

RAS 9183

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 01/21/05

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Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Paul B. Abramson
Dr. Charles N. Kelber

In the Matter of

LOUISIANA ENERGY SERVICES, L.P.

(National Enrichment Facility)

Docket No. 70-3103-ML

ASLBP No. 04-826-01-ML

January 21, 2005

MEMORANDUM AND ORDER
(Ruling on In Limine Motions and
Providing Administrative Directives)

Pending before the Licensing Board are a series of motions filed by applicant Louisiana Energy Services, L.P. (LES) and the NRC staff seeking to strike portions of prefiled direct testimony and associated exhibits filed by intervenors Nuclear Information and Resource Service and Public Citizen (NIRS/PC) relating to the four environmental contentions -- NIRS/PC EC-1 -- Impacts upon Ground and Surface Water; NIRS/PC EC-2 -- Impact upon Water Supplies; NIRS/PC EC-4 -- Impacts of Waste Storage; and NIRS/PC EC-7 -- Need for the Facility -- that are scheduled to be the subject of evidentiary hearings beginning Monday, February 7, 2005. Board rulings on these motions are set forth below, as well as administrative directives regarding further party filings to address these rulings and other matters.

I. In Limine Motion Rulings

A. LES Motions To Exclude Prefiled Direct Testimony of George Rice and Charles Komanoff For Lack of Requisite Expert Qualifications and Reliability

DISCUSSION: Motion In Limine on Behalf of [LES] to Exclude Prefiled Direct Testimony of George Rice for Lack of Requisite Expert Qualifications and Reliability (Jan. 12, 2005) at 2-9 [hereinafter LES Motion to Exclude Rice Testimony]; Motion In Limine on Behalf of [LES] to Exclude Prefiled Direct Testimony of Charles Komanoff for Lack of Requisite Expert Qualifications and Reliability (Jan. 12, 2005) at 2-11 [hereinafter LES Motion to Exclude Komanoff Testimony]; Response on Behalf of [NIRS/PC] to LES Motion to Exclude Prefiled Direct Testimony of George Rice (Jan. 18, 2004) at 3-4; Response on Behalf of [NIRS/PC] to LES Motion to Exclude Prefiled Testimony of Charles Komanoff (Jan. 18, 2004) at 4-10.

RULING: By its motions, LES requests that the Board exclude in full the prefiled direct testimony of George Rice as to contention NIRS/PC EC-2, and Charles Komanoff as to contention NIRS/PC EC-7, submitting that (1) neither Mr. Rice nor Mr. Komanoff possess the requisite qualifications to testify as an expert regarding the specific issues raised by the respective contentions; and (2) their testimony does not constitute reliable evidence.

As to the question of their qualification as experts, we find that both Mr. Rice and Mr. Komanoff possess the qualifications necessary to provide expert testimony concerning, respectively, contentions NIRS/PC EC-2 and EC-7. As the Commission stated in a recent decision regarding expert witness qualification, the standard by which experts are qualified allows the Board considerable latitude in deciding whether the witness will be of assistance in the proceeding. See Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27-28 (2004). While certain portions of the prefiled direct testimony of a witness may ultimately be found not persuasive by a Board in making its determinations regarding the

ultimate issue, that does not mean the witness is not qualified to provide that testimony, or to rebut the direct testimony of other parties or otherwise to provide assistance during an evidentiary hearing. In this instance, we find that the qualifications of these witnesses are sufficient to get them over the “expert witness” hurdle. Accordingly, we deny the LES motions to exclude the testimony of Mr. Rice and Mr. Komanoff because they lack sufficient qualifications to provide expert witness testimony.

