

January 18, 2005

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD January 18, 2005 (1:19 pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of

Docket No. 70-3103

Louisiana Energy Services, L.P.
National Enrichment Facility

ASLBP No. 04-826-01-ML

**RESPONSE ON BEHALF OF
NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN TO
COMMISSION STAFF MOTION IN LIMINE TO PRECLUDE NIRS/PC TESTIMONY**

Preliminary statement

This Memorandum is submitted on behalf of Intervenors Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") in opposition to the NRC Staff's Motion in Limine to Preclude Nuclear Information and Resource Service and Public Citizen Testimony, filed on January 12, 2005.

Argument

The Commission Staff argue that portions of the testimony of four expert witnesses proffered by NIRS/PC should be excluded from consideration. NIRS/PC deal in order with the arguments presented. In each instance, Staff have adopted an unnecessarily narrow construction of the contentions admitted by the Board. The testimony offered by NIRS/PC is directly relevant to the dispute before the Board, and the motion in limine should be denied.

a. Commission Staff's objections to the testimony of George Rice.

George Rice, a professional hydrologist, has presented 26 pages of prefiled direct testimony. The Staff objects to two passages:

1. The Staff asserts that Mr. Rice may not testify to the errors in Staff's analysis in the DEIS of the flow and dimensions of water bodies caused by leakage from the NEF's stormwater detention basin and the septic leach field. Staff contends that at one time NIRS/PC correctly amended its contentions to state that Staff had inadequately explained its calculations, but subsequently Staff filed interrogatory answers, giving some explanation. Staff asserts that NIRS/PC should have amended their contentions again to state that Staff had given an erroneous explanation and may not offer testimony to that effect.

The sequence of events is as follows: On October 20, 2004, following the schedule in the Memorandum and Order dated August 16, 2004, NIRS/PC moved to supplement their contentions, seeking to assert, inter alia, as to such water bodies: "The DEIS contains estimates of the dimensions of such water bodies, flow rates, and discharge areas. However, NRC provides no explanation of such calculations, and it is not possible to determine whether they are reasonable." (NIRS/PC Motion to Amend, Oct. 20, 2004, at 4). On November 10, 2004, Commission Staff filed interrogatory responses, containing calculations. (NRC Staff responses to NIRS/PC interrogatories, Nov. 10, 2004). On November 22, 2004, the Board ruled, admitting a new contention, with several new bases, concerning impacts upon ground water as disclosed in the DEIS. (Memorandum and Order, Nov. 22, 2004, at 8-11). One of the bases asserted the inadequacy of data support for the DEIS descriptions of perched water bodies. (*id.*, App. A at 1, Contention EC-1).

Thus, Staff's current objection, that NIRS/PC should have moved yet again to amend their contentions to catch up with the Staff's interrogatory answers, omits to note that such motion would have been made after the date set in the pending schedule, viz: October 20, 2004.

In any event, NIRS/PC in the basis in question state that Commission Staff have not explained their calculations *and* it is not possible to determine whether they are reasonable. The testimony by Mr. Rice states that Staff underestimated the rate of flow through permeable materials (e.g., gravels), so that it is not possible to determine that Staff's calculations are reasonable, and that Staff's information still suffers from deficiencies:

“LES and NRC should conduct an investigation to locate potential discharge areas downgradient of the proposed site. They should also estimate the time required for water from the NEF to reach the discharge areas. The time to reach discharge areas should be calculated using groundwater flow rates for the more permeable materials underlying the site (e.g., the value calculated above for flow through gravels).” (Rice prefiled direct testimony at 19, Jan. 7, 2005).

Thus, Mr. Rice's prefiled testimony states that information justifying the DEIS calculations is still lacking.

