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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

February 1, 2005 (4:43pm)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)	
)	Docket No. 70-3103-ML
Louisiana Energy Services, L.P.)	
)	ASLBP No. 04-826-01-ML
(National Enrichment Facility))	

MOTION IN LIMINE ON BEHALF OF LOUISIANA ENERGY SERVICES, L.P.
TO EXCLUDE CERTAIN PREFILED REBUTTAL TESTIMONY OF NIRS/PC
WITNESSES GEORGE RICE, ARJUN MAKHIJANI, AND MICHAEL SHEEHAN

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323 and § 2.337(a), Louisiana Energy Services, L.P. (“LES”) herein moves the Atomic Safety and Licensing Board (“Licensing Board”) to exclude certain prefiled rebuttal testimony of Nuclear Information and Resource Service and Public Citizen (“NIRS/PC”) witnesses (1) George Rice, (2) Arjun Makhijani, and (3) Michael Sheehan.¹ The inadmissible testimony, which LES identifies below, is outside the scope of the pertinent environmental contentions. As discussed below, the entirety of Dr. Sheehan’s prefiled rebuttal testimony should be stricken. Dr. Sheehan has *again* defied the Board by raising issues that have been repeatedly rejected as irrelevant to Contention NIRS/PC EC-7.

¹ See “Rebuttal Testimony of George Rice on Behalf of Nuclear Information and Resource Service and Public Citizen NIRS/PC Contention EC-1” (Jan. 28, 2005); “Rebuttal Testimony of Dr. Arjun Makhijani Regarding Nuclear Information and Resource Service and Public Citizen’s Contention EC-4” (Jan. 28, 2005); and “Rebuttal Testimony of Michael F. Sheehan on Behalf of Nuclear Information and Resource Service and Public Citizen NIRS/PC EC-7” (Jan. 28, 2005).

II. ARGUMENT

NRC regulations governing the admission of evidence provide that “[o]nly *relevant, material, and reliable* evidence which is not unduly repetitious will be admitted. *Immaterial or irrelevant parts* of an admissible document will be segregated and excluded so far as is practicable.”² As the Commission stated in the *Claiborne* proceeding: “Our own longstanding practice requires adjudicatory boards to adhere to the terms of admitted contentions”³ In particular, “[w]here an issue arises over the scope of an admitted contention, NRC opinions have long referred back to the bases set forth in support of the contention.”⁴ The Licensing Board should exclude the NIRS/PC rebuttal testimony identified below because it exceeds the scope of the admitted contentions and bases, and ignores prior Board rulings in this proceeding.

A. Inadmissible Rebuttal Testimony of George Rice

1. *Rebuttal Testimony Regarding Two Water-Bearing Units Beneath the Site*

In its Memorandum and Order (Ruling on In Limine Motions and Providing Administrative Directives) of January 21, 2005 (“Ruling on In Limine Motions”), in response to LES and NRC Staff motions, the Licensing Board struck portions of the January 7, 2005 prefiled direct testimony of George Rice relative to Contention NIRS/PC EC-1. That testimony related, in part, to the alleged lack of information regarding two water-bearing units beneath the site (*i.e.*,

² 10 C.F.R. § 2.337(a) (emphasis added).

³ *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 105 (1998) (citation omitted).

⁴ *See Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002) (citation omitted).

a sandstone unit located approximately 600 feet below the National Enrichment Facility ("NEF") site and the Santa Rosa Aquifer at roughly 1,100 feet below ground surface). The Board stated:

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) [], 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.⁵

By the same token, a witness cannot seek to resurrect an inadmissible matter in his prefiled rebuttal testimony. Contrary to Mr. Rice's suggestion, the mere "mention" of the two water-bearing units by LES for background purposes should not serve to "resurrect" this matter. Accordingly, LES respectfully requests that the Licensing Board strike from the prefiled rebuttal testimony of George Rice Questions and Answers 24 and 25, in their entirety. These questions and answers relate specifically to the above-framed issue, which the Licensing Board deemed inadmissible in its January 21 ruling.