B. LES and Staff Motions to Exclude Portions of Prefiled Testimony of George Rice

DISCUSSION: Motion In Limine on Behalf of [LES] To Exclude Portions of Prefiled Direct Testimony of NIRS/PC Witnesses George Rice, Arjun Makhijani, Michael Sheehan and Charles Komanoff As Irrelevant (Jan. 12, 2005) at 2-3 [hereinafter LES Motion In Limine]; NRC Staff Motion In Limine To Preclude [NIRS/PC] Testimony (Jan. 12, 2005) at 1-5 [hereinafter Staff Motion In Limine]; Response on Behalf of [NIRS/PC] to LES Motion to Exclude Portions of Prefiled Direct Testimony of George Rice, Arjun Makhijani, Michael Sheehan and Charles Komanoff As Irrelevant (Jan. 18, 2004) at 2-4 [hereinafter NIRS/PC Response to LES Motion In Limine]; Response on Behalf of [NIRS/PC] to Commission Staff Motion In Limine to Preclude NIRS/PC Testimony (Jan. 18, 2005) at 2-7 [hereinafter NIRS/PC Response to Staff Motion in Limine].¹

RULING: We deal first with the LES and staff motions to exclude those portions of Mr. Rice’s contention NIRS/PC EC-1-related testimony regarding the need for NRC and LES to investigate the possible existence of a water-bearing sandstone layer approximately 600 feet below the proposed NEF site, as well as an associated LES request to strike Figures 1 and 3 to

¹ Because citations to NIRS/PC pleadings are based on the printed copies of the wordprocessing files they submitted via e-mail on the date of filing, those citations may vary from what is reflected in the actual hard copy versions of the pleadings, which had not been received by the Board at the time this memorandum and order was issued.

his testimony. We agree with LES and the staff that our November 22, 2004 ruling denying a NIRS/PC request to permit late-filed amendment of this contention to include the matters discussed in what NIRS/PC denoted Basis E because it “fail[ed] to establish with specificity any genuine material dispute with the [staff’s Draft Environmental Impact Statement] and/or lack[ed] adequate factual or expert opinion support,” Licensing Board Memorandum and Order (Ruling on Late-Filed Contentions) (Nov. 22, 2004) at 10 (unpublished) [hereinafter Board Late-Filed Contentions Ruling], is conclusive of the inadmissibility of the question “What information is lacking regarding two water bearing units beneath the site?” and Mr. Rice’s answer thereto. Having been rejected at the pleading stage, this matter cannot now be resurrected by virtue of the prefiled direct testimony of a witness who, for whatever reason, did not provide support (via affidavit or otherwise) for admission of the issue when it was previously proffered by NIRS/PC.

Accordingly, we grant the LES and staff motions to strike that question and the answer and, consistent with this ruling, also strike from the question on page 4 that states “Please describe the proposed site,” the last sentence of the last paragraph of the answer, which is on page 5. Relative to Figures 1 and 3, because they are referenced in other portions of Mr. Rice’s testimony that are not subject to the LES motion in limine, we deny the LES motion in this regard, leaving it to LES in its rebuttal or otherwise to provide its views concerning any relevant deficiencies in those drawings relative to the circumstances in which they are used.²

Regarding the challenge by the staff to portions of Mr. Rice’s testimony relating to Part A of contention NIRS/PC EC-1 concerning the adequacy of certain staff calculations regarding groundwater flow rates and two water-bearing units located below the proposed LES

² Also with respect to the figures used in connection with Mr. Rice’s testimony, the general practice relative to prefiled testimony is that, other than resumes or curriculum vitae regarding the witness, attachments are not to be used with the testimony in lieu of exhibits. Thus, Figures 1-3 attached to Mr. Rice’s testimony should be removed as attachments and made separate NIRS/PC exhibits that are referenced as such in his testimony.

facility, the Board grants this staff request as well. As the staff points out, as admitted, this portion of the contention focused on the staff's purported failure to provide an explanation relative to these DEIS calculations, an omission that the staff, in the evidentiary materials being presented to the Board, apparently is prepared to indicate has been corrected. See NRS Staff Testimony of Alan Toblin Concerning [NIRS/PC] Environmental Contention 1 ("NIRS/PC EC-1") (Impacts Upon Ground and Surface Water (Jan. 7, 2004) at 7. As the NIRS/PC response indicates, they were aware that the staff had cured the alleged omission in early November 2004. See NIRS/PC Response to Staff Motion in Limine at 2. As a consequence, if at that point NIRS/PC had a concern about the substance of the staff's response, the appropriate action would have been promptly to amend their contention to specify the nature of their concerns with that response. Again, NIRS/PC cannot use its prefiled testimony to cure pleading deficiencies relative to its contentions.³ Accordingly, regarding the question "Have LES or NRC addressed the fate of the water that would leak from the storm water detention basin and septic leach fields?", the staff's motion to strike is granted relative to those portions of Mr. Rice's prefiled testimony answer (1) beginning on page 18 with the word "Although" and ending on page 19 with the phrase "1.3 mi/yr."; and (2) on page 19 in the third full paragraph, the second sentence beginning with "The" and ending with "gravels)."

