

December 6, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
LOUISIANA ENERGY SERVICES, L.P.) Docket No. 70-3103
)
(National Enrichment Facility)) ASLBP No. 04-826-01-ML
)
)

NRC STAFF'S MOTION IN LIMINE TO PRECLUDE
NUCLEAR INFORMATION AND RESOURCE SERVICE
AND PUBLIC CITIZEN TESTIMONY

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.323 and 2.337(a), the staff of the Nuclear Regulatory Commission ("Staff") hereby files this motion *in limine* to preclude Nuclear Information and Resources Service and Public Citizen ("NIRS/PC") from offering testimony based on the expert reports of Michael Sheehan, Arjun Makhijani, George Rice, and Charles Komanoff on matters outside the scope of the admitted contentions presently before this Atomic Safety and Licensing Board ("Board"). For the following reasons, the Staff respectfully requests that the Board issue an Order that such testimony be excluded from NIRS/PC's pre-filed testimony on the environmental contentions, which must be filed by December 30, 2004.

II. BACKGROUND

Pursuant to the Board's October 20, 2004 discovery ruling¹, on November 24, 2004, NIRS/PC filed expert reports by George Rice, Arjun Makhijani, Michael Sheehan, and Charles Komanoff, four persons it plans to use to present evidence supporting its contentions in the hearing regarding the application of Louisiana Energy Services, L.P. ("LES") to construct and

¹ Memorandum and Order (Discovery Rulings), October 20, 2004.

operate the National Enrichment Facility (“NEF”), a uranium enrichment plant.² Pre-filed testimony on environmental contentions must be filed by December 30, 2004³, and NIRS/PC has stated that the reports contain the substance of the opinions and the bases therefore to be presented in the NIRS/PC testimony.⁴ This motion seeks to preclude testimony based on portions of those expert reports which are outside the scope of the admitted contentions presently before the Board. It is important to the timely and efficient disposition of this case that the testimony be relevant.⁵ Indeed, NRC regulations call for immaterial or irrelevant evidence to be excluded so far as it is practicable.⁶ Thus, the Staff requests that the Board rule that the information in question be excluded before pre-filed testimony is filed, in order to ensure efficiency and that only relevant issues are addressed in the parties’ pre-filed testimony. Counsel have conferred in an attempt to resolve this issue but were unable to successfully come to a resolution.

III. DISCUSSION

Evidence is admissible in an NRC proceeding only if it is relevant, material, and reliable.⁷ Immaterial, unreliable, or irrelevant evidence should be segregated from admissible evidence and excluded whenever possible.⁸ Evidence outside the scope of admitted contentions is irrelevant and

² See “Expert Reports on Behalf of Nuclear Information and Resource Service and Public Citizen Pursuant to Order Dated October 20, 2004”, dated November 24, 2004. (“NIRS/PC Expert Reports”)

³ See Memorandum and Order (Memorializing and Ruling on Matters Raised in Conjunction with August 3, 2004 Conference Call and Setting General Schedule for Proceeding), August 16, 2004, Appendix A.

⁴ See NIRS/PC Expert Reports at 1.

⁵ See 10 C.F.R. § 2.337(a).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

therefore inadmissible in a Board proceeding on those contentions.⁹ Because parts of the expert reports filed by NIRS/PC on November 24, 2004 are irrelevant to the contentions presently admitted before the Board, NIRS/PC should be precluded from introducing testimony based on those portions of the expert reports. Alternatively, if such testimony is proffered by NIRS/PC before the Board rules on this motion, such testimony should be excluded.

A. Expert Report of Michael F. Sheehan

Portions of testimony in Dr. Sheehan's expert report should be precluded because they are irrelevant to this proceeding as they fall beyond the scope of the admitted contentions presently before the Board.¹⁰ The Board has admitted the following contention entitled "Need for the Facility," as EC-7:

Petitioners contend that the Environmental Report (ER) does not adequately describe or weight the environmental, social, and economic impacts and costs of operating the National Enrichment Facility (See ER 1.1.1 *et seq.*) in that:

- (A) Louisiana Energy Services, L.P.'s (LES) presentation erroneously assumes that there is a shortage of enrichment capacity.
- (B) LES's statements of "need" for the LES plant (ER 1.1) depend primarily upon global projections of need rather than projections of need for enrichment services in the U.S.
- (C) LES has referred to supply and demand in the uranium enrichment market (ER 1.1) but it has not shown how LES would effectively enter this market in the face of existing and anticipated competitors and contribute some public benefit.¹¹

⁹ See Memorandum and Order (Discovery Rulings), October 20, 2004, at 10; *Private Fuel Storage* (Independent Spent Fuel Storage Installation), Memorandum and Order (Ruling on In Limine Motions and Providing Administrative Directives), (unpublished order), 2000 WL 862622 (NRC), June 12, 2000.

