

RAS 10541

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

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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

October 4, 2005

MEMORANDUM AND ORDER

(Ruling on In Limine Motions and Motion to Dismiss)

Pending before the Licensing Board are (1) a September 22, 2005 motion by applicant Louisiana Energy Services, L.P., (LES) renewing its August 31, 2005 motion to dismiss certain contentions, or portions thereof, of intervenors Nuclear Information and Resource Service and Public Citizen (NIRS/PC) that are scheduled to be the subject of an October 2005 evidentiary hearing in this proceeding, and seeking to exclude certain portions of the prefiled direct testimony of NIRS/PC witness Dr. Arjun Makhijani relative to that evidentiary hearing; and (2) a September 22, 2005 motion by the NRC staff, also seeking to strike portions of the prefiled direct testimony of Dr. Arjun Makhijani relative to the remaining contentions in this proceeding -- NIRS/PC EC-3/TC-1 – Depleted Uranium Hexafluoride Storage and Disposal; NIRS/PC EC-5/TC-2 – Decommissioning Costs; and NIRS/PC EC-6/TC-3 – Costs of Management and Disposal of Depleted UF₆. 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. RULING ON LES MOTION TO DISMISS

On August 31, 2005, LES filed a motion seeking to dismiss and/or narrow the scope of several NIRS/PC contentions admitted to this proceeding. The Board issued a memorandum and order on September 2, 2005, prior to receiving party responses to the LES motion, concluding that the substance of the motion would most appropriately be addressed in the context of an LES motion in limine relative to prefiled direct testimony by NIRS/PC or by a renewed motion to dismiss at that time. See Licensing Board Memorandum and Order (Regarding LES Motion to Dismiss/Narrow Scope; Schedule for Prefiled Testimony and Related Filings) (Sept. 2, 2005) (unpublished) [hereinafter September 2 Order]. LES accordingly renewed in part its August 31 motion in a September 22 motion relative to the prefiled direct testimony of NIRS/PC witness Dr. Makhijani. Specifically, the renewed LES motion seeks dismissal of contention NIRS/PC EC-3/TC-1 in its entirety, regarding the plausibility of a strategy for private sector disposal of depleted uranium hexafluoride (DUF_6) waste from LES, including deconversion by Cogema, as well as dismissal of the first subpart of NIRS/PC EC-5/TC-2, regarding the adequacy of the contingency factor applied by LES to its overall dispositioning cost estimate for DUF_6 . See Motion in Limine and Renewed Motion to Dismiss on Behalf of [LES] Concerning the Direct Testimony of Arjun Makhijani and Contentions NIRS/PC EC-3/TC-1 and EC-5/TC-2 (Sept. 22, 2005) at 11-13 [hereinafter LES Motion].

NIRS/PC responded to the LES motion to dismiss on September 28, 2005, stating that (1) with regard to contention EC-3/TC-1, the question of whether deconversion by Cogema is a plausible strategy continues to raise a genuine factual dispute; and (2) with regard to the first subpart of contention EC-5/TC-2, LES's assumptions improperly narrow the scope of the contingency factor. See Memorandum on Behalf of Intervenors [NIRS/PC] in Response to

Motion In Limine and Renewed Motion to Dismiss by [LES] (Sept. 28, 2005) at 18-24 [hereinafter NIRS/PC Response to LES Motion].

As the Board stated its September 2 memorandum and order regarding the first LES motion to dismiss or limit the scope of NIRS/PC contentions, even if the Board were to strike all of NIRS/PC's prefiled direct and rebuttal testimony relative to the remaining contested issues in this proceeding, NIRS/PC nonetheless may seek to make its case "defensively" on the basis of cross-examination of LES and staff witnesses alone. See September 2 Order at 2.

Accordingly, at this juncture, the LES motion to dismiss contention NIRS/PC EC-3/TC-1 and the first subpart of NIRS/PC EC-5/TC-2 is denied. LES and the staff are therefore directed to present prefiled rebuttal testimony relative to Dr. Makhijani's prefiled direct testimony on those contentions, except to the extent certain testimony is stricken in accord with our rulings below.