³ Although NIRS/PC seems to suggest that the staff is trying improperly to use its in limine motion as the equivalent of a motion to dismiss or for summary disposition in order to preemptively (and prematurely) resolve this issue, see NIRS/PC Response to Staff Motion In Limine at 4, we fail to see such a procedural deficiency. As the Board has previously suggested, see Board Late-Filed Contentions Ruling at 15 n.11, a party can seek a merits resolution of a contention of omission by submitting an appropriate motion seeking to establish that the omission has been cured. If time does not permit or a party does not wish to take this course, however, it can instead await the evidentiary hearing and present testimony (or other evidence) to the same effect.

With respect to the balance of Mr. Rice's proffered testimony, we find that it may be of assistance to the Board in making its ultimate determination on the issues raised by contentions EC-1 and EC-2.⁴

C. LES and Staff Motions to Exclude Prefiled Testimony of Charles Komanoff

DISCUSSION: LES Motion In Limine at 7-9; Staff Motion In Limine at 10-12; NIRS/PC Response to LES Motion In Limine at 12-13; NIRS/PC Response to Staff Motion In Limine at 14.

RULING: The prefiled direct testimony of Mr. Komanoff consists largely of computations attempting to demonstrate that the perceived "need" for enrichment services could be met at minimal cost by increasing the "tails assays" at existing nuclear fuel enrichment plants. Indicating that the testimony is being offered solely in support of contention NIRS/PC EC-7, NIRS/PC characterizes this testimony as showing that "there is in fact no shortage of enrichment capacity to serve the needs of utilities," NIRS/PC Response to LES Motion In Limine at 12; that "one substitute for such capacity is to purchase more U₃₀₈," *id.*; and that "the need for enriched uranium can be met without building new enrichment capacity," NIRS/PC Response to Staff Motion In Limine at 14. At its root, however, this testimony offers a wholly new contention, i.e., that LES and the staff failed to consider the alternative that the perceived "need" for enrichment services could instead be satisfied by increasing the tails assays. See NIRS/PC Response to LES In Limine Motion at 12-13 ("To be sure, such evidence suggests that an additional alternative should be considered; . . ."). A contention asserting that this alternative should have been (but was not) considered might have been admissible had it been

⁴ As we noted in section B.1 of our January 18 procedural order, NIRS/PC must separate, in its entirety, the testimony of Mr. Rice regarding EC-1 from that regarding EC-2 and file each segment testimony separately with the Board in accordance with section II below.

timely proffered. As we have noted in other contexts above, however, expert testimony cannot be used to cure procedural pleading deficiencies such as, in this case, converting a contention submitted in the context of a NEPA needs analysis (i.e., whether or not additional enrichment services are in fact needed) into a NEPA alternatives analysis.

In this proceeding, the opportunity for submission of an additional contention of this type has long passed. Accordingly, we grant the LES and staff in limine motions as to all the testimony of Mr. Komanoff relating to the proposition that tails assays could be increased as a method of substituting for the increased enrichment services (including, of course, all economic arguments and all computations).

The balance of Mr. Komanoff's testimony provides a comparison of the projected per kilowatt (KW) cost increase allocable to Mr. Komanoff's proposed alternative with the potential "carbon taxes" that he posits would be levied on generators using carbon based fuels. This testimony is wholly unrelated to contention NIRS/PC EC-7 and, as such, the LES and staff in limine motions are granted relative to this information as well.

We thus strike all the prefiled testimony of Charles Komanoff and any associated exhibits.

D. LES and Staff Motions to Exclude Portions of Prefiled Testimony of Arjun Makhijani

DISCUSSION: LES Motion In Limine at 3-5; Staff Motion In Limine at 5-8; NIRS/PC Response to LES Motion In Limine at 4-6; NIRS/PC Response to Staff Motion In Limine at 7-9.

