



10 CFR 2.390  
10 CFR 30.6  
10 CFR 40.5  
10 CFR 70.5

SEP 18 2006

NEF-06-00037-NRC

ATTN: Document Control Desk  
Director  
Office of Nuclear Material Safety and Safeguards  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Louisiana Energy Services, L. P.  
National Enrichment Facility  
NRC Docket No. 70-3103

Subject: Clarifying Information Related to Louisiana Energy Services Request for Withholding Department of Energy Information from Public Disclosure Pursuant to 10 CFR 2.390

- References:
1. Letter NEF#05-035 dated December 30, 2005, from R.M. Krich (Louisiana Energy Services, L. P.) to Director, Office of Nuclear Material Safety and Safeguards (NRC) regarding "Response to NRC Request for Clarifications on LES Response to NRC Request for Additional Information on Depleted Uranium Disposition Costs and Application for Withholding Information from Public Disclosure"
  2. Letter NEF#06-005 dated February 27, 2006, from R. M. Krich (Louisiana Energy Services, L. P.) to Director, Office of Nuclear Material Safety and Safeguards (NRC) regarding "Responses to NRC Request for Clarifications on Depleted Uranium Disposition Costs and Fuel Cycle Facility Performance Indicator Program and Application for Withholding Information from Public Disclosure"
  3. E-mail dated May 18, 2006, from J.R. Curtiss, Counsel for LES (Winston & Strawn LLP) to T.C. Johnson, LES Project Manager, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards (NRC) regarding "Affidavits from Larry Brown for NEF-05-035 and NEF-06-005"

umssol

4. Letter dated July 21, 2006, from J.G. Giitter, Chief, Special Projects Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards (NRC) to K.W. Gross, Licensing Manager (LES) regarding "Louisiana Energy Services Request for Withholding Information from Public Disclosure (Louisiana Energy Services Gas Centrifuge Enrichment Facility)"
5. Letter dated August 21, 2006, from J.R. Curtiss, Counsel for LES (Winston & Strawn LLP) to T.C. Johnson, LES Project Manager, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards (NRC) regarding "Louisiana Energy Services, L.P. (National Enrichment Facility), Docket No. 70-3103, Request for Extension of Time to Respond to Questions Concerning 10 C.F.R. 2.390 Nondisclosure Request"

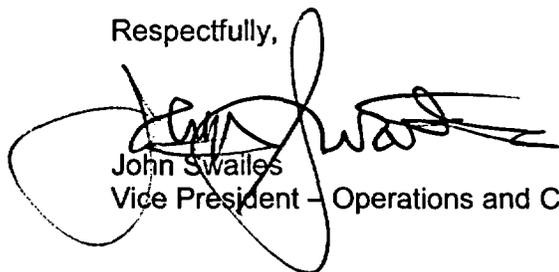
By letters dated December 30, 2005 (Reference 1), and February 27, 2006 (Reference 2), LES submitted clarifying information in response to NRC Staff requests for additional information related to LES's estimated depleted uranium disposition costs. The information provided by LES via those letters concerns a proprietary U.S. Department of Energy ("DOE") report on depleted uranium disposition costs. Accordingly, LES also requested that the information be withheld from public disclosure pursuant to 10 CFR 2.390. On May 18, 2006, LES submitted via electronic mail two affidavits executed by Mr. Larry W. Brown of the Department of Energy (Reference 3) in support of those nondisclosure requests.

By letter dated July 21, 2006 (Reference 4), the NRC requested that LES respond, within 30 days, to two questions posed by the NRC concerning the basis for LES's request that the NRC withhold the subject information from public disclosure pursuant to 10 C.F.R. 2.390. By letter dated August 21, 2006 (Reference 5), LES requested an additional 30 days (until September 21, 2006) to respond, in order to coordinate its responses to the NRC's questions with DOE.

LES has obtained from DOE the information necessary to respond to the NRC's questions of July 21, 2006, and to provide the additional justification necessary to withhold the subject information from public disclosure. Enclosure 1 provides the responses to the NRC's questions.

If you have any questions or need additional information, please contact Mr. Karl Gross, Licensing Manager, at 505.391.1004.

