 (March 7, 1997).

Here, there is evidence that, if depleted uranium from LES's enrichment operations is disposed of in a geologic repository, the cost of disposal will exceed LES's estimate by a factor of five to seven, and the total cost of dispositioning depleted uranium may exceed LES's estimate by a factor of three to four or more. (See Makhijani disposal rebuttal at A.16, Oct. 25, 2005). Thus, if LES is licensed and commences operations on the basis of LES's own cost estimates, and it is later found that deep disposal is required, there is a major question as to LES's ability to furnish the needed additional security. Notably, neither LES nor the Commission Staff have challenged Dr. Makhijani's estimates of the cost of deep geologic

disposal. The estimates presented by Dr. Makhijani are the only deep disposal cost estimates that have been offered in evidence.

In the October 24-27, 2005 hearings, witnesses testified that, should LES's dispositioning plans be infeasible, the costs of different methods could be addressed in periodic adjustments of the decommissioning cost estimate pursuant to 10 CFR 70.25(e). Thus, in discussing deconversion, Commission Staff witness Mayer stated:

> WITNESS MAYER: . . . At the same time the NRC has the ability, during the annual updates of the financial assurance mechanism, if it becomes clear that the NEF facility, I'm sorry, if the deconversion facility will not be built, that they could, at that point, then require funding for all of the cylinders over the life of the facility.
>
> In other words, they have the—
>
> JUDGE ABRAMSON: Yes, you could require—
>
> WITNESS MAYER: --ability—
>
> JUDGE ABRAMSON: --that, but what would be the sense? You only need to require them to fund what their problem is. And if it is a three year, if it is a bond good for three years, you require them to fund whatever is going to be the liability over that three year window.
>
> And then at the end of three years you adjust. Assuming there are not changes in the interim. And we will get to the change question later.
>
> WITNESS MAYER: I agree, I'm just pointing out that the NRC has a mechanism that if it suddenly becomes apparent that the facility, the deconversion facility isn't built, that they have the ability to, at that point, request the funding for the rest of the cylinders, if they wanted to. (Tr. 2145-46).

Counsel for LES then pursued the point, seeking to establish that, if LES's proposed strategy for deconversion did not succeed, the Commission could use its authority under the periodic update provision to require additional funding:

> WITNESS JOHNSON: Yes, I believe that the Applicant has provided a plausible strategy for deconversion.
>
> MR. CURTISS: And in the event that circumstances should change at some point, on any issue relative to the plausibility of a deconversion facility, do you agree with the description that has been provided by this panel, relative to the authority that the agency has, under the periodic update provision?
>
> WITNESS JOHNSON: Yes.
>
> MR. CURTISS: Thank you. (Tr. 2148-49).

Addressing disposal costs, witnesses testifying on the contingency provision were asked about the prospect that, after giving financial assurance for near-surface disposal, LES might be required to carry out deep geologic disposal. Mr. Laguardia stated that the decommissioning cost estimate might be increased upon a periodic update. (Tr. 3106, 3114-15, 3117-20). However, his testimony made clear that, if LES were in financial difficulties or decommissioning had to be carried out by a third party, it might be difficult to obtain the necessary funding to support the increased cost estimate. (Tr. 3120-25).

Staff witnesses likewise testified that, if it were determined that deep disposal is necessary, a new cost estimate and contingency allowance would be made. (Tr. 3136-37). Staff also stated that "The purpose of decommissioning funding is to ensure that there is money available to decommission the facility in the event the licensee is unavailable to do that for whatever reason. Bankruptcy might be a reason." (Tr. 3137). Staff was asked whether, upon bankruptcy, "there's no periodic update process going on, is there?" (Tr. 3137-38). Staff acknowledged that "if the bankruptcy occurred, the financial updates would have, hopefully, have dealt with those changes in the situation prior to that." (Tr. 3138). Staff had no estimate of the cost of deep disposal. (Tr. 3139-40).

Indeed, LES's latest prefiled testimony concerning cost of capital relies *entirely* on the assertion that LES's deconversion cost estimate will be repeatedly updated, and financial assurance provided, assertedly resulting in an adequate allowance for deconversion at the end of the NEF's operating life. (LES Supplemental Direct testimony A.23 at 13-14, A.25 at 16, A.26 at 16-17, A.27 at 17-18).

