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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Paul B. Abramson
Dr. Charles N. Kelber

In the Matter of	Docket No. 70-3103-ML
LOUISIANA ENERGY SERVICES, L.P.	ASLBP No. 04-826-01-ML
(National Enrichment Facility)	January 11, 2006

MEMORANDUM AND ORDER
(Ruling on In Limine Motion)

Pending before the Licensing Board is a motion filed by applicant Louisiana Energy Services, L.P., (LES) seeking to strike portions of the prefiled direct testimony filed by intervenors Nuclear Information and Resource Service and Public Citizen (NIRS/PC) witness Arjun Makhijani relating to three contentions -- NIRS/PC Environmental Contention (EC)-3/Technical Contention (TC)-1 – Depleted Uranium Hexafluoride Storage and Disposal; EC-5/TC-2 – Decommissioning Costs; and EC-6/TC-3 – Costs of Management and Disposal of Depleted UF_6. Board rulings on this motion are set forth below, as well as administrative directives regarding further party filings to address these rulings.

I. BACKGROUND

On November 29, 2005, LES requested that the Board permit it to supplement the record developed during the October 24-27, 2005 evidentiary hearings relative to two issues: (1) the estimated costs of washing and recertifying empty depleted uranium hexafluoride cylinders for reuse or, alternatively, disposing of those cylinders; and (2) the cost of capital

associated with the construction of a private deconversion facility in the LES cost estimate for constructing such a facility. See [LES] Motion to Supplement the Record (Nov. 29, 2005) at 1. In response to the LES motion, NIRS/PC asserted that the motion should not be granted because NIRS/PC had not been given the opportunity to contest the validity or sufficiency of the information submitted by LES.[1] See Response on Behalf of Intervenors [NIRS/PC] to Motion by [LES] to Supplement the Record (Dec. 6, 2005) at 1-2. On December 13, 2005, the Board ruled that NIRS/PC should have the opportunity to challenge the supplemental material proffered by LES, and established a schedule for an evidentiary hearing on the matter. See Licensing Board Memorandum and Order (Ruling on Motion to Supplement Record) (Dec. 13, 2005) (unpublished) [hereinafter December 13 Order]. Pursuant to that schedule, on December 29 and 30, 2005, LES and the staff, and NIRS/PC, respectively filed with the Board prefiled direct testimony and supporting prefiled exhibits. See Prefiled 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 (Costs of Capital and Cylinder Management) (Dec. 30, 2005) [hereinafter NIRS/PC Testimony]; Supplemental Direct Testimony of Rod Krich on Behalf of [LES] Regarding Cost of Cylinder Management and Cost of Capital Issues (Dec. 29, 2005) [hereinafter LES Testimony]; NRC Staff Prefiled Testimony Concerning Clarifying Information Relating to Cost Estimate of Deconversion (Dec. 29, 2005).

II. IN LIMINE MOTION REGARDING PREFILED DIRECT TESTIMONY

A. LES Motion to Exclude Portions of Dr. Arjun Makhijani's Cost of Capital Testimony

DISCUSSION: [LES] Motion In Limine to Exclude Portions of the Prefiled Direct

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[1] The NRC staff did not object to the LES supplementation request. See NRC Staff Motion for Extension of Time for Filing Proposed Findings of Fact and Conclusions of Law (Nov. 29, 2005) at 2 n.2.

Testimony of Arjun Makhijani Concerning Cost of Capital and Cylinder Management in LES's Deconversion Cost Estimate (Jan. 4, 2006) at 5-8 [hereinafter LES Motion]; Response on Behalf of Intervenors [NIRS/PC] to Motion In Limine by [LES] (Jan. 9, 2006) at 1-7 [hereinafter NIRS/PC Response].[2]

RULING: Turning first to the LES challenges to Dr. Makhijani's testimony regarding the "cost of capital," LES requests that the Board strike portions of the prefiled direct testimony that LES argues "bear no relation to the specific 'cost of capital' question identified by the Board." See LES Motion at 5. LES first seeks to strike testimony by Dr. Makhijani, in answer two, relative to labor market uncertainties, heath care costs, and pension coverage, as unrelated to the cost of capital for a deconversion facility. See id. As set forth in the Board's December 27, 2005 memorandum and order, the scope of the February 2006 evidentiary hearing is limited to two discrete issues: (1) the potential costs of washing and recertifying empty depleted uranium hexafluoride cylinders for reuse or, alternatively, disposing of those cylinders; and (2) the cost of capital associated with the construction of a private deconversion facility in the LES estimate for constructing such a facility. See Licensing Board Memorandum and Order (Evidentiary Hearing Schedule and Prehearing Administrative Matters) (Dec. 27, 2005) at 1 n.1 (unpublished) [hereinafter December 27 Order]. Because this portion of Dr. Makhijani's testimony does not relate to the narrow cost of capital issue before the Board, we grant the LES motion as to this portion of the testimony.