Moreover, both Commission Staff and LES have filed direct testimony on the very issue of the dimensions of ground water bodies created by leakage from the stormwater basin and septic fields. (NRC Staff testimony of Alan Toblin at 6-12; LES prefiled direct testimony on NIRS/PC contention EC-1 at 27, 41-45). Mr. Rice would clearly be on good grounds in filing the contested testimony as rebuttal to such testimony. Thus, Staff's motion has little practical effect.

In any event, the caselaw relied upon by Commission Staff does not support exclusion of Mr. Rice's testimony. The decisions from the *Private Fuel Storage* proceeding, 54 NRC 163, LBP-01-23 (Aug. 1, 2001), 54 NRC 199, LBP-01-26 (Sept. 20, 2001), and 55

NRC 20, LBP-02-2 (Jan. 14, 2002), and *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), 56 NRC 373, CLI-02-28 (Dec. 18, 2002), all involve attempts to cause a broad contention of omission, addressed to an Environmental Report, to migrate to apply to a superseding “licensing-related document” (56 NRC at 382), which contained new information on the issue. Here, in contrast, NIRS/PC have made a timely contention, addressed to a newly-issued DEIS. The DEIS reported on calculations by Staff, and NIRS/PC specifically contended that the data supporting the calculations were not set forth. Thereafter, additional data emerged in discovery. NIRS/PC now seek, in testimony, to home in yet more specifically on the shortcomings of the calculations. Commission Staff claim that each new data disclosure requires an amended pleading. Such a rule would lead to repeated amendments as individual data items emerge. To the contrary, the pleading rule of *Private Fuel Storage* and *Duke Energy* seeks to prevent a generalized complaint of omission from being transformed “into a broad series of disparate new claims” about a later document (56 NRC at 383). But this case has moved beyond the pleading stage; it is at the stage of admitting testimony. Staff may not raise the specter of supposed broad claims that might come within an allegation of omission, because the issue here concerns highly specific expert testimony.

Staff’s motion is, in effect, a summary disposition motion, addressed to one basis for amended contention EC-1 that the Board admitted on November 22, 2004. Indeed, the *Private Fuel Storage* and *Duke Energy* cases that Staff rely on all discuss motions to dismiss contentions. But this case has moved beyond the pleading stage, and its expedited schedule does not allow summary disposition motions addressed to late-filed contentions. See

Memorandum and Order Att. A, note 4 (Aug. 16, 2004)). Staff should not be allowed to circumvent this bar through the device of a motion in limine.

2. Commission Staff also object that Mr. Rice testifies concerning a water-bearing layer present at the site of the National Enrichment Facility at a depth of 600 feet. (Staff Mot. 6). Mr. Rice there states that LES and the Commission Staff have failed to answer basic questions about this layer, such as its areal extent, conductivity, water quality, and flow characteristics. (Rice prefiled testimony at 8-9). As background, it should be noted that the contention originally admitted in this case as to ground water impacts states as follows:

CONTENTION: Petitioners contend that the Environmental Report contained in the application does not contain a complete or adequate assessment of the potential environmental impacts of the proposed project on ground and surface water, contrary to the requirements of 10 C.F.R. 51.45.

The bases set forth in the Petition include the following:

“A. Basis: In this situation, the ER has several serious shortcomings: The ER fails to demonstrate that there has been any evaluation of the fate of waste waters and runoff that enter the subsurface at the NEF. To determine where this water will go, LES should answer the following questions:

* * *

b. Where would water flowing along the alluvial/Chinle contact be discharged?

c. How long would it take for water from the NEF to reach the discharge area?

d. Are there subsurface fractures or other fast pathways that would allow water to flow rapidly from the alluvium to the Chinle, or from the Chinle to the Santa Rosa?

* * *

e. LES also should have determined the ages of water in the Chinle and Santa Rosa. Relatively young water would indicate that water reaches these units along fast flow paths.”

The Board ruled as to this contention that it be “[a]dmitted, as supported by bases sufficient to raise genuine issues of material fact adequate to warrant further inquiry.” (Memorandum and Order, July 19, 2004, at 28).