Clearly, LES has placed the periodic cost adjustments in the center of the dispute over decommissioning costs. The prospect of a future change in disposal strategy, requiring funding

for deep disposal, has specifically been litigated within the scope of NIRS/PC's pending contentions. Indeed, the Board itself inquired as to the operation of regulations under which the decommissioning costs may be adjusted and financial assurance augmented. (Tr. 3148).

Against this background, on January 30, 2006, the Board issued an order specifying matters that would be the subject of testimony at the mandatory hearing set for March 6, 2006, in Hobbs, New Mexico. The order requests that LES and Commission Staff address the following question, among others:

> 4. The Commission has directed the staff to investigate whether amendment of 10 C.F.R. Part 61 is required to properly address the issue of disposal of depleted uranium from an enrichment facility. In the context of its decommissioning funding plan, LES will be providing a surety, in the form of a bond, covering all decommissioning costs expected during the term of that bond. The size of that bond will be determined *a priori* upon the basis of conditions at the time of issuance or renewal. The current sizing of that bond is proposed to be based upon near-surface disposal of depleted uranium. If the Commission determines, at a future date, that near-surface disposal of depleted uranium from an enrichment facility such as the NEF is no longer appropriate, how will the bond be modified to accommodate the accompanying change in decommissioning costs? What mechanisms will be put in place at the issuance of the license to ensure that LES, which is a "single purpose" entity with no assets outside its ownership of the NEF, has the wherewithal to, and actually provides, the increased bond amount?

(Memorandum and Order, Jan. 30, 2006, at 3). The quoted paragraph recognizes that a determination that the depleted uranium requires disposal in a deep repository, rather than near-surface burial, would significantly increase the decommissioning cost estimate. Further, such an increase would require LES to increase the surety bond that secures its decommissioning obligations. The order asks what assurance LES can offer, in light of its minimal assets other than the NEF itself, that the cost of deep disposal will be bonded and secured.

Argument

The question posed by the Board in paragraph 4 of the January 30, 2006 order goes to the heart of contentions advanced by NIRS/PC. Thus, the availability of security for costs of deep disposal cannot be separated from such issues as:

1. What methods of disposal will meet the dose limits of 10 CFR Part 61?
2. In that connection, are the doses for mine disposal presented by the NRC staff in the FEIS, which neither the NRC Staff nor their consultant could reproduce, reasonable, or are they incorrect and serious underestimates as shown by evidence presented by NIRS/PC?
3. Will deep disposal in a geologic repository meet the 10 CFR Part 61 dose limits?
4. What is the probable cost of deep disposal by such methods?
5. What uncertainties affect such cost estimates?
6. What initial cost estimate should the Board adopt in light of the costs and uncertainties?

These issues are clearly encompassed within the NIRS/PC contentions litigated in the hearings held in October 2005. Thus, the issues contained in paragraph 4 of the Board's January 30, 2006 order are not uncontested matters, suitable for a mandatory hearing. Rather, they are aspects of the contested issues advanced by NIRS/PC and admitted for hearing. They should not be heard in the absence of NIRS/PC. If such issues are to be considered further by the Board, NIRS/PC should be permitted to appear, argue, cross-examine witnesses, and present testimony.

Paragraph 4 in the January 30, 2006 order suggests that "mechanisms" may be adopted to enhance the likelihood that LES will fund deep disposal at a later date. But NIRS/PC have directly challenged LES's disposal cost estimates. The statement by the Board in the Claiborne

case, quoted above, rejecting any "rough approximation" of LES's disposal costs, and the magnitude of the adjustment that would need to be made if LES's estimate were adopted and deep disposal later proved necessary, together show the necessity to apply faithfully and at the outset, and not to postpone, the regulatory requirements that the "decommissioning funding plan must contain a cost estimate for decommissioning" and that "financial assurance [be] provided in the amount of the cost estimate for decommissioning." (10 CFR 70.25(e)). NIRS/PC are entitled to participate in any hearing regarding the decommissioning cost estimate.

