

RAS 11096

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

DOCKETED 01/25/06

SERVED 01/25/06

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

January 25, 2006

MEMORANDUM AND ORDER
(Ruling on In Limine Motion)

Pending before the Licensing Board is a January 18, 2006 motion filed by applicant Louisiana Energy Services, L.P., (LES) seeking to strike a portion of the prefiled rebuttal testimony submitted 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 UF₆. Specifically, LES avers that a portion of that testimony raises the issues of the costs associated with disposal of calcium fluoride (CaF₂) and hydrofluoric acid (HF) neutralization, which LES contends are irrelevant to the issues before the Board in the context of the previously scheduled mid-February 2006 evidentiary hearing. See [LES] Motion In Limine to Exclude a Portion of the Prefiled Rebuttal Testimony of Arjun Makhijani on Cost of Capital and Cost of Cylinder Management (Jan. 18, 2006) at 1-2. In response, NIRS/PC contends that the text identified by LES should not be excluded, in that it simply states the qualification that the LES estimates for cost of capital do not include costs for

HF neutralization or CaF₂ disposal, and does not contain any new evidence about expected costs for those specified items. See Response on Behalf of Intervenors [NIRS/PC] to January 18, 2006 Motion In Limine by [LES] (Jan. 23, 2006) at 1-2 [hereinafter NIRS/PC Response].¹

As LES points out, the Board struck from Dr. Makhijani's prefiled direct testimony certain statements that closely resemble the testimony at issue here, ruling that the costs associated with HF neutralization and CaF₂ disposal are unrelated to the narrow cost of capital issue now before the Board, which is limited to the capital costs associated with the construction of a private deconversion facility in the LES estimate for constructing such a facility. See Licensing Board Memorandum and Order (Ruling on In Limine Motion) (Jan. 11, 2006) at 4 (unpublished). While the language stricken from the prefiled direct testimony included actual cost figures, it also included a statement to the effect that costs of disposal of CaF₂ were not included in the relevant cost estimate. The Board was not persuaded in the context of Dr. Makhijani's prefiled direct testimony, and is not persuaded here, by the NIRS/PC argument that discussions regarding LES estimates for cost of capital must be qualified by their noninclusion of HF neutralization and CaF₂ disposal costs. See NIRS/PC Response at 2. Nor is the Board swayed by NIRS/PC's second point, namely that LES did not complain of certain other additional costs alluded to by Dr. Makhijani in his testimony supports the NIRS/PC assertion that HF neutralization and CaF₂ disposal costs are relevant to the cost of capital. See id. at 2-3. Accordingly, the Board grants the LES motion as to the specified statement made by Dr. Makhijani in answer five of his prefiled rebuttal testimony, and strikes that portion of answer five

¹ The NRC staff does not object to the LES motion. See NRC Staff Response to Motion In Limine to Exclude a Portion of the Prefiled Rebuttal Testimony of Arjun Makhijani on Cost of Capital and Cost of Cylinder Management (Jan. 23, 2006) at 1-2.

on page nine beginning with “It does not include” through the end of that sentence.²

With the above ruling, limited revision of the NIRS/PC prefiled rebuttal testimony is required. The Board therefore requests that on or before Friday, February 3, 2006, NIRS/PC submit revised versions of the prefiled rebuttal testimony of Dr. Makhijani that omits the text we have stricken by the above ruling. This is not an opportunity to rephrase, add to, or otherwise substantively alter previously submitted prefiled rebuttal 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).

Finally, as the Board has noted on several prior occasions, the fact that 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

² As was previously noted by the Board in similar situations, see, e.g., Tr. at 2331-32, although the Board strikes this portion of Dr. Makhijani’s testimony and therefore excludes it from the evidentiary record, the entirety of the January 13, 2006 prefiled rebuttal testimony, including the sentence we exclude with our above ruling, remains part of the official record of this proceeding.

on the basis of oral cross-examination of LES and staff witnesses relative to their direct and rebuttal testimony.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD³

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

January 25, 2006

³ 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

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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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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 25th day of January 2006