The aquifer at the 600 foot point would occur within the Chinle Formation, which is present at the site beneath alluvial strata and overlies the Santa Rosa Aquifer. (ER 3.3-2). The Santa Rosa is at approximately 1100 feet below ground surface. (Rice prefiled testimony at 4). The Board has ruled that NIRS/PC have raised genuine issues of material fact as to the pathway followed by water (a) flowing along the alluvial/Chinle contact, (b) flowing through possible fractures from the alluvium to the Chinle, (c) flowing through possible fractures from the Chinle to the Santa Rosa. The Board also held it relevant to determine the ages of water in the Chinle and the Santa Rosa. Within the scope of that admissibility ruling, the testimony offered by Mr. Rice simply points out that among the rock bodies present in the zones that the Board has allowed NIRS/PC to assert should have been investigated is a water bearing zone at the 600 foot point that should be investigated for its presence and flow characteristics and to determine what chemicals are present. Such testimony is clearly relevant to the admitted contention that asserts failure to resolve important hydrologic issues.

Indeed, within the scope of the admitted contention EC-1, expert witnesses for LES have pointed out the existence of the water-bearing layer at 600 feet. (LES direct testimony on NIRS/PC Contention EC-1, at 14). LES states in that testimony that “LES has not conducted local investigations of those water-bearing units due to their great depths and the thickness and low permeability of the overlying Chinle Formation red beds.” (id.). LES’s witnesses, not unexpectedly, do not agree with NIRS/PC’s witness on the need to

investigate the stratum at 600 feet. But the Board has admitted contention EC-1, which addresses the sufficiency of the subsurface investigation, and NIRS/PC should be allowed to present expert testimony on the question.

LES claims that the Board excluded the testimony in issue in its November 22, 2004, ruling on late-filed contentions. (LES Mot. 2-3). In that decision, the Board stated that proposed Basis E lacked sufficient support. (Memorandum and Order, Nov. 22, 2004, at 11). However, the testimony in issue here, advanced by a qualified hydrologist, goes beyond stating unanswered questions and specifically identifies conductivity, chemical quality, and magnitude and direction of flow as the characteristics of the rock body needing investigation in connection with contention EC-1. Such specific statements were not contained in the basis rejected by the Board. The testimony should be allowed.

b. Commission Staff's objections to testimony of Dr. Arjun Makhijani.

Commission Staff ask the Board to reject testimony by Dr. Arjun Makhijani supporting contention EC-4. This contention states that LES and the Commission Staff in the ER and the DEIS have failed to disclose the environmental impacts of processes used to deconvert depleted uranium hexafluoride ("DUF₆") to a more stable form for disposal:

NIRS/PC EC-4 -- IMPACTS OF WASTE STORAGE

CONTENTION: 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 ("UF₆") waste that is required in conjunction with the proposed enrichment plant.

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.

Dr. Makhijani's testimony points out that there is no discussion in the ER or the DEIS of alternatives to the conversion product selected by the Department of Energy ("DOE") for production at the Paducah and Portsmouth conversion plants, which is U_3O_8 . Among the alternative conversion products is UO_2 . The applicable regulations require an ER and a DEIS to consider appropriate alternatives for achieving the aims of the project. (10 CFR 51.45(b)(3), (c); 51.71(a), (d)). DOE has sought to evaluate the advantages and disadvantages of different disposal forms, including uranium metal, DUF_4 , DU_3O_8 , and DUO_2 . (See Croff, A.G., et al., Assessment of Preferred Depleted Uranium Disposal Forms, ORNL/TM-2000/161 (June 2000)). Dr. Makhijani points out that from the standpoint of disposal performance UO_2 may be superior to U_3O_8 . (Makhijani prefiled direct testimony at 8, 10-11, 14). The analysis of the impacts of deconversion logically should include the impacts of deconversion to different waste forms, including the environmental impacts from processing to produce such form and the impacts from disposal of alternative forms, to enable the decision makers to select the environmentally preferable alternative.