II. IN LIMINE MOTION RULINGS

A. LES and Staff Motions to Exclude Portions of NIRS/PC's Prefiled Testimony on LES Deconversion Strategy and Cost Estimate

DISCUSSION: NRC Staff's Motion In Limine to Exclude [NIRS/PC] Testimony (Sept. 22, 2005) at 1-5 [hereinafter Staff Motion]; LES Motion at 2-8; Memorandum on Behalf of Intervenors [NIRS/PC] in Response to NRC Staff's Motion In Limine to Exclude NIRS/PC Testimony (Sept. 28, 2005) at 1-12 [hereinafter NIRS/PC Response to Staff Motion]; NIRS/PC Response to LES Motion at 1-9, 10-11, 12-13, 15.

RULING: We deal first with LES's motion to exclude certain introductory testimony by Dr. Makhijani, which LES argues impermissibly raises the "performance histories" or "track records" of third parties. See LES Motion at 4-5. The Board finds that the testimony identified by LES must be excluded, but on different grounds. At bottom, this testimony attempts to identify a legal and policy standard as to what constitutes a "plausible strategy," and the extent to which a license or contract between LES and a third party might be required. Expert testimony is not required as to such a legal or policy question. Instead, to the extent that

NIRS/PC wishes to propose certain legal standards or definitions as to what constitutes a “plausible strategy” for deconversion (or disposal), it may do so in the context of its Proposed Findings of Fact and Conclusions of Law relative to the findings the Board must make following the October 2005 hearing on these contested issues.¹ Accordingly, we grant the LES motion to strike Dr. Makhijani’s testimony relative to what is required to demonstrate a plausible strategy, including that related to the track records or performance histories of third parties.

For its part, the staff moved to exclude portions of Dr. Makhijani’s testimony that it alleges improperly challenge the staff’s Final Environmental Impact Statement (FEIS) regarding the LES application and are, therefore, outside the scope of any admitted contention. See Staff Motion at 4. The staff is correct that none of NIRS/PC’s remaining contentions place the adequacy of the FEIS at issue. The portion of Dr. Makhijani’s testimony the staff contests does not, however, seek to challenge the FEIS, but merely uses discussions in the FEIS to provide support for its argument that calcium fluoride (CaF₂) cannot be disposed of in an industrial landfill. We therefore deny the staff’s motion in this regard.

The remainder of the challenges by LES and the staff to Dr. Makhijani’s deconversion testimony generally overlap in subject matter. First, LES and the staff both challenge Dr. Makhijani’s discussion of the possible need for LES to deconvert depleted uranium from the National Enrichment Facility (NEF) to UO₂ rather than U₃O₈ as proposed by LES in its application. The Board declined to hear testimony on this subject matter in the context of the February 2005 evidentiary hearing on environmental contentions, see Licensing Board Memorandum and Order (Ruling on In Limine Motions Regarding Prefiled Direct and Rebuttal

¹ Indeed, this legal/policy question of what constitutes a plausible strategy should be addressed in the context of the each of the parties’ proposed findings of fact and conclusions of law if they believe such a discussion would aid the Board in its decision relative to the remaining contested issues in this proceeding.

Testimony and Providing Administrative Directives) (Feb. 4, 2005) at 3-4 (unpublished), and we will not allow such testimony here. Accordingly, we grant the LES and staff motions to strike as to this issue.

LES and the staff also challenge, in part or in whole, Dr. Makhijani's testimony relative to the overall cost for deconversion, transportation, and disposal of depleted uranium from the NEF. As noted above, this Board has consistently rejected testimony based on the premise that DUF_6 from the NEF will have to be deconverted to UO_2 , as NIRS/PC has asserted is necessary, instead of U_3O_8 , as LES proposes. The entirety of the testimony in Dr. Makhijani's answer to question nine, including the cost estimates that might otherwise be helpful to the Board in determining the reasonableness of cost estimates relied on by LES, incorporates the assumption that depleted uranium would be converted to UO_2 , making it impractical for the Board to attempt to extract that cost information that is not tainted by the inclusion of the assumption of deconversion to UO_2 . Accordingly, the Board grants the LES and staff motions as to this testimony.

