January 12, 2005

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
(National Enrichment Facility)	)	

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

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's ("Board") Memorandum and Order, dated December 15, 2004, the Staff of the Nuclear Regulatory Commission ("Staff") hereby requests that the Board issue an Order, *in limine*, to exclude portions of the prefiled testimony of George Rice, Arjun Makhijani, Michael Sheehan, and Charles Komanoff on behalf of the Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") from the record of this proceeding. For the reasons set forth below, the Staff submits that portions of the testimony of Mr. Rice, Dr. Makhijani and the entire testimony of Mr. Komanoff and Dr. Sheehan are inadmissible in that they are outside the scope of the admitted contentions. In addition, the Staff submits that the testimony of Mr. Komanoff is inadmissible in that it is not based on sound scientific principles and does not constitute proper expert testimony.

DISCUSSION

Evidence is admissible in an NRC proceeding only if it is relevant, material, and reliable.[1] Immaterial, unreliable, or irrelevant evidence should be segregated from admissible evidence and

[1] 10 C.F.R. § 2.337(a).

excluded whenever possible.[2] Evidence outside the scope of admitted contentions is irrelevant and therefore inadmissible in a Board proceeding on those contentions.[3] The scope of a contention "necessarily hinges upon its terms coupled with its stated bases."[4] In addition, to be admissible as expert testimony, testimony must be based on reliable scientific principles and methods.[5]

As discussed below, portions of NIRS/PC's prefiled direct testimony, filed by NIRS/PC on January 7, 2005, address matters which were not raised in the admitted contentions and are therefore not relevant to the matters which are before the Board. Additionally, portions of NIRS/PC's testimony are not based on reliable scientific principles and methods. Such testimony should be excluded.[6]

A. Testimony Regarding NIRS/PC Contention EC-1

Basis (A) of NIRS/PC EC-1 states:

> (A) The DEIS correctly notes that leakage from the stormwater detention basin and the septic leach fields will probably cause formation of perched bodies of groundwater at the alluvium/Chinle interface. (DEIS, 4-13, 4-14). The DEIS contains estimates of the dimensions of such water bodies, flow rates, and

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[2] *Id.*

[3] *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.

[4] *Public Service Corporation of New Hampshire (Seabrook Station, Units 1 & 2)*, ALAB-899, 28 NRC 93, 97 (1988), *aff'd sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert. denied,* 502 U.S. 899 (1991); *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 379 (2002).

[5] *See* 10 C.F.R. § 2.337(a); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 & 3), ALAB-819, 22 NRC 681, 720 & n. 52 (1985); See also, *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 589-590 (1993) (applying the Federal Rules of Evidence).

[6] In this motion, the Staff sets forth the grounds for its objections to the testimony submitted. The specific portions of testimony to which the Staff objects are shown in strikeout form in the versions attached to this motion as Attachment 1 (testimony of George Rice) and Attachment 2 (testimony of Dr. Arjun Makhijani).

> discharge areas. However, *NRC provides no explanation of such calculations,* and it is not possible to determine whether they are reasonable (emphasis added).

NIRS/PC presents testimony of George Rice concerning this basis. In his testimony, Mr. Rice discusses the calculations performed by the NRC Staff to obtain values for flow rates of potential perched water bodies caused by leakage from the stormwater detention basin and septic leach fields. In this discussion, Mr. Rice cites to the *NRC Staff's Response to Interrogatories and Document Request by Petitioners Nuclear Information and Resource Service and Public Citizen to Commission Staff*, November 10, 2004 ("NRC Response to NIRS/PC Interrogatories"). In interrogatory responses 11 and 12, the NRC Staff explained the calculations it performed to estimate the impact of the site stormwater detention basin and septic systems, related to the discussion on pages 4-13 and 4-14 of the Draft Environmental Impact Statement ("DEIS"). The NRC Response to NIRS/PC Interrogatories mooted Basis (A) of NIRS/PC EC-1 by explaining the calculations used to estimate values associated with potential perched water bodies. Thereafter, NIRS/PC made no attempt to amend Basis (A) to reflect the fact that the sought-after calculations had been explained.