RULING: At issue are portions of the prefiled direct testimony of Dr. Makhijani regarding contention NIRS/PC EC-4. LES and the staff first contend that we should exclude those portions of the testimony that relate to the ultimate disposal of depleted uranium (DU) and the waste classification of DU. The Commission recently held that DU is low-level waste, CLI-05-05, 61 NRC __ (Jan. 18, 2005), so that the LES proposed strategy of turning over its

depleted uranium to DOE for disposal is a “plausible strategy.” Therefore, his testimony regarding the disposal of depleted uranium and all testimony relating to classification of this waste is outside the scope of this contention as admitted, and we grant the LES and staff motions as to these issues.

With regard to LES and staff concerns about the testimony of Dr Makhijana as it relates to the environmental impacts of disposal of deconversion products, in addition to the fact that this gets into a disposal issue of the type we recently have excluded from this contention, see Licensing Board Late-Filed Contentions Ruling at 15, it also appears to be another improper attempt to use expert testimony to amend an existing contention or introduce what is essentially a new contention outlining an additional alternative for consideration. We thus grant the LES and staff in limine motions relative to this testimony.

Finally, regarding the question raised by LES about the relevance of portions of Dr. Makhijana’s testimony addressing the lack of any general Department of Energy (DOE) guidelines governing the free release of contaminated hydrofluoric acid or calcium fluoride, we agree with LES that to the degree the contaminant load in these products determines the fate and impacts of such deconversion products, this is a relevant matter for consideration in the context of this contention. See NIRS/PC Response to LES Motion In Limine at 6. Accordingly, the LES in limine is denied in this regard.

To summarize, the LES and staff in limine motions are granted in that the prefiled direct testimony of Arjun Makhijani is stricken as follows: (a) for the question “Given that the DEIS refers to the environmental impact statements for the DOE deconversion facilities, what do such statements disclose that is relevant to the operation of the NEF and the depleted uranium produced by the NEF?”, on page 8, delete the bullet that begins “The ultimate disposal”; (b) for the question “With these understandings, what criticisms do you have of the disclosure that has

been made in the ER and the DEIS of the impacts of conversion of depleted uranium?”, on page 10 delete the first paragraph of the answer that begins “The specific steps”; (c) for the question “The regulations require an ER and a DEIS to consider appropriate alternatives for achieving the aims of the project. (10 C.F.R. 51.45(b)(3), (c); 51.71(a), (d). Please explain the respects in which the ER and DEIS disclosure does not cover all deconversion products that are appropriate to be considered for deconversion,” beginning on page 11 delete the entire question and answer; (d) for the question “In listing appropriate alternative deconversion products, what alternatives should be included?”, beginning on page 16 delete the entire question and answer; (e) for the question “In analyzing the impacts of the AHF process, what factors would need to be considered?”, beginning on page 18 delete the second and third bulleted paragraphs beginning “A design of the” and “A specific, firm location”, respectively; and (f) for the question “Are there other impacts that you believe should be considered in the DEIS?”, beginning on page 24 delete the entire question and answer.

D. LES and Staff Motions to Exclude Prefiled Testimony of Michael Sheehan

DISCUSSION: LES Motion In Limine at 5-7; Staff Motion In Limine at 8-10; NIRS/PC Response to LES Motion In Limine at 7-12; NIRS/PC Response to Staff Motion In Limine at 9-13.

RULING: LES and the staff both request that the Board exclude the prefiled direct testimony of Dr. Sheehan in its entirety as outside the scope of contention NIRS/PC EC-7 and therefore irrelevant. Much of Dr. Sheehan’s prefiled direct testimony does indeed falls outside the scope of this proceeding and/or the contention for which it is offered. For example, his testimony regarding the effect of the NEF upon the United States-Russian high enriched uranium agreement is outside the limited scope of this contention as admitted, as is his testimony regarding Urenco management integrity, the effects on the Ogallala aquifer, and the

disposal of depleted uranium tails. Thus, we grant the LES and staff in limine motions to the extent that we find that only the following portions of Dr. Sheehan's prefiled direct testimony are to be submitted:

1. Section I.A, in its entirety.
2. Section I.B, only:
 - a) the first question and the first sentence of the answer thereto,
 - b) the second question and the answer thereto.
3. Section I.C, only
 - c) the first question and paragraph four of the answer thereto,
4. Section V, in its entirety, except for:
 - a) the question "How secure is the Russian HEU Agreement going forward" and the answer thereto.
 - b) the question "How certain is the construction of USEC's American Centrifuge plant?" and the answer thereto.

