

October 7, 2005

DOCKETED  
USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

October 7, 2005 (3:11pm)

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)	)	

**APPLICANT'S MOTION TO STRIKE ADDITIONAL PORTION OF THE DIRECT  
TESTIMONY OF ARJUN MAKHIJANI REGARDING DECONVERSION STRATEGY  
AND CONTINGENCY FACTOR**

On October 4, 2005, the Atomic Safety and Licensing Board ("Board") ruled on motions in limine filed by Louisiana Energy Services, L.P. ("LES") and the Nuclear Regulatory Commission ("NRC") Staff in the captioned proceeding.<sup>1</sup> In ruling on those motions, the Board struck, on numerous grounds, substantial portions of the September 16, 2005 prefiled direct testimony of Arjun Makhijani, as submitted on behalf of intervenors Nuclear Information and Resource Service and Public Citizen ("NIRS/PC"). Of relevance here, the Board struck certain statements made by Dr. Makhijani on the ground that they "attempt[ed] to identify a legal or 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."<sup>2</sup> The Board explained that "[e]xpert testimony is not required as to such a legal or policy question," and that any NIRS/PC legal or policy views regarding the meaning of the "plausible strategy" standard would better reserved for the intervenors' Proposed Findings of Fact and Conclusions of Law.<sup>3</sup>

<sup>1</sup> See Memorandum and Order (Ruling on In Limine Motions and Motion to Dismiss) (unpublished) (Oct. 4, 2005) ("Ruling on In Limine Motions").

<sup>2</sup> Ruling on In Limine Motions, at 3.

<sup>3</sup> *Id.* at 3-4.

Among the testimony stricken by the Board was the following statement by Dr. Makhijani (which appears in Answer 4 of his testimony): "For a deconversion facility built by a company that meets the requirements laid out above, a specific site need not be chosen, but a siting process must be specified by the [NRC] for this particular facility."<sup>4</sup> Thus, it appears that the Board viewed this statement as improper expert testimony on a legal or policy question, presumably insofar as it clearly suggests that the Commission's "plausible strategy" standard requires the identification of a deconversion facility "siting process." Notably, however, the Board did not strike the following statement by Dr. Makhijani (in Answer 6 of his testimony):

Based on Cogema's experience operating a similar deconversion plant in France (*i.e.*, the Pierrelatte plant) to that which would be required to handle the material from the proposed LES facility, reliance on Cogema for the deconversion option would be considered technologically plausible once a siting process for deconversion facility is specified by the NRC and provided that the final deconversion form chosen is U<sub>3</sub>O<sub>8</sub> and not UO<sub>2</sub>.<sup>5</sup>

LES believes that the underscored statement constitutes testimony that is directly at odds with two of the evidentiary rulings contained in the Board's October 4th Ruling on In Limine Motions, *i.e.*, that NIRS/PC may not present expert testimony on (1) legal or policy questions, or on (2) the chemical disposal form of depleted uranium from the NEF (*i.e.*, the UO<sub>2</sub> versus U<sub>3</sub>O<sub>8</sub> issue).<sup>6</sup>

Insofar as that testimony may have been inadvertently retained by the Board, LES moves the Board to exclude it from Dr. Makhijani's prefiled direct testimony on the grounds specified above. The statement of concerns appears in Dr. Makhijani's testimony on LES's

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<sup>4</sup> See, e.g., "Direct Testimony of Dr. Arjun Makhijani in Support of NIRS/PC contentions EC-3/TC-1, EC-5/TC-2, and EC-6/TC-3 Concerning LES's Deconversion Strategy and Cost Estimate" (Sept. 16, 2005), at 7 (emphasis added). As Board's ruling reflects, this excluded statement also appears in other pieces of Dr. Makhijani's prefiled direct testimony.

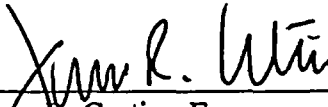
<sup>5</sup> *Id.* at 9-10 (emphasis added).

<sup>6</sup> See Ruling on In Limine Motions, at 3-4.

deconversion strategy and cost estimate, as well as in his testimony on LES's contingency factor (Answer 6, page 11). As such, LES requests that it be stricken from both pieces of testimony. While LES did not originally move to strike the subject statements, this request now appears to be timely and appropriate in view of the Board's decision of October 4th to strike similar "siting process" testimony as improperly raising a legal or policy question. Moreover, it is fully consistent with the Board's October 4th evidentiary determinations, and, in this regard, involves a ministerial or "housekeeping" matter.

LES respectfully requests a prompt Board ruling on this request. If the Board is unable to rule before the parties submit their prefiled rebuttal testimony on October 11, 2005, then LES will address Dr. Makhijani's "siting process" argument as part of its rebuttal testimony. A ruling before that date would obviate the need for rebuttal testimony on this issue.

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "APPLICANT'S MOTION TO STRIKE ADDITIONAL PORTION OF THE DIRECT TESTIMONY OF ARJUN MAKHIJANI REGARDING DECONVERSION STRATEGY AND CONTINGENCY FACTOR" in the captioned proceeding has been served on the following by e-mail service, designated by \*\*, on October 7, 2005 as shown below. Additional service has been made by deposit in the United States mail, first class, this 7th day of October 2005.

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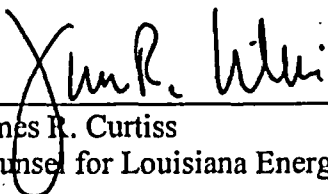
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