LES also seeks to strike testimony by Dr. Makhijani in answer two, in which he references potential health risks of uranium and associated regulatory delay. See LES Motion at 5. As LES notes, the Board has repeatedly stricken testimony on, and refused to admit contentions relative to, the health effects issues raised here by Dr. Makhijani. See, e.g.,

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[2] The staff did not file a response to the LES in limine motion.

Licensing Board Memorandum and Order (Ruling on In Limine Motions and Motion to Dismiss) (Oct. 4, 2005) at 12 (unpublished) [hereinafter October 4 Ruling]. Accordingly, we grant the LES in limine motion relative to these issues. In addition, because the first sentence of the paragraph following that stricken language also refers to certain "risk factors" irrelevant to the matters at issue, that sentence should be rewritten as set forth below.

LES next challenges a portion of Dr. Makhijani's answer two testimony that suggests the LES failure to address capital costs calls into question the validity of the LES "financial guarantees" and cost estimate in its entirety. LES argues that the testimony exceeds the scope of the cost of capital issue and seeks to broaden a "'highly focused'" inquiry. See LES Motion at 6. While the testimony at issue is not strictly confined to the discrete "cost of capital" issue, it is not unrelated to the Board's inquiry or novel with respect to the testimony filed pursuant to the upcoming hearing. In fact, a substantial portion of the prefiled direct testimony of LES witness Rod Krich is devoted to an explanation of why LES did not include capital costs as a line item in the deconversion component of its cost estimate presented in conjunction with the October 2005 hearing. See LES Testimony at 11-17. Accordingly, we deny LES's motion to strike this portion of Dr. Makhijani's prefiled testimony.

Additionally, LES seeks to strike statements made by Dr. Makhijani in answers four and seven of his testimony, which LES asserts are irrelevant to the cost of capital. We grant the LES motion as to this testimony. The testimony in question argues that LES should increase its deconversion estimates to account for hydrofluoric acid neutralization costs and costs associated with the disposal of calcium fluoride as low-level radioactive waste. The costs cited are unrelated to the cost of capital and are therefore inadmissible. See LES Motion at 6, 7.

Responding to Dr. Makhijani's testimony in answer five, LES requests that the Board strike the question and corresponding answer in their entirety, in that they raise issues that

could have been litigated in the context of the October evidentiary hearing. See LES Motion at 6. Specifically, the testimony in question argues that LES should increase its cost estimates for a private deconversion facility to account for a "confidence factor" cited in the Urenco business study. See NIRS/PC Testimony at 11. To the extent this issue might be related to the cost of capital, it arguably also bears on the entirety of the deconversion cost estimate, and could therefore have been raised at an earlier date. Indeed, in its response NIRS/PC acknowledges that this issue relates to the total cost of financing the deconversion facility. See NIRS/PC Response at 5. We therefore grant LES's motion in limine with respect to this portion of the testimony.

Lastly, LES argues that Dr. Makhijani's two paragraph critique of the staff's analysis of the cost of capital is irrelevant to the issue before the Board, including the sufficiency of the staff's review of labor and health costs. See LES Motion at 7. As we have previously stated, see supra p. 3, health and labor costs are not relevant to the issue of cost of capital. Dr. Makhijani's testimony also presents generalized grievances related to the staff's analysis of the cost of capital issue. See NIRS/PC Testimony at 12. Such broad and generalized criticisms pertaining to a perceived lack of knowledge or ability of the staff to assess the cost of capital are inadmissible as well. A challenge to the staff's ability to review adequately a safety matter (such as the costs at issue here) is beyond the scope of Commission proceedings generally, and certainly exceeds the scope of the two discrete questions at issue in the February evidentiary hearing. See Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 396 (1995); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 807 (1983), review denied, CLI-83-32, 18 NRC 1309 (1983). Thus, we grant LES's motion with respect to the portions of answer six that levy generic attacks against the staff.

In summary, the LES motion in limine relative to Dr. Makhijani's testimony on cost of capital is granted in that the testimony is stricken as follows:

(1) In answer two, (a) the text on page three, last paragraph beginning with "It does not stand scrutiny" through the end of the paragraph,[3] and (b) the text on page five, beginning with "Indeed, it would be reasonable" through the end of the paragraph;[4]

(2) In answer four, (a) the text on page ten, in the first paragraph, last sentence beginning with "and a 0.25 euro per kg DU charge" through the end of that sentence, and (b) the text in the last paragraph on page ten, beginning with "This estimate of shortfall" through the end of the paragraph on page eleven;

(3) Question five and the answer thereto in its entirety;

(4) In answer six, beginning on page twelve, the first paragraph beginning with "Staff made no investigation of comparable wage rates" through the end of answer six; and

(5) In answer seven, the text on page thirteen, beginning with "If one incorporates costs of CaF_2 disposal" through the end of the sentence.

