

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 7748

ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 05/12/04

SERVED 05/12/04

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

May 12, 2004

MEMORANDUM AND ORDER

(Ruling on Request for Access to Proprietary Information)

In a series of recent pleadings concerning the timing of the 10 C.F.R. § 2.309(h)(2) reply of petitioner Attorney General of New Mexico (AGNM) to the responses of applicant Louisiana Energy Services, L.P., and the NRC staff to the April 5, 2004 AGNM hearing request relating to the December 12, 2003 LES application at issue in this proceeding, a question has arisen regarding access by AGNM to purported proprietary material referenced by LES in its May 3, 2004 response and/or its December 2003 application. In its May 11 filing on this subject,¹ AGNM asserts relative to its Technical Contention (TC)-ii that access to the information in question is necessary to make its arguments concerning this issue.

¹ In a May 11, 2004 informal e-mail to the Licensing Board, the NRC staff declined to take any position on this matter. Also filed on May 11 was a pleading from petitioners Nuclear Information and Resource Service and Public Citizen (NIRS/PC) supporting access by AGNM (and themselves) to such proprietary information. Although as a courtesy we have been providing NIRS/PC with copies of this Licensing Board's issuances, its hearing petition currently is before the Commission -- not this Board -- relative to the issue of standing. We nonetheless will accept the NIRS/PC filing as being in the nature of an amicus curiae submission. Cf. 10 C.F.R. § 2.315(d).

In its January 1, 2004 notice of hearing and order for this proceeding, the Commission made reference to the fact that portions of the LES application concerned nonpublic classified information and that persons wanting access to that information were to contact the agency immediately to obtain a proper clearance. See CLI-04-3, 59 NRC 10, 24 (2004). The Commission's order, however, provided no direction regarding access to nonpublic proprietary information. In contrast, in recent hearing opportunity notices, the agency has provided instructions regarding access to both nonpublic security sensitive and proprietary information relied upon in support of a license application. See, e.g., 69 Fed. Reg. 19,880, 19,881 n.1 (Apr. 14, 2004).

Under the circumstances here, and consistent with this access policy relative to nonpublic materials explicitly relied upon in support of an application, we conclude that AGNM should be afforded access to the purported proprietary material now. As a consequence, counsel for applicant LES, the staff, and AGNM should consult immediately and arrive at an agreement on a protective order under which the information at issue could be made available to the AGNM on an expedited basis.² Such a draft order should be presented to the Board on or before Wednesday, May 19, 2004. Once the Board has issued the protective order, AGNM

² As an example of such an order, see the Licensing Board's April 1, 1999 memorandum and order in the Shearon Harris independent spent fuel storage installation proceeding. (ADAMS Accession No. ML011420404). Although such an order would not apply to NIRS/PC to the extent they are not now before the Licensing Board, the other participants may wish to include them in any discussions to expedite matters in the event their hearing petition is referred to the Board.

shall have seven days from date upon which the material becomes available to it to file its reply relative to TC-ii.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD³

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

May 12, 2004

³ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant LES; (2) petitioners New Mexico Environment Department, AGNM, and NIRS/PC; and (3) the staff.

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON REQUEST FOR ACCESS TO PROPRIETARY INFORMATION) 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 Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of May 2004