Now, NIRS/PC attempts to use Mr. Rice's testimony to challenge the reasonableness of the NRC Staff's calculations. Mr. Rice states that "[a]lthough the hydraulic conductivity used by NRC may have resulted in a reasonable estimate of the average groundwater flow rate, it underestimates the rate at which groundwater is likely to flow through the more permeable materials underlying the site (e.g., gravels)."[7] His testimony continues by suggesting a change to the NRC Staff's calculations to factor in the hydraulic conductivity and porosity of gravel.[8] In doing so, Mr. Rice challenges the assumptions in the calculation itself, but does not dispute the fact that

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[7] Direct Testimony of George Rice on Behalf of Nuclear Information and Resource Service and Public Citizen, at pp. 17-18, dated January 7, 2005.

[8] *Id.*

the calculations underlying the DEIS estimates discussed in Basis (A) have been adequately explained. Therefore, this testimony extends beyond the scope of Basis (A) of EC-1, which only alleges a deficiency for the lack of explaining the calculations. Since these calculations were subsequently provided, NIRS/PC cannot challenge their reasonableness without amending this basis, which it has failed to do.

Commission precedent with regard to "contentions of omission" is well-settled. In cases where a contention alleges the omission of particular information and the information is later supplied by the Staff, the contention is moot.[9] In order to raise specific challenges regarding the newly supplied information, intervenors must timely file a new or amended contention that specifically addresses this new information.[10] The Commission reasoned that if it did not require an amended or new contention in "omission" situations, "an original contention alleging simply a failure to address a subject could readily be transformed – without basis or support – into a broad series of disparate new claims."[11]

In the instant case, Basis (A) of EC-1 is a contention of omission because it charges the NRC Staff with failing to explain its calculations with regard to dimensions, flow rates, and discharge areas of potential perched water bodies. Once these calculations were provided in the NRC Response to NIRS/PC Interrogatories, the burden was on NIRS/PC to amend Basis (A) to address specific concerns with the calculations themselves. NIRS/PC failed to amend Basis (A), and now seeks to use direct pre-filed testimony to allege that the NRC Staff should have used other assumptions in its calculations. Accordingly, all testimony of Mr. Rice pertaining to the

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[9] *In the Matter of Duke Energy Corp.*, (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-383 (2002), *citing Private Fuel Storage, LLC*, (Independent Spent Fuel Storage Installation), LBP-02-2, 55 NRC 20, 29-30 (2002); LBP-01-26, 54 NRC 199, 207-09 (2001); LBP-01-23, 54 NRC 163, 171-72 (2001).

[10] *McGuire and Catawba,* 56 NRC at 383.

[11] *Id.*

reasonableness of the NRC Staff's calculations should be stricken as exceeding the scope of the basis for the contention. Furthermore, Basis (A) of EC-1 is moot because its underlying claim, that the NRC did not provide an explanation of its calculations, was addressed when the NRC Staff filed interrogatory responses 11 and 12 of the NRC's Response to NIRS/PC Interrogatories.

The NRC Staff also objects to the answer provided by George Rice on pages 8-9 of his testimony regarding the lack of information on two water-bearing units; (1) the 100 foot-thick water-bearing sandstone layer at a depth of about 600 feet, and (2) the Santa Rosa Aquifer.[12] NIRS/PC raised this exact issue in an attempt to amend its contentions, marking this as proffered Basis (E) for EC-1.[13] The Licensing Board did not allow EC-1 to be amended by this basis, stating that it was "unsubstantiated" and that it "raise[d] a series of questions, yet fail[ed] to establish with specificity any genuine material dispute with the DEIS and/or lack[ed] adequate factual or expert opinion support.[14] Since NIRS/PC offers testimony of Mr. Rice that replicates rejected Basis (E) of EC-1, this portion of his proffered testimony should be excluded.