In *Exelon Generation Co.,* CLI-05-17 (July 28, 2005), the Commission described the correct role of the mandatory hearing in a licensing proceeding. The Commission distinguished between issues put in dispute by intervenors and matters that are the Board's statutory obligation to review:

> As the Commission's Appeal Board concluded when examining this issue many years ago, "the only reasonable interpretation" distinguishes "between *issues* in contest and *matters* which have not been placed in controversy." As we explain further below, with respect to contested issues, the Board "must resolve the controversy" itself, as a *de novo* matter. But with respect to uncontested matters, the Board must merely "decide whether the *staff's* review has been adequate to support [its] findings." (CLI-05-17 at 14)(footnotes omitted).

The Commission explained that the evidentiary standard is different for uncontested and contested matters. In general, the applicant or the Staff has the burden of proof of contested matters. A lesser standard applies to uncontested matters:

> We hold that the boards should conduct a simple "sufficiency" review of uncontested issues, not a *de novo* review. Only when resolving contentions litigated through the adversary process must the boards bring their own "*de novo*" judgment to bear. In such cases, boards must decide, based on governing regulatory standards and the evidence submitted, whether the applicant has met its burden of proof (except where the NRC Staff has the burden). But when considering safety and environmental matters not subject to the adversarial process – so-called "uncontested" issues -- the boards should decide simply whether the safety and environmental record is "sufficient" to support license issuance. (id. 18-19)(footnotes omitted).

Further, and critically in this instance, an intervenor has no right to participate in the hearing of uncontested matters:

> The scope of the intervenors' participation in adjudications is limited to their admitted contentions, *i.e.*, they are barred from participating in the uncontested portion of the hearing. (id. 34).

The Commission emphasized that this approach was intended "to ensure that the parties and adjudicatory tribunals focus their interests and adjudicatory resources on the contested issues as presented and argued by the party with the primary interest in, and concerns over the issues." (id. 35)(footnote omitted). Thus, contested issues are *only* to be presented and resolved in hearings focused upon and dedicated to such matters.

The issues addressed by paragraph 4 of the Board's order dated January 30, 2006 come within the scope of the contentions litigated in October 2005. Indeed, the same matters were addressed in the testimony at that hearing. Under the Commission's decision in CLI-05-17, the Board may hear such matters only in contested hearings, and not in mandatory hearings, where a lesser standard of proof applies and intervenors may not participate.

In this situation, NIRS/PC submit that the issues contained in paragraph 4 of the January 30, 2006 order should be heard in the format of a contested hearing. Thus, if the issues are to be heard in the March 6, 2006 hearing, NIRS/PC should be permitted to appear, cross-examine, offer testimony and other evidence, and present argument on those issues at that hearing. Alternatively, the Board may wish to direct that the issues contained in paragraph 4 shall be heard in a separate contested hearing at the Commission's headquarters in Rockville, Maryland.

Conclusion

For the reasons set forth herein, the Board should enter its order, directing that the issues contained in paragraph 4 of the January 30, 2006 order should be heard in the format of a

contested hearing. If the issues are to be heard in the March 6, 2006 hearing, then NIRS/PC should be permitted to appear, cross-examine, offer testimony and other evidence, and present argument on those issues at that hearing. Alternatively, the issues contained in paragraph 4 may be heard in a separate contested hearing at the Commission's headquarters in Rockville, Maryland.

Respectfully submitted,

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February 10, 2006

CERTIFICATE OF SERVICE

Pursuant to 10 CFR § 2.305 the undersigned attorney of record certifies that on February 10, 2006, the foregoing Motion for Leave to Appear, Argue, Give Evidence, and Cross-examine on behalf of Intervenors Nuclear Information and Resource Service and Public Citizen was served by electronic mail and first class mail upon the following:

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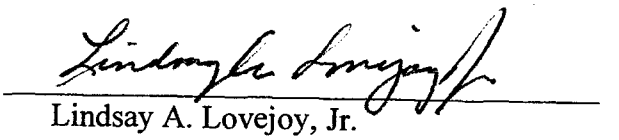

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