In this regard, however, the Board continues to be interested in testimony from NIRS/PC that might challenge or contradict the cost estimates relied on by LES in its direct testimony in a manner that does not include reliance on numbers generated by assuming deconversion to a form other than U_3O_8 . Therefore, to the extent that Dr. Makhijani can provide the Board with a cost estimate that does not incorporate an assumption of deconversion to UO_2 , or any other matters the Board has previously declined to hear, such as increased health risks to women, NIRS/PC may submit such testimony as part of its prefiled rebuttal testimony. That being said, to the extent LES or the staff find reason to exclude any or all of that testimony, they may file motions in limine relative to Dr. Makhijani's prefiled rebuttal testimony in accordance with the schedule established in section III below.

Finally, regarding the challenges by LES and the staff to testimony by Dr. Makhijani that addresses the adequacy of the Department of Energy's (DOE) cost estimates for disposal of depleted uranium and/or raises issues related to DOE's performance history, the Board is persuaded by these motions. In support of this testimony, NIRS/PC cites the Board's June 30, 2005 ruling on late-filed contentions, in which we stated that "the reasonableness of the estimated costs of either the DOE plausible strategy or any potential private disposal strategy will be at issue in this proceeding." See NIRS/PC Response to Staff Motion at 12 (quoting Licensing Board Memorandum and Order (Ruling on Late-Filed Contentions) at 13-14 (June 30, 2005) (unpublished) [hereinafter June Late-Filing Ruling]). This Board statement cannot, however, be read in a vacuum; it must be considered within the context in which it was made, and as it was affected by our subsequent rulings.

The quoted statement was made in the context of a proposed amendment by NIRS/PC to contention EC-3/TC-1, which challenges the plausibility of LES's strategy for private sector disposal of depleted uranium,² and did not address or challenge disposal or decommissioning costs, which are the matters that are the subject of contentions EC-5/TC-2 and EC-6/TC-3. See June Late-Filing Ruling at 7-13. The focus of the subject ruling was to make clear that if LES intended to rely on a private sector strategy for determination of its decommissioning funding obligations, it would have to provide corresponding private sector cost estimates, and to leave open, at that point, the question of the extent to which any DOE cost estimates might also

² The proposed amendment itself concerned the suitability of Waste Control Specialists (WCS) as a private sector disposal strategy. Neither "cost estimates" nor the "DOE plausible strategy" were the subject of that proposed contention amendment or this Board's ruling on the admissibility of that amendment. Nonetheless, the parties should be advised that in the absence of sound support for the view that the cost estimates of private sector strategy underlying LES' estimates of decommissioning funding are reasonable, the Board will look to the cost of the DOE disposal option strategy as an alternative that has been accepted by the Commission.

be relevant.. See id. at 13 n.12. Its legal significance, however, must be read within its context, which relates only to the private sector disposal option.

When the Board was subsequently directly presented by a proposed amendment to contention EC-5/TC-2 with the question of admissibility of challenges to DOE cost estimates as part of the DOE disposal option, we found those challenges outside the scope of this proceeding. See Licensing Board Memorandum and Order (Ruling on Motion to Admit Late-Filed Amended and Supplemental Contentions) at 21-22 (Aug. 4, 2005) (unpublished) [hereinafter August Late-Filing Ruling]. That ruling rested, as we therein stated, upon our view that the agency has no basis for assuming DOE has erred in computing its fees and no authority to direct or challenge the fee estimates DOE has provided pursuant to its own statutory authority under section 3113 of the USEC Privatization Act, 42 U.S.C. § 2297h-11. Nonetheless, because of the unique nature of that question, we referred that particular portion of our ruling to the Commission for its consideration. Absent a Commission ruling reversing our exclusion of consideration of DOE cost estimates in this portion of the proceeding, the Board will not hear testimony concerning the adequacy of the particular costs associated with the DOE disposal option, except in one limited respect. If, based on the LES and staff prefiled testimony and exhibits, NIRS/PC identifies any element of decommissioning or disposal whose costs have not been included in the estimated costs³ for the DOE disposal option (except those elements that have been excluded by our prior rulings⁴) it may provide prefiled rebuttal testimony (or

³ These would be cost estimates, if any, associated with the DOE disposal option that were not part of the cost estimate provided by DOE pursuant to section 3113 of the USEC Privatization Act.

