

RAS 9031

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

DOCKETED 12/21/04

SERVED 12/22/04

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

December 21, 2004

MEMORANDUM AND ORDER
(Ruling on Motion to Suspend Hearing Schedule)

Pending with the Licensing Board are a number of recently-filed pleadings relating to the impacts of the October 25, 2004 Commission determination to suspend public access to the agency's ADAMS document repository system pending agency review of the material in the system to determine whether it might contain any information, denoted as "protected information," that might be potentially useful to terrorists and to remove or redact that information. These include:

1. Motion on Behalf of Nuclear Information and Resource Service and Public Citizen [(NIRS/PC)] to Compel Commission Compliance with Hearing Rules and to Suspend Hearing Schedule Pending Release of Commission Files (Dec. 15, 2004).
2. NRC Staff Response to Motion on Behalf of [NIRS/PC] to Compel Compliance and Suspend the Hearing (Dec. 20, 2004).
3. NRC Staff Motion for Protective Order Governing Disclosure of Information (Dec. 20, 2004).

4. Letter from Lisa B. Clark, NRC Staff Counsel, to the Licensing Board (Dec. 20, 2004).

5. Louisiana Energy Services, L.P., [(LES)] Response to Motion to Suspend Hearing Schedule and Comments on Draft Protective Order (Dec. 20, 2004).

6. Comments on Behalf of [NIRS/PC] on Commission Staff Draft Protective Order (Dec. 20, 2004).

7. Joint Response of New Mexico Environment Department [(NMED)] and New Mexico Attorney General [(AGNM)] to Nuclear Regulatory Commission Staff's Motion for Protective Order (Dec. 20, 2004).

The crux of the dispute embodied by the December 15 NIRS/PC motion is over the availability of ADAMS materials for its preparation for the long-scheduled February 2005 evidentiary hearings on NIRS/PC environmental contentions and the impact of that availability on the hearing schedule.

Given that the staff in the first instance is acting pursuant to Commission directives relative to the review and disclosure of what is now being designated as "protected information," from our perspective the question of the disclosure and proper handling of this material is one akin to the disclosure and handling of other types of sensitive material, including proprietary, safeguards, and classified information. A participant can obtain access to such information pursuant to an appropriate protective order. In this instance, after reviewing the proposed staff protective order, the procedural/administrative provisions of which are consistent with other protective orders entered previously in other agency adjudicatory proceedings, we find it appropriate and issue it as part of the proceeding today.

There remains the question of whether NIRS/PC lack of access to ADAMS documents post-October 25 provides cause for a delay in the hearing schedule. The staff in its

December 20, 2004 response to the NIRS/PC motion and its protective order motion indicates that:

1. Upon execution of the Confidentiality and Non-Disclosure Agreement by a party, the staff will make available a compact disc containing all hearing file documents.
2. The staff expects that all sensitive documents in the hearing file will be redacted and available to the public by December 31, 2004.

Given these representations, it appears that NIRS/PC and the other parties to this proceeding can have prompt access to the entire hearing file by executing the confidentiality agreement.¹ Moreover, it appears that by year's end they will have access to redacted versions of those documents so they can make a determination about whether any of the direct prefiled testimony they wish to proffer or any of the exhibits they may wish to rely upon in support of that testimony fall into the protected information category. This, in turn, will allow them to make a judgment as to what information must be treated as "protected" and how they need to treat that information providing it to the Board and the other parties in connection with their filings.

Under the circumstances, we consider a slight delay in the filing of prefiled testimony and accompanying supporting exhibits to be appropriate and establish the following schedule to reflect filing dates associated with hearing file disclosure.²

1. Upon staff receipt of confirmation of an executed confidentiality agreement from counsel for a party (e.g., by fax), by 3:00 p.m. Eastern Time on a business day, staff should

¹ Although NIRS/PC may not have access to some hearing file items through ADAMS post-October 25, 2004, it apparently made no effort to raise that lack of access with the Board timely in accordance with 10 C.F.R. § 2.232(a).

² Exhibits should be marked numerically with a designation that identifies the party sponsoring the exhibit, such as "Staff Exhibit 1," "LES Exhibit 4," or "NIRS/PC Exhibit 5."

provide that party with CD of all hearing file documents by sending it that same business day by express mail or other overnight delivery service.

2. Direct prefiled testimony and supporting exhibits shall be filed within seven days of the date the staff provides notice to all parties of the availability of redacted versions of the hearing file. To the degree prefiled testimony contain protected information, those portions of the testimony should be marked as such by the filing party and served upon the Office of the Secretary, the Board, the staff, and all parties who have executed a confidentiality agreement, while simultaneously filing a separate version of the testimony setting forth all non-sensitive portions of the testimony with the Office of the Secretary for inclusion in the hearing file and serving that version upon the Board and parties. Thereafter, any party motions in limine regarding the prefiled direct testimony should be filed within five days of the direct prefiled testimony; responses shall be filed within five days of any motions, **prefiled rebuttal testimony; along with a revised version of any prefiled direct testimony reflecting any Board in limine motion rulings, should** be filed within seven days of the Board's ruling on any in limine motions; and cross-examination plans and party outline summaries should be filed within seven days thereafter. To the degree pre-filed rebuttal testimony contains protected information, it likewise should be marked and provided to the Office of the Secretary, the Board, the staff, and all parties who have executed a confidentiality agreement, and a separate redacted version sent to the Board, the parties, and the Office of the Secretary for inclusion in the public docket file.

3. Relative to the February evidentiary hearing, to the degree NIRS/PC intends to rely upon any ADAMS document to which it previously had access but does not have a copy because of the unavailability of ADAMS post-October 25, 2004, on or before Monday, December 27, 2004, NIRS/PC should identify those documents to the staff, which should provide copies of those documents to NIRS/PC by overnight/express mail on or before

Wednesday, December 29, 2004. Those documents will be subject to nondisclosure under the protective order until such time as the staff has made any redaction determination, which should be completed on or before Monday, January 10, 2004, and any such document provided in support of prefiled direct testimony before staff review is completed should have a cover sheet noting it is the subject of ongoing staff review and that it “may contain protected information.”

Relative to the evidentiary hearing on the NIRS/PC environmental contentions, to the extent any party disputes the nondisclosure of any testimony or exhibit, it may file a motion raising that issue with its proposed findings of fact and conclusions of law. Also, party concerns about the need for consideration in the evidentiary hearing of any document to which a party asserts it did not have timely access because of the post-October 25 nonpublic availability of ADAMS should be brought to the Board’s attention in accordance with 10 C.F.R. § 2.323 and/or 10 C.F.R. § 2.326, as appropriate.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD³

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

December 21, 2004

³ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant LES; (2) intervenors NMED, the 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 MOTION TO SUSPEND HEARING SCHEDULE) 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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Docket No. 70-3103-ML
LB MEMORANDUM AND ORDER (RULING ON
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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 22nd day of December 2004