However, Commission Staff would apparently delete any reference to disposal performance in Dr. Makhijani's testimony, contending that it is outside the scope of contention EC-4. (Commission Staff Mot. 8). The difficulty with this approach is that, as is well known, the purpose of deconversion of DUF_6 is to generate a suitable form for disposal. (See LES prefiled testimony concerning NIRS/PC contention EC-4 at 4). That being the case, it is not possible to determine which deconversion form is an "appropriate alternative" without information on its disposal performance. Present information indicates that DU_3O_8 , and DUO_2 are at least in the running, but there is no EIS analysis of

the performance of DUO₂ for disposal, and the analysis in the DEIS of the performance of DU₃O₈ has no technical explanation and cannot be given credence. (See Makhijani prefiled direct testimony at 12).

Commission Staff urge that any testimony on disposal issues actually involves the waste classification issues now pending before the full Commission (Staff Mot. 9). However, Dr. Makhijani does not state that consideration of conversion (or disposal) impacts first requires waste classification; indeed, he states the contrary. (Makhijani prefiled direct testimony at 13-14). It is quite appropriate to consider the proposed disposal location and the degree of isolation to be afforded the DU waste form in projecting its performance. See *State of Minnesota Pollution Control Agency v. NRC*, 602 F.2d 412 (D.C. Cir. 1979). The fact that other studies may have examined alternative disposal forms (LES prefiled testimony on NIRS/PC contention EC-4 at 4) does not allow alternatives to be eliminated in the DEIS, since “these studies were not made part of the EIS and so invocation of them cannot alone ‘permit a reasoned choice of alternatives.’” *Chelsea Neighborhood Associations v. U.S. Postal Service*, 516 F.2d 378, 389 (2d Cir. 1975).

c. Commission Staff’s objections to testimony of Michael F. Sheehan.

Commission Staff object to Dr. Sheehan’s testimony in its entirety. Briefly, Dr. Sheehan, speaking as an economic expert, shows that the effect of the introduction of the proposed NEF into the United States is likely to be the replacement of one domestic source of enrichment capacity—United States Enrichment Corporation (“USEC”)—with a new entity controlled by Urenco, a foreign supplier. Commission Staff object that such testimony should not be considered by the Board and the Commission as they weigh the costs and benefits of the proposed NEF project. (Staff Mot. at 11-12).

It is important to view this objection in the light of the contention that has been admitted. The text of contention EC-7 addresses the inadequacy of the cost-benefit analysis:

NIRS/PC EC-7 -- NEED FOR THE FACILITY

CONTENTION: Petitioners contend that the Environmental Report (ER) does not adequately describe or weigh 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.

In explaining this contention, NIRS/PC had stated as bases, inter alia, (A) that it is an error to assume a shortage of enrichment capacity and that the EIS should explore alternative means to satisfy the need for enriched uranium, (B) that the EIS should investigate the impacts of alternative means of supplying enriched uranium to U.S. utilities and the proportion of the U.S. demand that the NEF would serve and (F) that the EIS should explore how LES would enter the market in the face of existing and anticipated competitors and contribute some public benefit, considering the costs faced by the market participants. (NIRS/PC Petition 39-41 (April 6, 2004); Reply 19—20 (May 10, 2004)). Commission Staff agreed with the admission of this contention as supported by such bases. (Commission Staff Answer to NIRS/PC Petition at 16-18 (May 3, 2004)). NIRS/PC argued to the Board that "NEPA is generally regarded as calling for some sort of weighing of the

environmental costs against the economic, technical, or other public benefits of a proposal.” In re *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 88 (1998). Such analysis of “public benefits” cannot be limited to economic impacts and should account for a range of benefits sought by national policy. (*LES*, 47 NRC at 95-96). Moreover, the EIS must “to the fullest extent practicable, quantify the various factors considered.” 10 CFR § 51.71(d). The EIS must “indicate what other interests and considerations of Federal policy, including factors not related to environmental quality if applicable, are relevant to consideration of environmental effects.” 10 CFR § 51.71(d). (See NIRS/PC Reply at 18 (May 10, 2004)). Based upon that record, the Board admitted this contention as to such bases. (Memorandum and Order at 32 (July 19, 2004)).

