

RAS 9062

December 20, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

Before Administrative Judges:

December 20, 2004 (4:30pm)

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

ASLBP No. 04-826-01-ML

JOINT RESPONSE OF NEW MEXICO ENVIRONMENT DEPARTMENT AND
NEW MEXICO ATTORNEY GENERAL TO NUCLEAR REGULATORY COMMISSION
STAFF'S MOTION FOR A PROTECTIVE ORDER

Introduction

Nuclear Regulatory Commission ("NRC") Staff has proposed a protective order keeping confidential all documents in this matter entered into the electronic hearing file that have not been screened and redacted for sensitive information by NRC Staff. The proposed order is unnecessarily broad and inconsistent with the access generally afforded to the public under the Commission's rules. *See* 10 C.F.R. §§ 2.336, 2.390. Accordingly, the protective order should be modified so that it both protects legitimate security concerns and the public's interest in access to documents and information in this proceeding.

Background

Because of security concerns, the Commission closed public access on October 25, 2004 to its ADAMs system and the hearing file in this matter and other Commission matters. Since

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that time, the parties in this matter have not had access to the documents previously on the ADAMS system and documents entered into the electronic hearing file since October 25, 2004.

NRC Staff has begun the process of screening documents for security concerns under criteria that is not available to the parties in this matter, although NRC Staff has told the parties that the screening criteria relate to preventing terrorists from being able to damage the uranium enrichment facility proposed by Louisiana Energy Services, L.P. ("LES"). At this point, NRC Staff has identified 242 documents that have sensitive information under the criteria. These documents include the LES application for a license. These documents are not currently available to the parties or the public through the NRC. The parties have copies of some, but not all of the documents, or have had access in the past to some, but not all of the documents. At this point, however, the parties do not have copies of or access to all documents in this matter in the electronic hearing file, including all 242 sensitive documents.

NRC Staff has proposed a protective order that would keep confidential all documents in the electronic hearing file until the documents are screened by NRC Staff and redacted for sensitive information. NRC Staff has been unable to provide the parties the legal authority for keeping such documents confidential, the precise screening criteria for keeping documents or portions of documents confidential, the procedures by which a party can challenge NRC Staff sensitivity determinations, or an exact time frame for finishing the screening and redacting process and making available the documents in the electronic hearing file. In fact, it is not clear if the documents will be screened and redacted prior to the hearing scheduled in this matter in February 2005. The NRC Staff's proposed protective order does not cure any of the problems.

Argument

The New Mexico Environment Department (NMED) and the New Mexico Attorney General (NMAG) do not object to keeping confidential those portions of documents in this matter which pose a legitimate national security threat. NMED and the NMAG do oppose entering into the protective order as offered by NRC Staff because it is not sufficiently bounded and does not sufficiently protect the public's interest in access to information in this matter. To ensure that the public's access to information in this proceeding is protected while protecting legitimate security concerns, the protective order should include provisions that:

1. Set forth the screening criteria for determining what material is sensitive and a mechanism for challenging objectionable screening criteria so that the parties and the public know the basis for keeping documents confidential and are afforded the opportunity to challenge criteria that are not reasonably calculated to address national security concerns.
2. Limit the protective order through the February 2005 hearing so that the parties have an opportunity to determine how well the protective order is working and can recommend adjustments to the order if necessary.
3. Base the protective order on the Commission's legal authority to keep documents and materials confidential. *See, e.g.*, 10 C.F.R. §§ 2.336, 2.390, 2.327(c), 2.328 (permitting the Commission to restrict public access by issuing an order directing that public access be restricted).
4. Require the screening and redacting process to be completed by a date certain prior to hearing in this matter.
5. Set forth the procedural mechanism by which to appeal NRC Staff determinations whether a document or a portion of a document is sensitive.

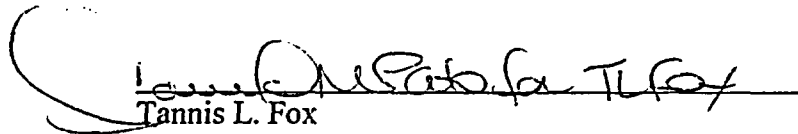
Placing such provisions in the protective order would not compromise legitimate security interests, but would maintain to the extent possible the parties' and the public's important interest in having access to the documents and materials in this matter.

Conclusion

For the foregoing reasons, any protective order issued in this matter should include the conditions outlined above.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARMENT



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CERTIFICATE OF SERVICE

I hereby certify that copies of the JOINT RESPONSE OF NEW MEXICO ENVIRONMENT DEPARTMENT AND NEW MEXICO ATTORNEY GENERAL TO NUCLEAR REGULATORY COMMISSION STAFF'S MOTION FOR A PROTECTIVE ORDER have been served upon the following persons by electronic mail, facsimile, and/or first class U.S. mail this 20th day of December, 2004:

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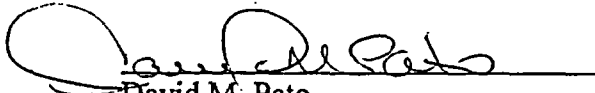
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December 20, 2004

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Re: **In the Matter of Louisiana Energy Services, L.P. (National
Enrichment Facility)**
 Docket No. 70-3103

Dear Rulemaking and Adjudications Staff:

Enclosed is the original and three copies of the Joint Response of New Mexico Environment Department and New Mexico Attorney General to Nuclear Regulatory Commission Staff's Motion for a Protective Order. The New Mexico Environment Department and the New Mexico Attorney General would appreciate it if you would kindly file, endorse and return a copy of each in the enclosed self-addressed, stamped envelope provided herewith.

Thank you for your assistance.

Sincerely,

David M. Pato
Assistant Attorney General
New Mexico Attorney General's Office

Enclosures