

October 14, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	Docket No. 70-3103
LOUISIANA ENERGY SERVICES, L.P.)	
)	ASLBP No. 04-826-01-ML
(National Enrichment Facility))	

NRC STAFF'S MOTION IN LIMINE TO EXCLUDE
NUCLEAR INFORMATION AND RESOURCE SERVICE
AND PUBLIC CITIZEN REBUTTAL TESTIMONY

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's ("Board") Memorandum and Order, dated October 4, 2004¹, the Staff of the Nuclear Regulatory Commission ("Staff") hereby requests that the Board issue an Order, *in limine*, to exclude portions of the prefiled rebuttal testimony of Dr. Arjun Makhijani on behalf of the Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") from the record of this proceeding. For the reasons set forth below, the Staff submits that portions of the rebuttal testimony of Dr. Makhijani are inadmissible in that they address issues which have previously been rejected by this Board on the grounds that they are outside the scope of the proceeding.

DISCUSSION

Evidence is admissible in an NRC proceeding only if it is relevant, material, and reliable. 10 C.F.R. § 2.337(a). Immaterial, unreliable, or irrelevant evidence should be segregated from admissible evidence and excluded whenever possible. *Id.* Evidence outside the scope of admitted contentions is irrelevant and therefore inadmissible in a Board proceeding on those

¹ Memorandum and Order (Ruling on In Limine Motions and Motion to Dismiss) "In Limine Order".

contentions.² The scope of a contention “necessarily hinges upon its terms coupled with its stated bases.”³ Following receipt of NIRS/PC’s direct pre-filed direct testimony on September 16, 2005, the Staff and Louisiana Energy Services, L.P. (LES) filed motions to exclude portions of that testimony.⁴ The Board granted the motions in part, provided clarification of the issues to be considered in the hearing and provided a schedule for the submission of motions in limine regarding rebuttal testimony. Significantly, the Board reminded the parties that the purpose of rebuttal testimony is to respond to the testimony of other parties not to put forth new testimony or reintroduce testimony that the Board has stricken. In Limine Order at 17. On October 11, 2005, NIRS/PC filed rebuttal testimony on the four subjects of the upcoming hearing.⁵ As discussed below, portions of the rebuttal testimony submitted by NIRS/PC improperly attempt to reintroduce testimony on matters that have been previously rejected by the Board and therefore should be excluded from the record of this proceeding.

² See Memorandum and Order (Discovery Rulings), October 20, 2004, at 10; *Private Fuel Storage* (Independent Spent Fuel Storage Installation), Memorandum and Order (Ruling on In Limine Motions and Providing Administrative Directives), (unpublished order), 2000 WL 862622 (NRC), June 12, 2000.

³ *Public Service Corporation of New Hampshire (Seabrook Station, Units 1 & 2)*, ALAB-899, 28 NRC 93, 97 (1988), *aff’d sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991); *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 379 (2002).

⁴ “NRC Staff’s Motion in Limine to Exclude Nuclear Information and Resource Service and Public Citizen Testimony,” September 22, 2005; “Motion in Limine and Renewed Motion to Dismiss on Behalf of Louisiana Energy Services, L.P. Concerning the Direct Testimony of Arjun Makhijani and Contentions NIRS/PC EC-3/TC-1 and EC-5/TC-2,” September 22, 2005.

⁵ “Rebuttal 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,” “Rebuttal Testimony of Dr. Arjun Makhijani in Support of NIRS/PC Contention EC-5/TC-2 Concerning LES’s Transportation Cost Estimate,” “Rebuttal 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 Disposal Strategy and Cost Estimate,” and “Rebuttal Testimony of Dr. Arjun Makhijani in Support of NIRS/PC Contentions EC-3/TC-1, EC-5/TC-2, and EC-6/TC-3 Applicable to LES’s Cost Estimate.”

A. Deconversion Rebuttal Testimony

The admitted contentions in this proceeding concern LES's strategy for disposition of the depleted uranium generated by the enrichment process that involves deconversion to an oxide by a private deconversion facility before disposal. The admitted contentions relating to deconversion are EC-3/TC-1, EC-5/TC-2 and EC-6/TC-3:

Contention EC-3/TC-1, as relevant, states:

Petitioners contend that Louisiana Energy Services, L.P., ("LES") does not have a sound, reliable, or plausible strategy for private sector disposal of the large amounts of radioactive and hazardous Depleted Uranium Hexafluoride ("DUF₆") waste that the operation of the plant would produce in that:

- (B) Similarly, the statement that "discussions have recently been held with Cogema concerning a private conversion facility" (ER 4.13-8) is without substance.

