

February 3, 2005

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION****DOCKETED  
USNRC****BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

February 3, 2005 (12:59pm)

**OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF**

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In the Matter of

Docket No. 70-3103

Louisiana Energy Services, L.P.  
National Enrichment Facility

ASLBP No. 04-826-01-ML

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**MOTION ON BEHALF OF  
NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN TO  
STRIKE TESTIMONY OF COMMISSION STAFF WITNESS CONCERNING NIRS/PC  
CONTENTION EC-2****Preliminary statement**

This Motion is submitted on behalf of Nuclear Information and Resource Service and Public Citizen, Intervenor herein ("NIRS/PC"), seeking an order by the Atomic Safety and Licensing Board (the "Board") striking the testimony of the Commission Staff witness, Alan Toblin, concerning NIRS/PC contention EC-2. Such testimony was not served in accordance with the orders of the Board and the Commission.

**Argument**

On January 28, 2005, counsel for NIRS/PC received by e-mail transmission from counsel for the Commission Staff, among other things, the prefled direct testimony of Alan Toblin, as expert witness on NIRS/PC contention EC-2. A letter dated January 28, 2004 from counsel for the Commission Staff stated that the Commission Staff prefled direct testimony had been revised to reflect changed exhibit numbers.

The January 28 transmission was the first that counsel for NIRS/PC had seen of any Commission Staff testimony on NIRS/PC contention EC-2. The Commission Staff had not

previously served the prefiled direct testimony of Alan Toblin concerning NIRS/PC contention EC-2 on counsel for NIRS/PC. The date for filing of prefiled expert direct testimony was fixed by order of the Board as January 7, 2005, three weeks earlier than January 28. (Memorandum and Order, at 1, Dec. 30, 2004). Further, the Commission itself has directed that service be effected by electronic mail with, in addition, service of a paper copy by first class mail or otherwise. (Commission Order, 69 Fed Reg. 5873, 5877 (Feb. 6, 2004). No electronic service of the Toblin testimony on contention EC-2 had been effected on January 7 or at any time until January 28.

Counsel for the Commission Staff have stated to counsel for NIRS/PC that the Toblin testimony on contention EC-2 was sent by e-mail on January 7, and exhibits were sent by separate e-mail, and that Commission Staff received an error message in response. Apparently, counsel for the Commission Staff made no effort to resend the testimony or to make it available to counsel for NIRS/PC in some other way. Counsel for NIRS/PC received other transmissions without difficulty on January 7. Counsel for NIRS/PC have only one e-mail mailbox for office use, and no prefiled direct testimony by Alan Toblin on contention EC-2 was received on January 7 in that mailbox.

No paper copy of the Toblin testimony on contention EC-2 has been received in the mail by counsel for NIRS/PC. Counsel for NIRS/PC are unaware of the existence of any certificate of service by counsel for the Commission Staff with respect to the Toblin direct testimony on contention EC-2.

In these circumstances, NIRS/PC and its expert witnesses have had no opportunity to review and respond by rebuttal to the Toblin testimony on NIRS/PC contention EC-2. Because of Commission Staff's noncompliance with the requirements of proper service, and the clear prejudicial effect on NIRS/PC, it is requested that the testimony be stricken.

## Conclusion

For the reasons set forth herein, NIRS/PC respectfully request that the Board enter its order directing that the Toblin direct testimony on contention EC-2 be stricken from the hearing file and deemed inadmissible.

Respectfully submitted,



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February 3, 2005

## CERTIFICATE OF SERVICE

Pursuant to 10 CFR § 2.305 the undersigned attorney of record certifies that on February 3, 2005, the foregoing Motion on behalf of Nuclear Information and Resource Service and Public Citizen to Strike Testimony of Commission Staff Witness concerning NIRS/PC Contention EC-2 was served by electronic mail and by first class mail upon the following:

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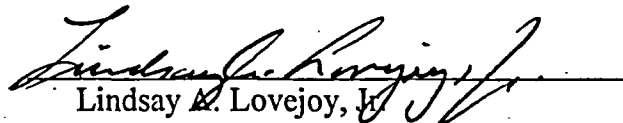
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