B. Testimony Regarding NIRS/PC Contention EC-4

The Board has admitted the following contention entitled "Impacts of Waste Storage," as NIRS/PC EC-4:

> Petitioners contend that the Louisiana Energy Services, L.P. Environmental Report (ER) lacks adequate information to make an informed licensing judgment, contrary to the requirements of 10 C.F.R. Part 51. The ER fails to discuss the environmental impacts of construction and lifetime operation of a conversion plant for the Depleted Uranium Hexafluoride ("UF_6") waste that is required in conjunction with the proposed enrichment plant.

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[13] *See* "Motion on Behalf of Petitioners Nuclear Information and Resource Service and Public Citizen to Amend and Supplement Contentions," October 20, 2004, at p. 5.

[14] *See* Memorandum and Order (Ruling on Late-Filed Contentions), November 22, 2004, at p. 10.

> The DEIS fails to discuss the environmental impacts of the construction and operation of a conversion plant for the depleted uranium hexafluoride waste. The DEIS entirely relies upon final EISs issued in connection with the construction of two conversion plants at Paducah, Kentucky, and Portsmouth, Ohio, that will convert the Department of Energy's inventory of depleted uranium (DEIS at 2-28, 2-30, 4-53, 4-54). Such reliance is erroneous, because the DOE plants are unlike the private conversion plant contemplated by LES.

The bases supporting the amended NIRS/PC EC-4 states:

> The ER does not, for example, include environmental impacts of construction and lifetime operation of a conversion plant for the UF_6 waste (suggesting that construction and operation of such a plant is not seriously considered). The suggestion that Cogema and/or ConverDyn may build and operate such a facility for the conversion of LES's UF_6 waste shows that the ER is deficient in not addressing the cumulative environmental impacts of construction and operation of such a facility, which would in fact be an integral part of LES's operations. Specifically, the disposition of contaminated hydrofluoric acid ("HF") would be a significant issue. Radioactively contaminated materials should not be released into open commerce. Treating HF as a waste or transporting it for reuse in the manufacture of UF_6 would be expensive and would create risks. Both the costs and risks must be analyzed.
>
> LES has chosen to focus its planning for a private conversion facility on a process different from the process to be used in the DOE plants. LES will adopt a process that generates anhydrous hydrofluoric acid ("AHF") (see LES Answer to Petitions of NIRS/PC and New Mexico Attorney General, May 3, 2004, at 72). The process discussed in the EISs for the Paducah and Portsmouth conversion plants is a different one, which generate aqueous HF and calcium fluoride (CaF2) (See Paducah EIS, DOE-0359, at S-19, 1-18; Portsmouth EIS, DOE-0360, at S-17, 1-19).
>
> Thus, the facilities and processes analyzed in the conversion plant EISs do not fully correspond to the configuration proposed for construction by LES. In particular, the use of a distillation process to upgrade the HF resulting from the conversion process to AHF is not considered in the EIS for either the Paducah or Portsmouth facilities. In addition, when the engineering analysis for these proposed facilities was conducted, the distillation option was not even commercially developed. The Draft Engineering Analysis Report for the Long-Term Management of Depleted Uranium Hexafluoride - Rev. 2, Lawrence Livermore National Laboratory (LLNL)(1997), which is included as supporting material to the conversion plant EISs, states:

> Distillation is a common industrial process and was the design basis for this suboption. The processing of the azeotrope and the process parameters for the conversion reactors were patterned after the General Atomics/Allied Signal response to the RFR and the Sequoyah Fuels Corp. patented process. This representative process has not been industrialized, but the initial research and development have been completed. (J.W. Dubrin et. al., "DEPLETED URANIUM HEXAFLUORIDE MANAGEMENT PROGRAM: The Engineering Analysis Report for the Long-Term Management of Depleted Uranium Hexafluoride Volume I", Lawrence Livermore National Laboratory, May 1997 (UCRL-AR-124080 Vol. 1 Rev. 2), at 3-8.