2. *Rebuttal Testimony Regarding the Adequacy of Certain Staff Calculations Concerning Groundwater Flow Rates*

In its January 21 ruling, the Licensing Board struck from the prefiled direct testimony of George Rice statements challenging the adequacy of certain NRC Staff calculations relating to the postulated flow of water from the Site Stormwater Detention Basin and septic

⁵ Ruling on In Limine Motions, at 3-4.

leach fields along the so-called alluvium/Chinle contact. In granting the NRC Staff's *in limine* motion, the Licensing Board explained:

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 [citation omitted]. 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.⁶

In view of this ruling, the Licensing Board should strike the third full paragraph of Answer 23 (beginning on page 16 with word "Regarding" and ending on page 16 with the phrase "100 cm/s") and Answer 32 (on page 20, in its entirety) of Mr. Rice's prefiled rebuttal testimony. These answers relate to the substance of the Staff's calculations (in particular, to the hydraulic conductivity and porosity values used in those calculations).

B. Inadmissible Rebuttal Testimony of Arjun Makhijani

In its January 21, 2005 order, the Licensing Board ruled that Dr. Makhijani's prefiled direct testimony "relating to the classification of [depleted uranium] waste [was] outside the scope of this contention as admitted."⁷ The Licensing Board further ruled that other portions of Dr. Makhijani's prefiled direct testimony were inadmissible because they delved "into a disposal issue of the type we recently have excluded from this contention," and "appear[ed] to be another improper attempt to use expert testimony to amend an existing contention or introduce

⁶ Ruling on In Limine Motions, at 4-5.

⁷ *Id.*, at 7.

what is essentially a new contention outlining an additional alternative for consideration.”⁸ Notably, the Licensing Board struck from Dr. Makhijani’s prefiled direct testimony all discussion related to Dr. Makhijani’s assertion in that testimony that “[i]n analyzing the impacts of the deconversion process, the choice must be made between [the] deconversion product (*i.e.*, U₃O₈ or UO₂).”

As with his prefiled direct testimony on Contention NIRS/PC EC-4, Dr. Makhijani’s rebuttal testimony centers on the alleged need to deconvert depleted uranium generated by the NEF to UO₂, as opposed to the U₃O₈ form proposed by LES in its license application, for the sole reason that Dr. Makhijani believes that UO₂ is the preferred form *for disposal*. As such, much of Dr. Makhijani’s rebuttal testimony meets the foregoing Board description, *i.e.*, it seeks improperly to address an inadmissible disposal-related issue and to introduce “an additional alternative for consideration.” For this reason, Questions and Answers 3, 6, and 7 of Dr. Makhijani’s rebuttal testimony should be stricken in their entirety.

C. Inadmissible Rebuttal Testimony of Michael Sheehan

Despite the Licensing Board’s substantial curtailment of his prefiled direct testimony in response to LES and Staff *in limine* motions, in his rebuttal testimony, Dr. Sheehan continues to delve into inadmissible issues relating to costs, prices, and alleged competitive effects on USEC. This fact is manifest in Dr. Sheehan’s conclusions, which read as follows:

1. The Staff and LES analyses are defective in that they reach conclusions about the adequacy of enrichment supply over time without dealing explicitly with *cost and price* while making critical assumptions based on *costs and prices*.
2. The Staff and LES analyses refuse to consider the possibility that the construction of the NEF plant *would seriously jeopardize the ability of USEC to construct the its American Centrifuge plant* with its up-to-date

⁸ *Id.*

technology. If the construction of the NEF effectively prevents the construction of the USEC plant which would otherwise be constructed, the NEF plant would fail to meet its need justification as set forth in the ER and be counterproductive in its own terms.

3. The *replacement of USEC by Urenco* as the dominant or single producer in the United States would sharply worsen and not improve the security of United States supply.
4. The presentation of data on contracts signed by the NEF is not evidence of the ability of the NEF plant to provide net "benefits to the public."⁹

LES has previously responded many times (at least six) to the seemingly indefatigable attempts of NIRS/PC to expand the scope of a narrowly focused environmental contention to include issues related to plant economics and the alleged adverse effect of NEF operation on the uranium enrichment market, and on USEC specifically.¹⁰ The Licensing Board has repeatedly ruled in LES's (and the NRC Staff's) favor, confirming the limited scope of Contention NIRS/PC EC-7. For example, in rejecting two NIRS/PC motions to compel discovery, the Licensing Board stated that "the particular bases which the Licensing Board found supported admission of this contention were narrowly focused . . .", and did *not* warrant "examination of the 'business case' or profitability of the NEF venture."¹¹ Further, the Licensing

⁹ Sheehan Rebuttal Testimony, at 6-7, 28-29 (emphasis added). Even in addressing the existence of LES contracts, Dr. Sheehan bases his argument on the alleged anti-competitive effect of the proposed NEF.