¹⁰ In addition, Dr. Sheehan's expert report sets forth several conclusions but provides no scientific basis for such conclusions nor any scientific methodology from which he derived the conclusions. The Federal Rules of Evidence, rules to which the Board often looks for guidance concerning the admissibility of evidence in NRC testimony, and NRC caselaw require that expert testimony be grounded in reliable scientific principles and methods. The Staff reserves the right to object, if necessary at a later time, to Dr. Sheehan's testimony on *Daubert* grounds.

¹¹ Memorandum and Order (Rulings Regarding Standing, Contentions, and Procedural/Administrative Matters), July 19, 2004, at 43.

Little of Dr. Sheehan's expert report, which primarily deals with Urenco's corporate citizenship and competition between Urenco and USEC, fits within the three bases admitted for the contention. Testimony must be within the scope of an admitted contention, as supported by its bases, in order to be considered relevant evidence by the Board.¹² The scope of a contention "necessarily hinges upon its terms coupled with its stated bases."¹³ Because much of Dr. Sheehan's expert report goes beyond the three very specific bases supporting NIRS/PC's admitted contention, it is irrelevant and testimony based on that report should therefore be excluded. Only the testimony related to the supply of enrichment capacity, found on parts of pages 17 and 18,¹⁴ is within the scope of the admitted contention as supported by its basis and is therefore potentially relevant to this proceeding. The remainder of Dr. Sheehan's testimony is outside the scope of NIRS/PC EC-7 and is therefore inadmissible.

B. Expert Report of Arjun Makhijani

Portions of Arjun Makhijani's expert report are also outside the scope of the admitted contentions presently before the Board and should therefore similarly be excluded. The only contention presently before the Board upon which Dr. Makhijani will be testifying is NIRS/PC

¹² See Memorandum and Order (Discovery Rulings), October 20, 2004, at 10; *Public Service Company of New Hampshire, et. al.* (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 345 (1991); see also *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-03-21, 58 NRC 338, 346 (2003).

¹³ *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff'd sub nom. Massachusetts v. NRC*, 924 F.2d 31 1 (D.C. Cir.), cert. denied, 502 U.S. 899 (1991); see also *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2); *Catawba Nuclear Station*, (Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002).

¹⁴ The first two paragraphs of Section III "LEU Supply and Demand in the U.S." on page 17 and the first, second, third, and fifth paragraphs of Section III "Urenco and European Supply" on page 18 of Dr. Sheehan's expert report deal with supply of enrichment capacity and therefore fit within the first basis supporting NIRS/PC EC-7.

EC-4.¹⁵ Much of Dr. Makhijani's testimony deals with the technical contentions ("TCs") that will be decided by the Board at a later date¹⁶, and the Staff reserves the right to object to such evidence when it is offered. To the extent that NIRS/PC attempts to introduce the information in Dr. Makhijani's expert report that relates only to the TCs in its pre-filed testimony it will file on December 30, the Staff objects on the grounds that such evidence is outside the scope of the admitted contentions presently before the Board.

The scope of NIRS/PC EC-4 is narrow. It deals only with whether the ER and the Draft Environmental Impact Statement ("DEIS") discuss the environmental impacts of constructing and operating a deconversion facility, and with the DEIS's reliance on the Environmental Impact Statements ("EIS") issued in connection with the construction of two conversion plants that will convert the Department of Energy's ("DOE") inventory of depleted uranium.¹⁷ The only portion of Dr. Makhijani's expert report that deals with the environmental impacts of constructing and operating a deconversion facility and NRC's reliance on the DOE conversion plants is the portion of the expert report beginning with the sentence: "If any consideration is to be given by LES..." on

¹⁵ See Memorandum and Order (Memorializing and Ruling on Matters Raised in Conjunction with August 3, 2004 Conference Call and Setting General Schedule for Proceeding), August 16, 2004, Appendix A; see *also* "Responses on Behalf of Petitioners Nuclear Information and Resource Service and Public Citizen to Interrogatories by Applicant Louisiana Energy Services, L.P.", September 23, 2004.