⁴ Previously, the Board has indicated that a number of subjects are not appropriate matters for consideration in challenging LES cost deconversion or disposal cost estimates (such as disposal in the form of UO₂ and health effects of uranium) and those matters likewise would not be appropriate subjects of a challenge to costs associated with the DOE option

(continued...)

cross-examine the appropriate LES or staff witnesses) regarding the failure to include those items.

Accordingly, as LES and the staff point out, Dr. Makhijani's testimony relative to DOE cost estimates improperly discusses issues outside the scope of any admitted contention, and the LES and staff motions are therefore granted relative to that testimony.

To summarize, the LES and staff in limine motions relative to Dr. Makhijani's deconversion testimony are granted in that the testimony is stricken as follows:⁵ (1) in answer four, the text on page seven beginning with "In presenting the plan" and ending with "considered to be plausible," and on page eight the text beginning with "Similar to the considerations" and ending with "would be required" at the end of that page; (2) question eight and the answer thereto in their entirety; (3) question nine and the answer thereto in their entirety;⁶ and (4) question ten and the answer thereto in their entirety.

B. LES and Staff Motions to Exclude Portions of NIRS/PC's Prefiled Testimony on LES Transportation Cost Estimate

DISCUSSION: Staff Motion at 1-2, 5-7; LES Motion at 2-7, 9; NIRS/PC Response to Staff Motion at 1-9, 12-13; NIRS/PC Response to LES Motion at 1-9, 10-11, 12-13, 16-18.

RULING: LES once again challenges Dr. Makhijani's testimony on what LES views as impermissible challenges to the "performance histories" or "track records" of third parties. For the reasons set forth in our discussion of this challenge in the context of Dr. Makhijani's deconversion testimony, see supra pp. 3-4, we grant the LES motion to exclude certain

⁴(...continued)
either.

⁵ In all instances in which testimony text is struck, any accompanying footnotes are also eliminated.

⁶ NIRS/PC may, however, submit prefiled rebuttal testimony in the manner prescribed by the Board at p. 5 supra.

identified testimony by Dr. Makhijani, again with the understanding that NIRS/PC may propose certain legal standards or definitions as to what constitutes a “plausible strategy” in the context of its Proposed Findings of Fact and Conclusions of Law relative to the upcoming evidentiary hearing in this proceeding.

LES next seeks to exclude Dr. Makhijani’s testimony regarding the proper method for disposal of depleted uranium from the NEF on the grounds that it raises disposal issues unrelated to LES’s transportation cost estimate for depleted uranium. See LES Motion at 9. As the Commission indicated in its January 18, 2005 issuance, the issue of whether near-surface disposal of depleted uranium from the NEF will ultimately be appropriate remains before the Board for its consideration, see CLI-05-5, 61 NRC 22, 34-35, 35 n.64 (2005), and, in our view, testimony on this issue is sufficiently related to LES’s transportation cost estimates, as is testimony on the appropriate method of disposal for CaF₂, see supra p. 4. Therefore, the LES motion to strike this testimony is denied.

Also, the staff challenges a paragraph at the end of the answer to question seven that it characterizes as a improper challenge to the staff’s performance of its administrative functions relative to its safety review. Although the paragraph at issue also raises a question about the staff’s performance of its administrative functions in the context of its National Environmental Policy Act (NEPA) review, which is subject to Board scrutiny, we find that since this additional reference is being utilized to bolster what we find to be an inappropriate staff safety review challenge, the entire discussion should be stricken. Accordingly, we grant the staff’s motion in connection with this paragraph.