¹⁰ See (1) "[LES] Opposition to [NIRS/PC] Motion to Compel Responses to Interrogatories" (Oct. 12, 2004), at 2-12; (2) "[LES] Opposition to [NIRS/PC] Motion to Compel Responses" (Oct. 15, 2004); (3) "Response of [LES] to Motion to Compel Discovery Concerning Need for the National Enrichment Facility" (Oct. 28, 2004); (4) "Answer of [LES] to Motion on Behalf of [NIRS/PC] to Amend and Supplement Contentions" (Nov. 5, 2004), at 38-41; (5) "Motion on Behalf of [LES] to Restrict Scope of Prefiled Testimony of [NIRS/PC] on Environmental Contentions" (Dec. 6, 2004), at 5-7; and (6) 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 5-9.

¹¹ Memorandum and Order (Discovery Rulings) (unpublished) (Oct. 20, 2004), at 17-18. The Board added that "the remaining two contested bases for this particular contention were expressly disallowed by the Board because they focused upon these business case/profitability aspects." *Id.*

Board flatly rejected the late-filed NIRS/PC argument that the NRC Staff must consider “the effect of the addition of the NEF to the existing range of suppliers and forthcoming suppliers, the nature of competition that will occur, and the impacts upon market participants and consumers.”¹² In its most recent ruling, the Licensing Board concluded that “[m]uch of Dr. Sheehan’s prefiled direct testimony does indeed fall outside the scope of this proceeding and/or the contention for which it is offered.”¹³

In view of Dr. Sheehan’s continuing refusal to abide by the Licensing Board’s directives, LES respectfully requests that the Licensing Board, at a minimum, strike the entirety of Dr. Sheehan’s prefiled rebuttal testimony. His testimony again raises inadmissible issues and exceeds the proper scope of rebuttal testimony. Allowing its admission will lead only to delay and confusion at next week’s evidentiary hearing.

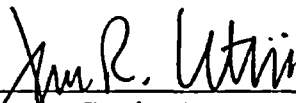
¹² Board Ruling on Late-Filed Contentions, at 17-18. *See also* Memorandum and Order (Ruling on Applicant Motion to Restrict Scope and Staff Motion In Limine) (unpublished) (Dec. 30, 2004), at 3 (enumerating the specific “matters obviously relevant to the admitted environmental contentions”).

¹³ Ruling on In Limine Motions, at 9. The Board cited, by way of example, Dr. Sheehan’s testimony regarding the effect of the NEF upon the United States-Russian high enriched uranium agreement, Urenco management integrity, the effects on the Ogallala aquifer, and the disposal of depleted uranium tails.

III. CONCLUSION

For the foregoing reasons, the Licensing Board should exclude from the evidentiary record in this proceeding the prefiled rebuttal testimony of George Rice and Arjun Makhijani identified above. In addition, LES respectfully requests that the Licensing Board strike the entirety of Dr. Sheehan's rebuttal testimony as beyond the proper scope of Contention NIRS/PC EC-7 and rebuttal testimony in general.

Respectfully submitted,



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Dated at Washington, District of Columbia
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

Louisiana Energy Services, L.P.

(National Enrichment Facility)

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "MOTION IN LIMINE ON BEHALF OF LOUISIANA ENERGY SERVICES, L.P. TO EXCLUDE CERTAIN PREFILED REBUTTAL TESTIMONY OF NIRS/PC WITNESSES GEORGE RICE, ARJUN MAKHIJANI, AND MICHAEL SHEEHAN" in the captioned proceeding have been served on the following by e-mail service, designated by **, on February 1, 2005 as shown below. Additional service has been made by deposit in the United States mail, first class, this 1st day of February 2005.

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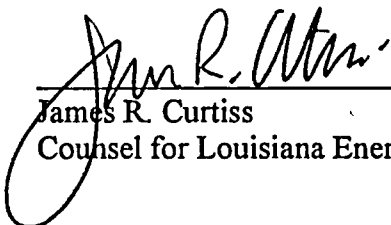
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