¹⁶ See "Costs and Risks of Management and Disposal of Depleted Uranium from the National Enrichment Facility Proposed to be Built in Lea County, New Mexico by LES" (Protected Material), expert report of Arjun Makhijani, PhD. and Brice Smith, PhD, November 24, 2004 ("Makhijani Report"). In addition, a great deal of Dr. Makhijani's expert report, dealing with the radiological characteristics and health effects of depleted uranium, deals with the proper waste classification of depleted uranium under NRC regulations, a matter that the Board referred to the Commission under 10 C.F.R. § 2.323(f) in its July 19, 2004 ruling on the admissibility of NIRS/PC's contentions and that the Commission accepted in its August 18, 2004 Memorandum and Order. This issue is therefore presently before the Commission and not within the Board's jurisdiction at this time. See Memorandum and Order, CLI-04-25, ___ NRC ___, slip op. at 4-5, August 18, 2004.

¹⁷ See Memorandum and Order (Ruling on Late Filed Contentions), November 22, 2004, Appendix A.

page 33 of Dr. Makhijani's expert report and continuing for the next three paragraphs, including the block quote from the EIS for the Paducah, Kentucky, facility.¹⁸ The remainder of Dr. Makhijani's expert report is outside the scope of admitted contention NIRS/PC EC-4 as amended, and is therefore irrelevant to this proceeding.

C. Expert Report of George Rice

In several instances, George Rice's expert report contains information supporting bases with which NIRS/PC sought to amend its contentions in a filing on October 20, 2004¹⁹, but which were rejected by the Board in its November 22, 2004, ruling.²⁰ The sections of Mr. Rice's report that relate to bases explicitly rejected by the Board, using virtually the same language as in the proposed amendments that the Board rejected, are "Water bearing unit at 600 feet," on page 9 of NIRS/PC Expert Reports, "Zones to be monitored," on page 10, "Fault," on page 11, and "Earthquakes," also on page 11.²¹ Because the Board has rejected NIRS/PC's attempts to amend its contentions upon these bases, this information contained in Mr. Rice's Expert Report is outside the scope of the admitted contentions and is therefore irrelevant and inadmissible.

D. Expert Report of Charles Komanoff

The second section of Mr. Komanoff's expert report, "Decommissioning costs," deals with a technical contention that the Board will address in the hearing from October 24, 2005, to November 7, 2005.²² Therefore, the Staff reserves its right to object to that portion of

¹⁸ See Makhijani Report at 33.

¹⁹ See "Motion on Behalf of Petitioners Nuclear Information and Resource Service and Public Citizen to Amend and Supplement Contentions", dated October 20, 2004.

²⁰ Memorandum and Order (Ruling on Late-Filed Contentions), November 22, 2004.

²¹ *Id.* at 8-10.

²² See Memorandum and Order (Memorializing and Ruling on Matters Raised in Conjunction with August 3, 2004 Conference Call and Setting General Schedule for Proceeding), August 16, 2004, Appendix A.

Mr. Komanoff's Expert Report when that contention is before the Board. To the extent that NIRS/PC intends to use that information in support of NIRS/PC EC-7, "Need For the Facility," the Staff objects on the grounds that such information is outside the scope of the admitted contentions presently before the Board, because the Board will consider the issue of decommissioning costs during the fall 2005 hearing.

In addition, Mr. Komanoff states that he is "assembling a probabilistic model" in order to present probability-based estimates of supply and demand.²³ The Staff objects to the use of such a model on the grounds that NIRS/PC has still not, at this late time, provided the Staff with the model or details regarding how it was derived. The Staff did not have an opportunity to question Mr. Komanoff regarding the model during his deposition, nor was the model included in Mr. Komanoff's expert report. Therefore, NIRS/PC should not be permitted to introduce the probabilistic model as evidence.

CONCLUSION

For the foregoing reasons, the Staff respectfully requests that the Board issue an order precluding NIRS/PC from offering testimony based on the portions of the expert reports of Michael Sheehan, Arjun Makhijani, George Rice, and Charles Komanoff, that fall outside the scope of the admitted contentions presently before the Board.

Respectfully Submitted,

/RA/

Lisa Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
this 6th day of December, 2004

²³ NIRS/PC Expert Reports at 39.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION IN LIMINE TO PRECLUDE NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN TESTIMONY" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 6th day of December, 2004.

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