Finally, LES and the staff again challenge Dr. Makhijani’s testimony regarding the overall cost for deconversion, transportation, and disposal of depleted uranium from the NEF. For the reasons set forth at supra p. 5, we grant the LES and staff motions relative to this

testimony, with the understanding that, to the extent Dr. Makhijani wishes to submit revised prefiled rebuttal testimony as to this subject matter that does not venture outside the clear boundaries we have established for the content of such testimony, see, e.g., supra p. 5, he may do so.

To summarize, the LES and staff motions in limine relative to Dr. Makhijani's transportation testimony are granted in that the testimony is stricken as follows: (1) in the answer to question four, the text on page seven beginning with "In presenting the plan" and ending on that same page with "to demonstrate a plausible strategy," as well as the text on page seven beginning with "Similar to the considerations" and ending with "would be required" on page eight; (2) in the answer to question seven, the text on page twelve beginning with "This is particularly noteworthy" and ending with "to be small at Envirocare"; and (3) question eight and the answer thereto, in their entirety.⁷

C. LES and Staff Motions to Exclude Portions of NIRS/PC's Prefiled Testimony on LES Disposal Strategy and Cost Estimate

DISCUSSION: Staff Motion at 1-2, 7-9; LES Motion at 2-7, 9-11; NIRS/PC Response to Staff Motion at 1-9, 13-16; NIRS/PC Response to LES Motion at 1-9, 10-11, 12-13, 15, 16-18.

RULING: Several of the challenges raised by LES and/or the staff with regard to Dr. Makhijani's disposal testimony repeat challenges directed at similar testimony presented by Dr. Makhijani in the context of deconversion and/or transportation. Because our rulings on those challenges are discussed in detail above, we provide only a brief explanation of our rulings on those repetitive issues as follows:

LES challenges certain of Dr. Makhijani's testimony regarding the requirements for a plausible strategy, seeking to exclude "the same inadmissible statements" identified in

⁷ NIRS/PC may, however, submit prefiled rebuttal testimony in the manner prescribed by the Board at p. 5 supra.

connection with the deconversion testimony. See LES Motion at 9. To the extent that this testimony again presents certain legal or policy standards relative to what constitutes a plausible strategy, that testimony is impermissible for the reasons discussed above, see supra p. 5. In addition, part of that testimony presents what the Board construes as an impermissible attack on the Commission's classification of depleted uranium as low-level waste, see CLI-05-5, 61 NRC at 34-36. By contrast, a portion of the text identified by LES in the context of this disposal testimony presents appropriate testimony on the subject of the manner in which DU from the NEF will be disposed. Accordingly, to the extent that Dr. Makhijani's testimony again provides an impermissible legal or policy analysis, see supra p. 5, or challenges the Commission's ruling in CLI-05-5, the motion by LES is granted.

With regard to the staff's concerns relative to Dr. Makhijani's testimony regarding the need for additional environmental analysis before a disposal option for DU could be selected, see Staff Motion at 7-8, as mentioned above, the Commission has left for Board consideration the issue of whether near-surface disposal of depleted uranium from the NEF will ultimately be appropriate, see CLI-05-5, 61 NRC at 34-35, 35 n.64. The testimony the staff here seeks to exclude relates directly to that issue left open by the Commission. Accordingly, we deny the staff's motion relative to this portion of Dr. Makhijani's testimony.

We also deny that portion of LES's motion seeking to exclude Dr. Makhijani's testimony regarding the basis for certain testimony concerning the acceptability of shallow-land burial of depleted uranium from the NEF, based on the reasoning set forth relative to that portion of Dr. Makhijani's transportation testimony concerning prior Commission and Board rulings, see supra pp. 8-9, except to the extent such testimony relates to specific sites.

To the extent Dr. Makhijani again presents testimony regarding the chemical disposal form for depleted uranium from the NEF (i.e., UO_2 v. U_3O_8), the LES and staff motions seeking

exclusion of that testimony are granted for the reasons discussed at pp. 4-5, supra. Likewise, Dr. Makhijani's testimony on the overall cost for deconversion, transportation, and disposal of depleted uranium from the NEF, which relies on an assumption of deconversion to UO₂, is impermissible and the LES and staff motions relative to that testimony are granted for the reasons set forth at supra p. 5. As is the case with Dr. Makhijani's deconversion and transportation testimonies relative to this subject matter, Dr. Makhijani may submit prefiled rebuttal testimony in accordance with our directives at supra p. 5, if he sees fit to do so.