It is recognized that NEPA requires an analysis of the costs and benefits of a proposed action. The statute calls upon the Commission to “insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations” (42 USC 4332(2)(B)), and regulations of the Council on Environmental Quality call for a cost benefit analysis of a formal or informal nature. 40 CFR 1502.23.

Here, LES has presented a lengthy interpretation of the benefits of the advent of the NEF to users of enrichment services, i.e., in furnishing a second domestic source of enrichment services, offering competition with USEC, and advancing national security objectives. (ER 1.1.1, 1.1.2). The DEIS in turn contains a discussion of the need to be satisfied by the project. (DEIS at 1-2 through 1-5). The DEIS refers to forecasts of U.S. enrichment requirements and states:

“The two forecasts indicate a need for additional uranium enrichment capability to ensure national security.

* * *

Purchasers of enrichment services view diversity and security of supply as vital from a commercial perspective (LES, 2004). The proposed NEF would supplement the domestic sources of enrichment services provided by USEC's Paducah Gaseous Diffusion Plant and the proposed American Centrifuge Plant. Beginning production in 2008 and achieving full production output by 2013, the proposed NEF would provide roughly 25 percent of the current and projected U.S. enrichment services demand (EIA, 2004a; EIA 2003b)." (DEIS at 1-4, 1-5).

Thus, the ER and DEIS conclude that the outcome of licensing the NEF would be (a) to ensure national security, (b) to provide a second domestic enrichment supplier to supplement the two plants operated by USEC, and (c) to serve roughly 25 percent of the demand by U.S. users of enrichment. Thus, LES and the Commission Staff have undertaken to assert, and to quantify, the benefits of the proposed project.

In such circumstances, courts have interpreted NEPA and its implementing regulations to require an accurate consideration of likely economic and other impacts of a proposed action. For example, in *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996), the agency had relied upon an inflated estimate of the economic benefits of construction of a dam, and the court held that the NEPA analysis was invalid:

"Misleading economic assumptions can defeat the first function of an EIS by impairing the agency's consideration of the adverse environmental impacts of a proposed project. . . . NEPA requires agencies to balance a project's economic benefits against its adverse environmental effects. . . . The use of inflated economic benefits in this balancing process may result in approval of a project that otherwise would not have been approved because of its adverse environmental effects. Similarly, misleading economic assumptions can also defeat the second function of an EIS by skewing the public's evaluation of a project."

Likewise, in *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983), the court directed that any EIS discussion of the economic benefits of a proposal must include prospective costs:

"However, once the Corps chose to trumpet the benefits of bulk cargo activities in the EIS as a 'selling point' for the oil project, it rendered a decision that these activities were imminent. NEPA therefore required full disclosure and analysis of their costs. . . . The Corps cannot tip the scales of an EIS by promoting possible

benefits while ignoring their costs. Simple logic, fairness, and the premises of cost-benefit analysis, let alone NEPA, demand that a cost-benefit analysis be carried out objectively. There can be no 'hard look' at costs and benefits unless all costs are disclosed."

In a word, "NEPA mandates a rather finely tuned and 'systematic' balancing analysis in each instance." *Chelsea Neighborhood Associations v. U.S. Postal Service*, 516 F.2d 378, 387 (2d Cir. 1975).