Respectfully,



John Swailes  
Vice President - Operations and Chief Nuclear Officer

Enclosures:

cc: T.C. Johnson, NRC Project Manager

## Enclosure 1

### **Response to Questions presented to Louisiana Energy Services by the Nuclear Regulatory Commission related to Basis for Withholding Department of Energy Information from Public Disclosure Pursuant to 10 CFR 2.390.**

The responses to these questions were provided by Mr. Isiah Smith, Jr., Deputy Assistant General Counsel for Administrative Litigation and Information Law, Office of the General Counsel, United States Department of Energy.

***Question 1) As a general rule, information generated by the Federal Government or produced under government contracts cannot be deemed to be proprietary information. Why in this case is the information properly classifiable as proprietary information?***

The premise of this question is flawed. It is an incorrect assumption to state that information generated by the Federal Government cannot be deemed proprietary information. Under the Freedom of Information Act (FOIA) documents prepared by the government can still come within Exemption 4 (Proprietary Information) if they simply contain summaries or reformulations of information supplied by a source outside the government. *See, e.g., OSHA Data/C.I.H., Inc. v. United States Dep't of Labor*, 220 F.3d 153, 162 n. 23 (3d Cir. 2000) (ratio calculated by agency, but based on "individual components" supplied by private-sector employers); *Gulf & W. Indus. v. United States*, 615 F.2d 527, 529-30 (D.C. Cir. 1979) (contractor information contained in agency audit report); *Matthews v. USPS*, No. 92-1208-CV-W-8, slip op. at 6 (W.D. Mo. Apr. 15, 1994) (technical drawings prepared by agency personnel, but based upon information supplied by computer company). Information produced under government contracts, such as procurement data or unit prices, often contains proprietary information with the potential to reveal privileged or confidential information and create significant competitive damage to the contractor. *McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 215 F. Supp. 2d 200, 205 & n. 3 (D.D.C. 2002) (reverse FOIA suit) (appeal pending on other grounds); *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303 (D.C. Cir. 1999 (reverse FOIA suit), *reh-g en banc denied*, No. 98-5251 (D.C. Cir. Oct. 6, 1999) *dismissed as moot on motion for entry of judgment*, 102 F. Supp. 2d 21 (D.D.C.) (underlying FOIA request withdrawn after issuance of D.C. Circuit decision), *reconsideration denied*, 109 F. Supp. 2d 27 (D.D.C. 2000).

Without access to the actual report and an opportunity to examine and analyze the information being withheld, the Office of General Counsel cannot opine definitively that it is or is not proprietary. However, it does appear that the information at issue may be properly considered proprietary information if it was submitted by a third party to the Agency and has the potential to cause significant competitive damage to the third party if released. As noted below, however, even if the information is not properly designated proprietary, we believe quite strongly that it should be withheld under the deliberative process exemption.

**Question 2) If a government agency gives internal deliberative process information to a non-governmental entity, any privilege authorizing withholdings of the information from public disclosure is generally waived. Why wasn't any privilege waived here when DOE gave the information to LES?**

Once again, this question relies on a mistaken analysis of information law. A government agency does not automatically waive its privilege to withhold information because it has been given to a third party. Under the FOIA information is generally considered released (and therefore subject to waiver) when it has entered the public domain through a prior disclosure. An agency may make an official disclosure of information outside the executive branch without risking waiver of that information if the agency can demonstrate a legitimate purpose for the disclosure, and is able to establish that the disclosure was made with a restriction on further dissemination. See FOIA Update, Vol. IV, No. 2, at 6 ("The Effect of Prior Disclosure: Waiver of Exemptions"); *Judicial Watch v. USPS*, 297 F. Supp. 2d 252, 268 (D.D.C. 2004); *McSheffrey v. Executive Office for United States Attorneys*, No. 02-239, 2003 WL 179840, at \*1 (D. C. Cir. Jan. 24, 2003). In addition, an agency may protect communications outside of an agency if they are part and parcel of the agency's deliberative process. *Dow Jones & Co. v. Department of Justice*, 917 F.2d 571, 574-75 (D.C. Cir. 1990). For example, disclosure of information to advisory committees does not waive an exemption. *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 107-08 (D.C. Cir. 1976). In this case, the Agency has shared information with a contractor on a need to know basis for the purpose of furthering the Agency's decision-making process. Therefore, the Agency has not automatically triggered a waiver of its discretion to withhold the proprietary information in the future from release to the general public simply by sharing that information on a limited basis with a third party.