Regarding the challenges by LES and the staff to testimony by Dr. Makhijani that purportedly seeks to challenge the adequacy of DOE cost estimates for disposal of depleted uranium and/or raise issues related to DOE's performance history, the Board grants those motions based on the reasoning set forth at pp. 6-7, supra.

LES and the staff also seek to exclude testimony on issues not included (and therefore not challenged) in Dr. Makhijani's deconversion or transportation testimony. First, LES and the staff challenge testimony regarding the chemical toxicity of uranium, contending that such testimony is beyond the scope of any admitted contentions. As LES notes, the Board has repeatedly refused to admit contentions relative to the health effects issues raised by Dr. Makhijani here, see, e.g., June Late-Filing Ruling at 13 n.13. At bottom, this portion of Dr. Makhijani's testimony constitutes an improper attempt to use expert testimony to amend an existing contention or raise a wholly new contention, and on a subject matter that this Board has repeatedly declined to admit. We thus grant the LES and staff in limine motions relative to this testimony.

LES and/or the staff next seek to exclude in its entirety Dr. Makhijani's testimony regarding the suitability of the WCS and Envirocare sites for shallow land burial of depleted uranium. Because the majority of the substance of Dr. Makhijani's testimony relative to the

WCS site essentially constitutes a challenge to the viability of the WCS application, which the Board has previously refused to hear, see August Late-Filing Ruling at 12, we grant the LES and staff motions related to the WCS testimony. Dr. Makhijani's testimony relative to Envirocare likewise seeks, contrary to the Board's August 4, 2005 ruling rejecting a contention relative to the viability of Envirocare as a disposal site, to contest the viability of that facility's license, and we accordingly grant the LES and staff motions related to the Envirocare testimony.

LES also seeks to exclude Dr. Makhijani's testimony regarding his conclusion about the reasonableness of LES reliance on cost information from WCS and Envirocare on the grounds that such testimony impermissibly challenges the viability of those sites. We grant LES's motion in this regard only to the extent that the testimony at issue goes to WCS's competency to receive depleted uranium from the NEF. The remainder of that testimony not only falls permissibly within the scope of the admitted contentions but, indeed, goes to the heart of the matters at issue in the upcoming evidentiary hearing.

Regarding the staff challenge to Dr. Makhijani's testimony concerning the likelihood of the need for disposal in a geologic repository, we grant the staff's motion only to the degree such testimony discusses impermissible issues, including health effects and licensing delays. The balance of that challenged testimony is permissible based on the fact that the Commission left this issue for Board consideration, see supra pp. 8-9.

In summary, the LES and staff motions in limine relative to Dr. Makhijani's disposal testimony are granted in that the testimony is stricken as follows: (1) in the answer to question four, the text on page seven beginning with "In presenting the plan" and ending on that page with "to demonstrate a plausible strategy," as well as the text in the next paragraph on that page beginning with "no strategy can be considered" and ending with "existing regulatory

requirements” and the last sentence in that paragraph beginning with “The three isotopes” and ending with “will be disposed,” and on page eight the text beginning with “Similar to the considerations” and ending on that page with “would be required”; (2) in the answer to question fourteen, the sentence on page forty-seven beginning “Our analysis has shown that WCS” and ending with the phrase “In addition,” at the beginning of the next sentence as well as the text on page forty-eight beginning with “As I have previously testified” through the end of the answer; and (3) in the answer to question seventeen, the last paragraph beginning “As I have testified, no credible.”

In addition, the following questions and answers are stricken in their entirety: questions eight, ten, eleven, twelve, thirteen, eighteen, nineteen,⁸ and twenty, and the answers thereto.