The testimony by Dr. Sheehan responds to this requirement of NEPA. He shows that there are economic and environmental costs likely to ensue from the licensing of the NEF that are not accounted for in the ER and the DEIS, and whose omission means that a decision based upon the ER or the DEIS would be based upon "misleading economic assumptions," *Hughes River*, 81 F.3d at 446. Dr. Sheehan's testimony addresses the claimed *public* benefits of the NEF project, such as the assumed advent of a second, competitive source of enrichment services; the asserted contributions to national security, diversity of supply, and security of supply; and the forecast that the NEF would supply 25 percent of U.S. requirements. LES and Commission Staff cannot be heard to "trumpet the benefits" (695 F.2d at 979) of the proposed NEF without being called to account for their misleading claims.

Commission Staff assert that Dr. Sheehan's testimony exceeds the scope of the admitted contentions. (Staff Mot. 11-12). But there is an admitted contention here, addressing whether "LES would effectively enter this market in the face of existing and anticipated competitors and contribute some public benefit." (NIRS/PC contention EC-7, Basis C). Such inquiry involves examination of the costs imposed by such a plant as well as its benefits. NIRS/PC stated in their Petition:

“LES has not provided the Commission with any information regarding the current costs of SWUs to present and expected market participants; the cost of the proposed NEF SWU production—including all costs related to construction, operation, decommissioning and UF₆ waste disposal—nor market projections; and thus has not demonstrated how construction of the proposed facility would satisfy any alleged need.” (NIRS/PC Pet. at 40-41, April 6, 2004).

In their Reply, NIRS/PC stated further that LES must show all the costs that the new plant would impose, so that the Commission can judge whether the benefits outweigh the cost:

“Before seeking a license, LES presumably studied the costs of other suppliers and the responsiveness of customers to price and other factors, to satisfy itself that utilities would buy SWUs from the NEF. The NEPA analysis underlies NRC’s decision whether to license this plant. If NRC is to make an informed decision, it must know the benefits of this project, viz: whether the project will produce SWUs better, faster, or cheaper—with the benefits quantified—than others can do.” (NIRS/PC Reply 20, May 10, 2004).

Dr. Sheehan’s testimony about, e.g., forthcoming competition with USEC or other suppliers, the possible impact of USEC’s failure, the actual extent of job and tax benefits, and the potential costs of groundwater contamination or the failure of LES’s waste disposal plans (Staff Mot. 11) all concerns the costs of the proposed NEF. Such costs are directly relevant to whether LES can “effectively enter this market in the face of existing and anticipated competitors and contribute some public benefit.” The motion in limine should be denied.

d. Commission Staff’s objections to the testimony of Charles Komanoff.

Charles Komanoff has presented a rigorous economic analysis, based upon LES’s own computerized market studies, that shows that there is in fact no shortage of enrichment capacity to serve the needs of utilities. (Komanoff prefiled direct testimony, Jan. 7, 2005). Such a demonstration comes squarely within the bounds of contention EC-7, one basis of which is that “Louisiana Energy Services, L.P.’s (LES) presentation erroneously assumes that there is a shortage of enrichment capacity.” Commission Staff

nevertheless want Mr. Komanoff's testimony excluded, stating that it would be acceptable if Mr. Komanoff challenged LES's claim of need for 3 million SWU of enrichment capacity, but to do so by showing that one substitute for such capacity is to purchase more U_3O_8 exceeds Staff's tolerance. (Staff Mot. 12-13).

Such argument might make sense in a Soviet-style command economy, in which the existence of a "shortage" is determined by government administrators. But in the United States there is a flexible market economy. In that economy, utilities may substitute uranium for enrichment services, based upon the relative prices. (Komanoff prefiled direct testimony at 11, Jan. 7, 2005). Mr. Komanoff has shown that the supposed "need" for enrichment can and will be addressed by market adjustments that bring additional U_3O_8 into the system.