> Therefore, the EISs for the DOE plants do not consider the impacts of the distillation process chosen by LES to generate AHF, nor the safety aspects of such operation, nor the impacts of sale, transportation, and use of AHF. The distillation process is not commercially established and projection of its impact will be speculative.

Portions of Dr. Makhijani's testimony related to waste disposal are outside the scope of the admitted contention, as supported by the bases, and therefore should be excluded by the Board.[15] The scope of a contention "necessarily hinges upon its terms coupled with its stated bases."[16]

The scope of NIRS/PC EC-4 deals only with whether the Environmental Report ("ER") and the DEIS discuss the environmental impacts of constructing and operating a conversion 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")

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[15] *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).

[16] *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).

inventory of depleted uranium. Specifically, NIRS/PC takes issue with the fact that the site specific DOE evaluations rely on a specific conversion process whereby the hydrofluoric acid ("HF") produced is neutralized and therefore do not evaluate the option of distilling the HF to form an anhydrous product.[17] Thus, only those portions of Dr. Makhijani's testimony which relate to the potential environmental impacts of the management of the HF produced by the conversion process are relevant to the contention.

Much of Dr. Makhijani's testimony, however, goes beyond the issue raised by the admitted contention and attempts to raise issues concerning the ultimate disposal of the depleted uranium ("DU"). These issues have already been raised by NIRS/PC in the context of their argument that depleted uranium should be considered greater than Class C waste and therefore must be disposed of in a geologic repository and are currently before the Commission for consideration.[18] Dr. Makhijani attempts to resurrect this issue by taking a somewhat different approach, alleging that conversion impacts cannot be considered until an approved disposal strategy is approved by the Commission - presumably by determining that it is greater than Class C waste. Because this issue - the proper classification of DU and its impact on disposal - is not before the Board, those portions of his testimony involving waste disposal strategies and alternate waste forms for ultimate disposal, including encapsulation in engineered ceramic, should be excluded.

C. Testimony Regarding NIRS/PC Contention EC-7

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:

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

[18] *See* Memorandum and Order, CLI-04-25, __ NRC __, slip op. at 4-5, August 18, 2004.

(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.[19]

With regard to this contention, NIRS/PC has submitted testimony from two proffered experts: Michael Sheehan and Charles Komanoff. The testimony of each and the Staff's objections are discussed below.

1. Direct Testimony of Michael Sheehan

Dr. Sheehan states that the purpose of his testimony is not only to address the need for the proposed National Enrichment Facility ("NEF"), but also to address other related issues. Specifically, Dr. Sheehan states that he will address:

1. Claims of substantial job and tax benefits associated with the construction of the facility;
2. The adverse environmental impact of installing the NEF facility in the United States;
3. The adverse environmental impact of operating the facility on the heavily mined and declining Ogallala Aquifer;
4. The impact on the competitiveness of the NEF relative to European supply of LEU, of the cost of disposal of DUF in the US compared to the cost of disposal in Europe for European plants;
5. LES' equivocation about the movement of DUF offsite by the end of 2038[20].

Thus, by his own admission, Dr. Sheehan's testimony raises issues beyond the admitted contention he is proffered to support. Certain issues are clearly outside the scope of the admitted contentions and are therefore irrelevant to this proceeding. These are: (1) Whether the application

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[19] Memorandum and Order (Rulings Regarding Standing, Contentions, and Procedural/Administrative Matters), LBP-04-14, 60 NRC __,__, slip op. at 43 (July 19, 2004).

[20] Direct Testimony of Michael F. Sheehan on Behalf of Nuclear Information and Resource Service and Public Citizen at 7-8, dated January 7, 2005. ("Sheehan Testimony")

was correct in concluding that substantial job and tax benefits would result from construction of the facility, (2) the alleged "LES equivocation" regarding the movement of DUF offsite, and (3) whether URENCO can be trusted to maintain the security of the technology involved.[21] Indeed, the last issue was explicitly rejected by the Board when it ruled on the admissibility of contentions.[22] Accordingly, the portions of his testimony which relate to these issues should be rejected.

