

RAS 9063

December 20, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

December 21, 2004 (8:30am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of

Docket No. 70-3103

Louisiana Energy Services, L.P.
National Enrichment Facility

ASLBP No. 04-826-01-ML

COMMENTS ON BEHALF OF
NUCLEAR INFORMATION AND RESOURCE SERVICE
AND PUBLIC CITIZEN
ON COMMISSION STAFF DRAFT PROTECTIVE ORDER

Preliminary statement

The following comments are submitted on behalf of Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") in response to the request by the Atomic Safety and Licensing Board (the "Board") in its Order dated December 16, 2004 for comments regarding the administrative/procedural terms of the draft protective order proposed by Commission Staff.

Comments

NIRS/PC have the following comments concerning the administrative and procedural terms of the draft protective order circulated by the Commission Staff:

1. The draft leaves unclear the mechanics of (a) coverage of new items, not yet in the hearing file, by the order and (b) the process and time frame for the Commission Staff to screen and approve such items as suitable for public release. Examples are prefiled testimony, briefs, exhibits, etc. Under the terms of the draft order, a legal brief, which is entirely non-confidential in the hands of the party who prepared it, becomes "entered into the hearing file" and therefore

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subject to confidentiality restrictions at the moment it is filed, and remains so until Commission Staff declares that it has been screened and approved as not containing sensitive information. Long delays by Commission Staff in screening and redaction may impose significant restraints upon public discussion of the proceeding by counsel or parties. The order could state, instead, that the Commission Staff will promptly screen and advise the parties of the status of documents as they are filed. A specific time limit (e.g., three days) would be useful.

2. It is not clear how live testimony will be screened and redacted. Under the terms of the order, live testimony may become part of the "hearing file" when testimony is given and recorded in the hearing. Under such a reading, the testimony, which has not been screened and approved by Commission Staff, immediately becomes "protected information." Thereafter, counsel and parties would be prohibited by the protective order from disclosing the testimony. Public disclosure, contrary to the order, might occur (a) when the witness gives testimony or refers to previous testimony or (b) when an attorney publicly refers to the testimony, such as in examining the witness. Such applications of the order would make it impossible to conduct the hearing in public.

3. There should be a provision for parties to obtain Board review of Commission Staff decisions on the status of documents and portions of documents. For this, it is necessary to state the legal authority and the criteria for establishing protected status.

4. The provision in paragraph 6 of the draft—that the order applies even when protected information has previously been released to the public—together with the provision in paragraph 8—requiring counsel and parties to report suspected disclosures of protected information—would impose an impossible and unenforceable requirement. Numerous copies of documents from the hearing file, such as the Draft Environmental Impact Statement, have been distributed

to the public and commented upon. The comments themselves appear to be protected information under paragraph 2 of the order. In requiring reports of disclosures of protected information in this context, including counsel's or parties' "suspicions and the reasons for them," it is not clear what is expected. Neither is it clear what kind of report is sufficient, given the wide public interest in this proceeding and the likelihood of wide distribution of protected information through electronic means.

Respectfully submitted,



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December 20, 2004

CERTIFICATE OF SERVICE

Pursuant to 10 CFR § 2.305 the undersigned attorney of record certifies that on December 20, 2004, the foregoing Comments on Behalf of Nuclear Information and Resource Service and Public Citizen on Commission Staff Draft Protective Order was served by electronic mail and by first class mail upon the following:

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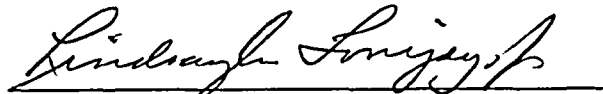
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