

December 30, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

December 30, 2004 (3:12pm)

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

MOTION ON BEHALF OF
NUCLEAR INFORMATION AND RESOURCE SERVICE
AND PUBLIC CITIZEN
FOR CLARIFICATION OF PROTECTIVE ORDER

Preliminary statement

This motion is submitted on behalf of Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") in seeking clarification of the Protective Order entered by the Atomic Safety and Licensing Board (the "Board") on December 21, 2004, on motion by the Commission Staff.

Discussion

NIRS/PC request clarification by the Board of the effect of the Protective Order upon attorneys, consultants, and employees of parties to this case and upon the forthcoming hearings. The Protective Order provides that the "Licensing Board may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding." (paragraph 10). NIRS/PC seek clarification or amendment pursuant to that authority. Certain aspects of the Protective Order entered on December 21, 2004, can usefully be clarified to enable persons bound by that order to conform to its requirements in the hearings scheduled to begin on

February 7, 2005. Counsel for NIRS/PC have conferred with counsel for the Commission Staff, who drafted and presented the Protective Order for entry by the Board. Certain matters have been resolved in those discussions; however, some matters appear to require action by the Board. The issues are as follows:

1. Under the terms of the Protective Order (footnote 1) the obligation to maintain confidentiality applies to all "protected information." Protected information is defined to include any document currently contained in the Electronic Hearing Docket ("EHD") or subsequently entered into the EHD, which has not been screened and approved by the NRC Staff as not containing sensitive information. Counsel for the Commission Staff have advised that none of the pleadings or orders currently in the EHD contains sensitive information that will require redaction. NIRS/PC submit that Commission Staff should be required to make any such screening determinations public, specifying the documents to which they apply, so that persons bound by the Protective Order can know that there is no obligation to keep specified documents confidential.

2. As stated, items subsequently entered into the EHD are "protected information" and must be kept confidential until approved by Commission Staff as not containing sensitive information. As a result, persons bound by the order may not disclose the contents of a brief or motion—such as this motion—after it has been filed, until Commission Staff determines that the document does not contain sensitive information. NIRS/PC submit that such terms impose an unnecessary level of secrecy upon this licensing proceeding. NIRS/PC propose that counsel for any party be authorized to certify that a document filed by such counsel does not contain information deemed sensitive under the criteria circulated by Commission Staff on December 22, 2004 and captioned "NRC Staff Review Criteria to Identify Sensitive Information in Fuel Cycle

Documents.” Such certification shall establish that the document to which it relates does not contain “protected information.” Absent such certification, a document will be deemed “protected information.” From discussions with counsel for Commission Staff, NIRS/PC expect that such a procedure is acceptable to Commission Staff. Such a procedure would seem to require an amendment to the Protective Order.

3. The Protective Order may be construed to apply to oral statements made during hearings, i.e., testimony and argument, since such statements are promptly transcribed and incorporated into the record of this proceeding and thus are “entered into the EHD and/or hearing file.” (Protective Order, footnote 1). NIRS/PC submit that such interpretation would make it impossible to conduct a public hearing and should be avoided. Therefore, NIRS/PC suggest that the Board express its view as to whether all oral statements and transcripts thereof are “protected information” until the Commission Staff rules otherwise or, on the other hand, oral statements on the record and transcripts thereof are only restricted by the disclosure limitations (i.e., paragraphs 2, 5, 7) of the Protective Order if they disclose the contents of documents which are themselves “protected information.” NIRS/PC suggest that it would be appropriate to set forth such guidance in an amendment to the Protective Order.

4. NIRS/PC submit that the forthcoming hearings should be open to the public to the maximum extent possible. Since some testimony may refer to documents containing protected information, NIRS/PC suggest that the Board supply guidance as to the applicable procedures. For example, NIRS/PC submit that there should not be deemed to be an impermissible disclosure if a witness refers to prefiled written testimony that contains protected information. Neither would it be appropriate, NIRS/PC suggest, to conduct cross-examination in closed session,

simply to guard against the chance that the witness may need to make oral reference to protected information.

5. Certain employees and consultants of NIRS/PC prefer not to execute the Confidentiality and Non-disclosure Agreement attached to the Protective Order. NIRS/PC request that the Board make clear, if it is the case, that such non-signers are not bound by the terms of the Protective Order. It would seem that persons who do execute the Confidentiality and Non-disclosure Agreement would be bound under paragraphs 2 and 5 not to disclose protected information to persons who have not signed that agreement.

6. There is a requirement in the Protective Order to report instances when protected information becomes available to unauthorized persons (paragraph 8). Since some protected information (e.g., the Draft Environmental Impact Statement) is in public circulation and has been discussed in news media, it is difficult to place reasonable bounds upon the reporting obligation. NIRS/PC submit that the Board should clarify the order by limiting the reporting obligation to persons who have signed the Confidentiality and Non-disclosure Agreement, and to require such persons to report only the loss or disclosure of protected information from files within their control.

7. The Board has stated that persons who disagree with nondisclosure of testimony or an exhibit may raise the issue on a motion filed with the proposed findings of fact and conclusions of law. (Memorandum and Order, at 5, Dec. 21, 2004). NIRS/PC suggest that the Board make clear that a question of nondisclosure under the criteria circulated by Commission Staff on December 22, 2004 and captioned "NRC Staff Review Criteria to Identify Sensitive Information in Fuel Cycle Documents" may be raised at other times as well. It may become evident, either before or after an issue arises in connection with the filing of proposed findings of fact and

conclusions of law, that certain materials need not be kept confidential. It should be permissible to raise such an issue at such a time.

Conclusion

NIRS/PC submit that considerations of security should not be allowed to inhibit unduly the public process. The Board should provide the clarifications requested herein so that the forthcoming hearings may go forward while allowing the Commission Staff to safeguard such information as comes within established criteria for confidentiality.

Respectfully submitted,



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December 30, 2004

CERTIFICATE OF SERVICE

Pursuant to 10 CFR § 2.305 the undersigned attorney of record certifies that on December 30, 2004, the foregoing Motion on Behalf of Nuclear Information and Resource Service and Public Citizen for Clarification of Protective Order was served by electronic mail and by first class mail upon the following:

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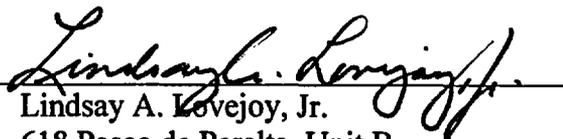
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