Contention EC-5/TC-2, as relevant, states:

Louisiana Energy Services, L.P., (LES) has presented estimates of the costs of decommissioning and funding plan as required by 42 U.S.C. 2243 and 10 C.F.R. 30.35, 40.36, and 70.25 to be included in a license application. See Safety Analysis Report 10.0 through 10.3; ER 4.13.1. Petitioners specifically contest the sufficiency of such presentations as based on . . . (4) the lack of any relevant estimate of the cost of converting and disposing of depleted uranium, given it does not rely upon the three examples - the 1993 CEC estimate, the LLNL report, and the UDS contract - cited in its application.

LES has presented additional estimates for the costs of deconversion. . . of depleted uranium for purposes of the decommissioning and funding plan required by 42 USC 2242 and 10 CFR 30.35, 40.36, and 70.25. See LES Response to RAI dated January 7, 2005. Such presentations are insufficient because they contain no factual bases or documented support for the amounts of the following particular current LES estimates, i.e., \$2.69/kgU for conversion, . . . and cannot be the basis for financial assurance.

Contention EC-6/TC-3 and supporting Basis (E) and (G) state:

Petitioners contend that the Louisiana Energy Services, L.P., ("LES") application seriously underestimates the costs and the feasibility of managing and disposing of the Depleted Uranium Hexafluoride ("DUF₆") produced in the planned enrichment facility in that:

- (E) A problem arises with respect to disposal of CaF₂. It is not known whether the CaF₂ will be contaminated with

uranium. Such contamination would prevent the resale of the CaF_2 and would require that such material be disposed of as low-level waste.

- (G) LES's "preferred plausible strategy" for the disposition of depleted UF_6 is the possible sale to a "private sector conversion facility" followed by disposal of deconverted U_3O_8 in a "western U.S. exhausted underground uranium mine." (ER 4.13-8). Such a conversion strategy cannot be accepted as plausible given that no such conversion facility exists nor is it likely to be built to suit LES's timing and throughput requirements.

The admitted contentions focus on the plausibility and cost of the private deconversion strategy proposed by LES, not the cost of disposal should the depleted uranium tails be transferred to the Department of Energy. Further, this Board has explicitly ruled that it will not hear testimony concerning the adequacy of the costs associated with the DOE disposal option except for claims that a particular element of disposal has not been included in the DOE estimate. In Limine Order at 7. Dr. Makhijani does not claim that DOE has not included costs associated with deconversion in his rebuttal testimony, but instead takes issue with the sufficiency of the DOE cost estimate. This testimony (Q&A's 11 and 12, beginning on page 14 and continuing to page 19) should therefore be excluded.

B. Disposal Rebuttal Testimony

The admitted contentions relating to disposal relate to LES's strategy to dispose of uranium oxide in the form of DU_3O_8 following deconversion by a private entity. The relevant contentions are EC-6/TC-3 and EC-5/TC-2:

EC-6/TC-3, as supported by Basis (I) states:

Petitioners contend that the Louisiana Energy Services, L.P., ("LES") application seriously underestimates the costs and the feasibility of managing and disposing of the Depleted Uranium Hexafluoride (" DUF_6 ") produced in the planned enrichment facility in that:

- (I) The "engineered trench" method of waste disposal proposed by LES is not likely to be acceptable (ER 4.13-11.-19) if DUF_6 is not considered low-level waste

EC-5/TC-2 states:

Louisiana Energy Services, L.P., (LES) has presented estimates of the costs of decommissioning and funding plan as required by 42 U.S.C.2243 and 10 C.F.R. 30.35, 40.36, and 70.25 to be included in a license application. See Safety Analysis Report 10.0 through 10.3; ER 4.13.1. Petitioners specifically contest the sufficiency of such presentations as based on the lack of any relevant estimate of the cost of converting and disposing of depleted uranium, given it does not rely upon the three examples - the 1993 CEC estimate, the LLNL report, and the UDS contract - cited in its application.

LES has presented additional estimates for the costs of deconversion, transportation, and disposal of depleted uranium for purposes of the decommissioning and funding plan required by 42 USC 2242 and 10 CFR 30.35, 40.36, and 70.25. See LES Response to RAI dated January 7, 2005. Such presentations are insufficient because they contain no factual bases or documented support for the amounts of the following particular current LES estimates, i.e., \$2.69/kgU for conversion, \$1.14/kgU for disposal, \$0.85kg/U for transportation, and a total of \$5.85kg/U including contingency, and cannot be the basis for financial assurance.