II. Administrative Matters

With the above rulings, certain revisions to and exclusions from NIRS/PC prefiled testimony are required. In accordance with the Board's December 20, 2004 order, prefiled rebuttal testimony should be filed on or before Friday, January 28, 2005. The parties are reminded that the purpose of rebuttal testimony is to respond only to the prefiled direct testimony propounded by the other parties to the proceeding, not for witnesses to put forth new testimony of their own or reintroduce testimony that the Board has stricken by its above rulings.

In addition, the Board requests that on or before Friday, January 28, 2005, NIRS/PC submit revised versions of their prefiled direct testimony (including Mr. Rice's bifurcated

testimony regarding EC-1 and EC-2 and prefiled exhibits in place of the three figures attached to his testimony, as discussed in Part I.A above) that omit all of the text (and associated footnotes) that we have stricken by the above rulings,⁵ and an exhibit list that reflects the removal of any associated exhibits.⁶ This is not an opportunity to rephrase, add to, or otherwise alter previously submitted prefiled direct testimony, but should be used only to eliminate stricken testimony.

The parties also should note, however, that the fact that the Board has determined that certain witness testimony should be stricken does not mean that NIRS/PC is no longer able to prevail relative to the contention or portion of the contention that witness was intended to address. NIRS/PC still have the opportunity to make their case in support of their proffered environmental contentions on the basis of prefiled rebuttal testimony (consistent with the guidance provided above) and oral cross-examination of LES and staff witnesses relative to their direct and rebuttal testimony.

Additionally, if the parties believe that the Board's action regarding the LES and staff in limine motions will have a substantial impact on the hearing schedule discussed in section A.6

⁵ Relative to the NIRS/PC direct and rebuttal testimony, the Licensing Board also requests that when NIRS/PC submit the rebuttal testimony and revised direct testimony, they number consecutively each of the questions and answers for each witness/panel (as was done by LES and the staff).

⁶ To the degree it will not longer use some exhibits, it is not necessary that LES renumber its exhibits, but simply provide the Board's law clerk with a revised listing per the instructions in section A.4 of our January 18, 2005 procedural order. If, however, as a result of the duplicative exhibit review requested by the Board in section A.1 of that order, NIRS/PC has identified any stricken exhibit that they were scheduled to introduce first that will also be relied upon later by either LES or the staff, they should advise that party on or before Wednesday, January 26, 2005, so that the party can add that item to its exhibit list. Also, if NIRS/PC wishes to use one of their stricken exhibits during cross-examination, it should utilize the number it originally assigned to the exhibit when it was intended to accompany their prefiled direct testimony.

of the Licensing Board's January 18, 2005 memorandum and order regarding administrative matters, as part of the joint report to be provided under that section, they should provide their views on scheduling impacts bearing in mind the Board's guidance in that section regarding making full use of February 11 and other hearing days.

Finally, in accord with the Board's earlier scheduling orders, party outlines should be sent to the Board and the other parties and cross-examination plans should be sent to the Board so as to ensure receipt no later than noon Eastern Time on Friday, February 4, 2005. In this regard, the Board requests that when counsel submit their cross-examination plans, which should be broken out by contention, as to each witness/panel they provide an estimate of the total amount of time counsel anticipates he/she will need for cross-examination of that witness/panel.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁷

/RA/
G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

January 21, 2005

⁷ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant LES; (2) intervenors New Mexico Environment Department, the Attorney General of New Mexico, and NIRS/PC; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON IN LIMINE MOTIONS AND PROVIDING ADMINISTRATIVE DIRECTIVES) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Docket No. 70-3103-ML
LB MEMORANDUM AND ORDER
(RULING ON IN LIMINE MOTIONS
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[Original signed by Rebecca L. Giitter]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of January 2005