B. LES Motion to Exclude Portions of Arjun Makhijani's Cylinder Management Testimony

DISCUSSION: LES Motion at 8-10; NIRS/PC Response at 1-2, 7-8.

RULING: LES seeks to strike Dr. Makhijani's entire cylinder washing testimony as repetitive and lacking substance and foundation. See LES Motion at 8-10. As noted by LES, the Board has requested that NIRS/PC focus any testimony related to the potential costs of washing and recertifying empty depleted uranium hexafluoride cylinders on challenges to the $0.59 per kilogram uranium (kgU) cost figure derived from the Urenco business study and, therefore, the $0.60 per kgU LES cost estimate. See id. at 8; December 13 Order at 3 n.4.

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[3] The stricken text above is the only portion of Dr. Makhijani's testimony that cites NIRS/PC Exh. 279. Therefore, that exhibit is also excluded.

[4] Additionally, to maintain consistency with our ruling on this issue, the Board modifies the first sentence of the following paragraph to read "Thus, an initial estimate made for the purpose of developing a baseline estimate of the cost of capital cannot fail to escalate the capital cost of the plant at the rate of inflation."

Citing Dr. Makhijani's reliance on prior discussions related to information in the Department of Energy Programmatic Environmental Impact Statement, the Urenco business study, and LES and staff witness statements, LES claims that NIRS/PC has failed to provide necessary new information challenging LES's cylinder cost management estimate. See LES Motion at 8. NRC regulations state that evidence may only be admitted if it is relevant, material, reliable, and not unduly repetitious. See 10 C.F.R. § 2.337(a). LES suggests Dr. Makhijani has merely rehashed prior testimony and evidence, thus making his testimony repetitious and inadmissible.

While a portion of Dr. Makhijani's testimony may appropriately be considered background information, to the degree that it discusses evidence that is already a part of the record, this does not mean the testimony is necessarily "unduly repetitious" or irrelevant to the issue of cylinder management. Further, LES found it neither repetitious nor irrelevant to provide an extensive defense of its non-inclusion of the costs described in Dr. Makhijani's testimony in its supplemental testimony. See LES Supplemental Testimony at 7-9. Challenging LES's cost estimates, Dr. Makhijani has asserted that the numbers relied upon by LES are deficient because they are based on European standards not United States standards. See NIRS/PC Testimony at 17. In response, LES argues that Dr. Makhijani has failed to explain the alleged deficiency adequately, and thus his testimony is inadmissible. In this context, however, Dr. Makhijani's allegations are minimally sufficient to go forward and the burden rests with LES to demonstrate that this alleged deficiency lacks validity. Therefore, we deny LES's motion with respect to the testimony on the cost of cylinder management.

III. ADMINISTRATIVE MATTERS

With the above rulings, certain revisions to and exclusions from NIRS/PC prefiled direct

testimony are required. In accord with the Board's December 13, 2005 order, prefiled rebuttal testimony and associated exhibits should be filed on or before Friday, January 13, 2006. 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 on or before Wednesday, January 18, 2006, with any responses filed on or before Monday, January 23, 2006.[5]

In addition, the Board requests that on or before Friday, January 13, 2006, NIRS/PC submit (1) a revised version 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 associated exhibits.[6] 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).

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[5] Given the change in the evidentiary hearing regarding the capital cost and cylinder washing matters from the late-January date proposed by the Board in its December 13, 2005 order to mid-February, the Board is revising the time within which parties can file and respond to in limine motions and responses regarding pre-filed rebuttal testimony to conform to that provided for prefiled direct testimony.

[6] 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.5 of our December 27 order, see December 27 Order at 6. If, however, as a result of the duplicative exhibit review requested by the Board in section A.4.a of the December 27 order, see id. at 4, 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 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.

As the Board noted relative to its in limine rulings regarding certain testimony related to the October 2005 hearing, see October 4 Ruling at 18, 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 issue or issues that witness was intended to address. NIRS/PC still have the opportunity to make their case in support of the issues before the Board 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 any in limine motions will have a substantial impact on the projected schedule for the February 2006 evidentiary hearing, they should provide their views on scheduling impacts by a joint report submitted no later than Friday, February 3, 2006.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD[7]

/RA/
G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

January 11, 2006

[7] 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
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	)	
(National Enrichment Facility)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON IN LIMINE MOTION) 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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Dated at Rockville, Maryland,
this 11th day of January 2006