The admitted contentions claim that shallow land disposal is not a plausible option because of the classification of the depleted uranium waste produced. Although NIRS/PC has attempted to broaden these contentions to claim that potential disposal sites (WCS and Envirocare) should not be permitted to accept this waste, the Board has ruled that decisions regarding the licensing of those sites is beyond the scope of this proceeding. In response to Staff and LES motions *in limine*, the Board reiterated that NIRS/PC's attempts to challenge the viability of Envirocare as a disposal site by contesting the viability of that facility's license is not an appropriate matter for consideration in the hearing. In *Limine Motion* at 13. Notwithstanding this directive, Dr. Makhijani has presented rebuttal testimony which challenges the propriety of Envirocare's license. This testimony (Q&A 11, beginning on page 15 and continuing to page 19) should therefore be excluded. While the Staff and LES cite Envirocare as a potential disposal site, the question of whether disposal is permitted under Envirocare's license is a matter for the appropriate regulatory authority - the State of Utah - not the NRC to decide.

C. Contingency Rebuttal Testimony

In the admitted contentions, LES challenges the sufficiency of the contingency factor added by LES to the cost estimate for decommissioning funding. Contention EC-5/TC-2, as relevant, states:

Louisiana Energy Services, L.P., (LES) has presented estimates of the costs of decommissioning and funding plan as required by 42 U.S.C. 2243 and 10 C.F.R. 30.35, 40.36, and 70.25 to be included in a license application. See Safety Analysis Report 10.0 through 10.3; ER 4.13.1. Petitioners specifically contest the sufficiency of such presentations as based on a contingency factor that is too low .

In the context of his rebuttal testimony regarding the contingency factor, Dr. Makhijani presents testimony relating to the claim that depleted uranium will require disposal in a geologic repository. In order to relate this claim to the contingency factor, he cites the uncertainties of licensing such a repository, quoting extensively from a statement ascribed to Dr. John Bredehoeft. In that statement, Dr. Bredehoeft focuses on the time, effort, expense and scrutiny that would be involved in licensing a facility like the WIPP or Yucca Mountain which could accept waste for geological disposal. This testimony is therefore a resurrection of NIRS/PC's claim that licensing delays should be accounted for in the decommissioning cost estimate, an issue which this Board has rejected. In Limine Order at 13. Accordingly, this testimony (Q&A 6 beginning at page 7 and continuing to page 11) should also be excluded.

CONCLUSION

For the reasons stated above, the Staff requests that the Board issue an Order, *in limine*, excluding portions of the rebuttal testimony of Dr. Arjun Makhijani cited above.

Respectfully submitted,

/RA/

Lisa B. Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
this 14th day of October, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
LOUISIANA ENERGY SERVICES, L.P.)	Docket No. 70-3103
)	
(National Enrichment Facility))	ASLBP No. 04-826-01-ML
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION IN LIMINE TO EXCLUDE NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN REBUTTAL TESTIMONY" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 14th day of October, 2005.

Administrative Judge * **
G. Paul Bollwerk, III
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
E-Mail: gpb@nrc.gov

Administrative Judge * **
Charles Kelber
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
E-Mail: cnkelber@aol.com

Administrative Judge * **
Paul Abramson
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
E-Mail: pba@nrc.gov

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

Office of the Secretary * **
ATTN: Rulemakings and Adjudication Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
E-mail: HEARINGDOCKET@nrc.gov

Mr. Rod Krich, Vice President
Licensing, Safety and Nuclear Engineering
Louisiana Energy Services
2600 Virginia Avenue NW.
Suite 610
Washington, D.C. 20037

James. R. Curtiss, Esq. **
Dave Repka, Esq. **
Martin O'Neill, Esq. **
Amy C. Roma, Esq.
Winston & Strawn
1700 K Street, N.W.
Washington, D.C. 20006
E-mail: jcurtiss@winston.com
drepka@winston.com
moneill@winston.com
aroma@winston.com

Lindsay A. Lovejoy, Jr. **
Nuclear Information and Resource Service
1424 16th Street, NW.
Suite 404
Washington, D.C. 20036
E-mail: lindsay@lindsaylovejoy.com
llovejoy@cybermesa.com

/RA/

Lisa B. Clark
Counsel for NRC Staff