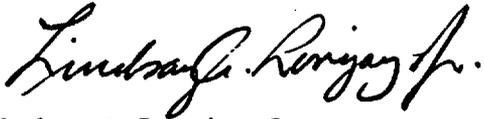
Commission Staff contend that Mr. Komanoff presumes the very premise challenged by NIRS/PC—that there is a need for additional enrichment supplies. (Staff Mot. 12). To the contrary, Mr. Komanoff's testimony shows that the need for enriched uranium can be met without building new enrichment capacity. (Komanoff prefiled direct testimony at 4-5). Moreover, his analysis makes only minor changes in the tails assay used in enrichment production and cannot seriously be challenged as unrealistic. (Staff Mot. 13). It is established that an agency may not define a proposal so narrowly that it forecloses a reasonable consideration of alternatives. *Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002). The evidence addresses that issue. The motion in limine should be denied.

Conclusion

The testimony offered by the witnesses for NIRS/PC is directly relevant to the contentions that the Board has set for hearing. No support should be given to Commission

Staff's efforts to restate the contentions admitted by the Board to narrow the matters in issue. The motion should be denied.

Respectfully submitted,



Lindsay A. Lovejoy, Jr.
618 Paseo de Peralta, Unit B
Santa Fe, NM 87501
(505) 983-1800
(505) 983-0036 (facsimile)
E-mail: lindsay@lindsaylovejoy.com

Counsel for Petitioners
Nuclear Information and Resource Service
1424 16th St., N.W. Suite 404
Washington, D.C. 20036
(202) 328-0002

and

Public Citizen
1600 20th St., N.W.
Washington, D.C. 20009
(202) 588-1000

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CERTIFICATE OF SERVICE

Pursuant to 10 CFR § 2.305 the undersigned attorney of record certifies that on January 18, 2005, the foregoing Response on behalf of Nuclear Information and Resource Service and Public Citizen to Commission Staff Motion in Limine to Preclude NIRS/PC Testimony was served by electronic mail and by first class mail upon the following:

G. Paul Bollwerk, III
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: gpb@nrc.gov

Dr. Paul B. Abramson
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: pba@nrc.gov

Dr. Charles N. Kelber
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: cnk@nrc.gov

James Curtiss, Esq.
David A. Repka, Esq.
Winston & Strawn
1400 L St.
Washington, D.C. 20005-3502
e-mail: jcurtiss@winston.com
drepka@winston.com
moneill@winston.com

John W. Lawrence, Esq.
Louisiana Energy Services, L.P.
2600 Virginia Ave., N.W.
Suite 610
Washington, D.C. 20037
e-mail: jlawrence@nefnm.com

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Associate General Counsel for Hearings, Enforcement, and
Administration

e-mail: OGCMailCenter@nrc.gov

lbc@nrc.gov

abc1@nrc.gov

jth@nrc.gov

dmr1@nrc.gov

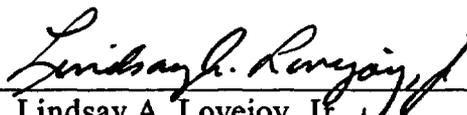
dac3@nrc.gov

Office of Commission Appellate Adjudication
Mail Stop O-16C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Tannis L. Fox, Esq.
Deputy General Counsel
New Mexico Environment Department
1190 St. Francis Drive
Santa Fe, NM 87502-1031
e-mail: tannis_fox@nmenv.state.nm.us

Glenn R. Smith, Esq.
Christopher D. Coppin, Esq.
Stephen R. Farris, Esq.
David M. Pato, Esq.
Assistant Attorneys General
P.O. Drawer 1508
Santa Fe, NM 87504-1508
e-mail: ccoppin@ago.state.nm.us
dpato@ago.state.nm.us
gsmith@ago.state.nm.us
sfarris@ago.state.nm.us

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications Staff (original and two copies)
e-mail: hearingdocket@nrc.gov



Lindsay A. Lovejoy, Jr.
618 Paseo de Peralta, Unit B

Santa Fe, NM 87501
(505) 983-1800
(505) 983-0036 (facsimile)
e-mail: lindsay@lindsaylovejoy.com