

September 7, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

STAFF RESPONSE TO LICENSING BOARD'S SEPTEMBER 2, 2005 ORDER

INTRODUCTION

On September 2, 2005, the Board directed the NRC Staff (Staff) and Louisiana Energy Services, L.P. (LES) to respond to the argument by NIRS/PC that document LES-PRO-00662 should not be protected because LES has filed no supporting affidavit, and thus has not carried its burden of proof relative to, the continued protection of that document.¹ For the reasons discussed below, the Staff is of the opinion that LES has met its burden.

BACKGROUND

On May 21, 2004, the Board issued a protective order governing the use of protected materials produced in the course of the instant proceeding.² The protective order provides that a participant "may designate as protected materials information (1) that is of the type customarily held in confidence by its owner; (2) for which there is a rational basis for having customarily held it in confidence; (3) that has, in fact, been kept in confidence; and (4) that is not found in public sources." Protective Order ¶ B. The order also provides that a party may

¹ Order (Request for Responses; Modification of Electronic Service Address) (Sept. 2, 2005) (unpublished) (September 2 Order).

² Memorandum and Order (Protective Order Governing Disclosure of Protected Materials) (May 21, 2004) (unpublished) (Protective Order).

contest the designation of material as protected by notifying in writing the party who designated the material as protected. *Id.* ¶ N. The designating party then has ten days to file a motion and supporting affidavits with the Board demonstrating that the materials should continue to be protected; if no motion is filed, the protective order will cease to apply to the challenged documents. *Id.*

On August 12, 2005, Nuclear Information and Resource Service and Public Citizen (NIRS/PC) challenged the designation of the following documents as proprietary: (1) a January 21, 2005 Memorandum of Understanding (MOU) between LES and Areva Enterprises, Inc.; (2) a January 14, 2004 Memorandum of Agreement (MOA) between LES and Waste Control Specialists; (3) a spreadsheet used by LES to prepare its waste disposal cost estimates, with the aforementioned MOA attached, marked as LES-PRO-0078; and (4) a second spreadsheet, similar to but not identical to the first spreadsheet, also used to prepare waste disposal cost estimates, marked as LES-PRO-00662. On August 22, LES filed a motion in response, which included affidavits related to the MOU, the MOA, and to the first of the two spreadsheets. On August 29, 2005, NIRS/PC filed a response to LES's motion arguing, among other things, that LES-PRO-00662 should not be protected because LES did not file a supporting affidavit for the second spreadsheet and therefore did not carry its burden of proof. On September 2, 2005, the Board ordered the Staff and LES to respond to NIRS/PC's arguments relative to this specific issue. On September 6, 2005, LES filed a clarified supporting affidavit for the document in question.

DISCUSSION

The protective order requires that affidavits be filed in support of any documents that the originator claims contain proprietary information. Protective Order, ¶ N. The protective order also requires that a motion in support of designation documents as proprietary be filed. Protective Order, ¶ N.

In the instant case, LES has complied with the substance of the Protective Order. The motion filed by LES outlines the basis for LES's claim that both spreadsheets are proprietary information. The first spreadsheet, LES-PRO-00778, was initially submitted to the Staff in January, 2005 as part of a clarifying information package. At the time that the spreadsheet was submitted to the Staff, LES designated it as proprietary information and filed an affidavit in support. The second spreadsheet, LES-PRO-00662, contains essentially the same proprietary information as the first, but contains additional input and output values. In its August 22 Motion, LES discussed the proprietary nature of both documents, both of which, according to LES, contain information proprietary to both LES and its commercial vendors. LES attached the earlier affidavit related to LES-PRO-00778, believing that the original affidavit submitted to the Staff in January, 2005 applied to both documents, and thereby satisfied the requirements. In addition, to ensure that the information remains protected, in its September 6, 2005 filing, LES filed an additional affidavit which expressly covers LES-PRO-00662 and clarifies its earlier intent.

While LES failed to specify in its original affidavit that it applied to both spreadsheets and has not complied with the ten-day deadline for filing an affidavit, it is clear that with its September 6 filing LES has made a good-faith attempt to comply with the substantive requirements of the Protective Order. Given the fact that the two spreadsheets contain the same proprietary information, and that LES has subsequently filed supporting affidavits, the Staff submits that the information should be protected.³

³ The remedy requested by NIRS/PC, that the information included in the spreadsheet at issue be publicly released, would result in harm not only to LES, but also to its commercial vendors, as outlined in LES's August 22 Motion. Given the potential for harm resulting from release of the information and LES's good faith attempts to comply with the substance of the regulations and the Protective Order, the Staff recommends that the Board find that the information is protected.

CONCLUSION

Based on the foregoing, it is the Staff's opinion that LES has met its burden, and that the document in question should be protected.

Respectfully Submitted,

/RA/

Margaret J. Bupp
Counsel for NRC Staff

Dated at Rockville, Maryland
this 7th day of September, 2005

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NUCLEAR REGULATORY COMMISSION

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LOUISIANA ENERGY SERVICES, L.P.)	Docket No. 70-3103
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)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "STAFF RESPONSE TO LICENSING BOARD'S SEPTEMBER 2, 2005 ORDER" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 7th day of September, 2005.

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