D. LES and Staff Motions to Exclude All or Portions of NIRS/PC’s Prefiled Testimony on LES Cost Estimate Contingency Factor

DISCUSSION: Staff Motion at 1-2, 9-10; LES Motion at 2-7, 11; NIRS/PC Response to Staff Motion at 1-9, 16-17; NIRS/PC Response to LES Motion at 1-9, 10-11, 12-13, 13-14, 15, 16-18.

RULING: As we indicated in section I above, we deny the LES motion to strike Dr. Makhijani’s testimony regarding the contingency factor in its entirety. Nonetheless, below we treat the LES motion as if it had been presented as separate challenges to individual portions of the testimony. In other words, we consider LES’s reasoning for excluding certain testimony relative to Dr. Makhijani’s presentations on deconversion, transportation, and disposal in making the following determinations:

To the extent Dr. Makhijani once again presents testimony that essentially provides a standard for or definition of “plausible strategy,” we strike that testimony for the reasons set forth in our discussion on this matter in the context of Dr. Makhijani’s deconversion testimony,

⁸ NIRS/PC may, however, submit prefiled rebuttal testimony in the manner prescribed by the Board at p. 5 supra.

see supra pp. 3-4, again with the understanding that NIRS/PC may propose certain legal standards or definitions as to what constitutes a “plausible strategy” in the context of its Proposed Findings of Fact and Conclusions of Law relative to the upcoming evidentiary hearing in this proceeding, see supra p. 4.

In addition, Dr. Makhijani presents impermissible testimony regarding licensing delays and currency conversion, which the Board has previously declined to admit. See June Late-Filing Ruling at 13 n.13.

Regarding the staff’s challenge to Dr. Makhijani’s discussion of the chemical toxicity of uranium, we grant the staff’s motion relative to this testimony based on our reasoning at supra, p. 12.

The staff also seeks to exclude Dr. Makhijani’s testimony regarding his conclusion about the reasonableness of LES reliance on cost information from WCS and Envirocare. For the reasons set forth in our ruling on this testimony in the disposal context, see supra pp. 12-13, we grant the staff’s motion in this regard only to the extent that the testimony at issue goes to WCS’s competency to receive depleted uranium from the NEF. Similarly, regarding the staff challenge to Dr. Makhijani’s testimony regarding the likelihood of the need for disposal in a geologic repository, we grant the staff’s motion in that such testimony impermissibly discusses issues such as disposal in the form of UO_2 and health effects of uranium, and is irrelevant to the contingency factor issue.

Dr. Makhijani’s testimony regarding the overall cost for deconversion, transportation, and disposal of depleted uranium from the NEF, which relies on an assumption of deconversion to UO_2 , is impermissible and the staff motion relative to that testimony is granted for the reasons set forth at supra p. 5. As is the case with Dr. Makhijani’s other testimonies relative to

this subject matter, Dr. Makhijani may submit prefiled rebuttal testimony in accordance with our directives at supra p. 5, if he sees fit to do so.

Finally, regarding the staff's challenge to testimony by Dr. Makhijani that purportedly seeks to challenge the adequacy of the DOE's cost estimates for disposal of depleted uranium, the Board grants that motion based on the reasoning set forth at pp. 6-7 supra, as well as the fact that this testimony is irrelevant to the appropriateness of the contingency factor to be applied to LES's cost estimate.

To summarize, the staff motion in limine relative to Dr. Makhijani's contingency factor is granted and, footed in the LES motion to dismiss in toto the contention Dr. Makhijani's contingency factor testimony is intended to support, the Board excludes additional testimony sua sponte, such that the testimony is stricken as follows: (1) in the answer to question four, the text on page seven beginning with "In presenting the plan" and ending on page eight with "all existing regulatory requirements," as well as the sentence in that paragraph beginning with "The three isotopes" and ending with "will be disposed," and the text on page eight beginning with "Similar to the considerations" and ending on page nine with "would be required"; (2) in the answer to question seven, the text on page eleven beginning with "there are two additional" through the phrase "The first is that" at the beginning of the next sentence, as well as the text on page twelve beginning with "The second is the issue" and ending with "15 to 40 percent" and in the next single-sentence paragraph on that page the word "both" and the phrase "and the potential for a further decline in the value of the dollar relative to the euro"; (3) questions eight and nine and the answers thereto, in their entirety; (4) in the answer to question ten, the sentence on page seventeen beginning "Our analysis has shown that WCS" and ending with the phrase "In addition," at the beginning of the next sentence, as well as the text on page eighteen beginning with "As I have previously testified" through the end of the answer; (5)