In addition, Dr. Sheehan has provided an opinion regarding the impact of the proposed NEF on the Ogallala aquifer. While this issue is the subject of a contention in this proceeding, it was raised in the context of the adequacy of the DEIS's consideration of the impacts of the proposed NEF on water supplies. Dr. Sheehan, however, is presenting an opinion on the economic impacts relating to the use of the aquifer. Thus, his testimony on this issue is beyond the scope of the admitted contentions and should be excluded.

The remainder of Dr. Sheehan's testimony concerns his theory that after the proposed NEF is constructed and begins operation, URENCO will drive USEC out of business, thereby eliminating a domestic supplier of enrichment services and adversely impacting the identified need for the facility. This testimony presents an entirely new theory concerning need which is not part of NIRS/PC's admitted contention. In relevant part, that contention advances a very different basis- that LES has failed to demonstrate how it will enter the market for uranium enrichment services in the face of existing competitors. Because this remaining portion of his testimony attempts to raise an entirely new issue outside of the admitted contention, it should be excluded as well.

2. Direct Testimony of Charles Komanoff

The Staff objects to the testimony of Mr. Komanoff in its entirety on the grounds that it does not even purport to relate to a fact which is relevant to the contentions advanced by NIRS/PC and

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[21] *See* Sheehan Testimony at 32-36.

[22] *See* Memorandum and Order (Rulings Regarding Standing, Contentions, and Procedural/Administrative Matters), LBP-04-14, slip op. at 30-31, 60 NRC __,__ (July 19, 2004).

admitted in this proceeding. Significantly, Mr. Komanoff has not identified the purpose of his testimony or identified the contention to which it relates other than to state that he has analyzed cost-benefit issues pertaining to the application. Upon review of the substance of his testimony and this statement, the Staff presumes that it is submitted in support of NIRS/PC EC-7, regarding the need for the facility. However, an examination of the testimony reveals that the testimony does not present a scientifically-based opinion regarding facts which are material to the contention NIRS/PC has advanced.

The contention, as admitted, presents three bases for NIRS/PC's assertion that LES's environmental report is not adequate; that (1) LES has erroneously assumed a shortage of enrichment capacity, (2) LES has erroneously relied on global projections of need rather than for domestic projections, and (3) LES has not shown how the proposed NEF would effectively enter the market for enriched uranium. Mr. Komanoff's testimony addresses none of these issues. Rather, he simply performs calculations to determine how the enriched uranium which would be produced by the proposed NEF (three million SWU's) could theoretically be met by increasing tails assays at nuclear power stations throughout the world. This, of course, presumes the very premise advanced by LES that NIRS/PC purports to challenge - that there is a need for additional enrichment supplies. The fact that this need could be satisfied by means other than building and operating the proposed NEF, even if proven, would not bear on the ultimate decision to be reached by the Board in deciding this contention - whether there is in fact a shortage of enrichment capacity. Accordingly, Mr. Komanoff's testimony is irrelevant to the issues before the Board and should be rejected on that basis alone.

However, even putting aside the issue of relevance, Mr. Komanoff's testimony should be rejected because it does not even purport to establish any grounds for concluding that the circumstance he postulates - that nuclear power stations worldwide will increase the tails assays for fuel they use - may actually happen. Instead, he has simply manipulated the inputs in the LES

model for determining enrichment supply in order to produce a particular outcome. Unless those inputs are realistic given the current enrichment market, the resulting calculations are meaningless. Because Mr. Komanoff has not presented any basis for using those inputs, Mr. Komanoff's testimony should be rejected as no more than unsupported speculation.[23]

CONCLUSION

For the foregoing reasons, the Staff respectfully requests that the Board issue an order, *in limine*, excluding portions of the testimony of George Rice and Arjun Makhijani, and the entire testimony of Michael Sheehan Charles Komanoff.

Respectfully Submitted,

/RA/

Lisa Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
this 12th day of January, 2005

[23] *See Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. at 590.

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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 12th day of January, 2005.

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