questions eleven and twelve and the answers thereto, in their entirety; (6) in the answer to question thirteen, the text on page twenty-three beginning "I have noted numerous examples" through the end of that answer on page twenty-five; (7) question fifteen and the answer thereto, in their entirety;⁹ and (8) question sixteen and the answer thereto, in their entirety.

III. ADMINISTRATIVE MATTERS

With the above rulings, certain revisions to and exclusions from NIRS/PC prefiled direct testimony are required. In accordance with the Board's September 2, 2005 order, see September 2 Order at 3-4, prefiled rebuttal testimony should be filed on or before Tuesday, October 11, 2005.¹⁰ The parties are reminded that the purpose of rebuttal testimony is to respond 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 limine motions (if any) regarding rebuttal testimony shall be filed so as to be received by noon Eastern Time (ET) on Friday, October 14, 2005, with any responses filed so as to be received by noon ET on Wednesday, October 19, 2005.

In addition, the Board requests that on or before Tuesday, October 11, 2005, NIRS/PC submit (1) revised versions of the prefiled direct testimony of Dr. Makhijani that omits all of the text (and associated footnotes) we have stricken by the above rulings and renumbers the questions to reflect stricken questions; and (2) an exhibit list that reflects the removal of any

⁹ NIRS/PC may, however, submit prefiled rebuttal testimony in the manner prescribed by the Board at p. 5 supra.

¹⁰ The parties are also reminded that, to the extent they have not already done so, at the time prefiled rebuttal testimony is filed, the parties should also provide the Board's law clerk with an electronic copy of their exhibit list revised in accordance with section 1 of the Board's September 22, 2005 memorandum and order. See Licensing Board Memorandum and Order (Additional Administrative Matters) (Sept. 22, 2005) at 1-2 (unpublished) [hereinafter September 22 Order].

associated exhibits.¹¹ This is not an opportunity to rephrase, add to, or otherwise substantively alter previously submitted prefiled direct testimony, but should be used only to eliminate stricken testimony (and correct any syntax issues that may arise as a result of the Board's ruling).

As the Board noted relative to its in limine rulings regarding the environmental contentions previously as issue, see Licensing Board Memorandum and Order (Ruling on In Limine Motions and Providing Administrative Directives) (Jan. 21, 2005) at 11 (unpublished), the fact 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 safety 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 outlined in their

¹¹ To the degree it will no longer use some exhibits, it is not necessary that NIRS/PC renumber its exhibits, but simply provide the Board's law clerk with a revised listing per the instructions in section A.4 of our September 14, 2005 procedural order, see Licensing Board Memorandum and Order (Regarding Administrative Matters Relative to October 2005 Evidentiary Hearing) (Sept. 14, 2005) at 6 (unpublished) [hereinafter September 14 Order], and section 1 of our September 22 order clarifying those instructions, see September 22 Order at 1-2. If, however, as a result of the duplicative exhibit review requested by the Board in section A.3.a of the September 14 order, see September 14 Order at 4-5, 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 Friday, October 7, 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, and that exhibit will not be first introduced by LES or the staff, it should utilize the number it originally assigned to the exhibit when it was intended to accompany their prefiled direct testimony.

September 12, 2005 joint report, they should provide their views on scheduling impacts by a joint report submitted no later than Friday, October 14, 2005.

Finally, in accord with the Board's earlier scheduling order, party outlines should be sent to the Board and the other parties and cross-examination plans sent to the Board so as to ensure receipt no later than Wednesday, October 19, 2005.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD¹²

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

October 4, 2005

¹² Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant LES; (2) intervenors 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
)
)
(National Enrichment Facility))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON IN LIMINE MOTIONS AND MOTION TO DISMISS) 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
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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 4th day of October 2005