

January 26, 2017

BY ELECTRONIC AND FIRST-CLASS MAIL

Paul J. Lockwood
Skadden, Arps, Slate, Meagher & Flom LLP
920 N. King Street, P.O. Box 636
Wilmington, Delaware 19899

RE: *United States of America v. Energy Solutions, et al.*, No. 16-cv-0156-GMS (D. Del.);
NRC File No. TR-17-01.

Dear Mr. Lockwood;

The Office of the General Counsel at the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) has received a subpoena that you have caused to be served on the agency. Treating the subpoena as a third-party subpoena under the Commission’s regulations at 10 C.F.R. § 9.200, *et seq.*, this office has assigned the processing number of “TR-17-01” to your request. Please refer to that number in future correspondence regarding this matter.

The subpoena you have provided does not comply with the NRC’s “Touhy” regulations governing such demands. The NRC requires parties who serve subpoenas on the NRC in litigation to which the NRC is not a party to provide the General Counsel with a statement or affidavit explaining (1) what information is sought from the agency; (2) the issues in dispute in the litigation; (3) the relevance of the information sought to the issues in dispute; and (4) why that information is not available elsewhere. See 10 C.F.R. § 9.203. The Supreme Court has held that an agency may deny a subpoena request if the requester does not comply with agency regulations governing the submission of subpoenas. *United States ex rel Touhy v. Ragen*, 304 U.S. 462 (1951). You did not submit a statement or affidavit addressing those matters with your subpoena; thus, the NRC will not comply with it as drafted.

In addition, the NRC now charges user fees to process third-party or “Touhy” subpoenas that take more than 50 hours of staff time. See 81 Fed. Reg. 41171, 41180 (June 24, 2016). We require that persons who submit third-party subpoenas that appear to require more than 50 hours to complete agree that they will pay the fees before we will initiate processing the request. Your subpoena clearly will require more than 50 hours of staff time to process but does not state that you agree to pay the required fees.

Furthermore, your subpoena as currently worded is extraordinarily burdensome and vague, particularly given that tens of thousands of publicly available documents that appear to be responsive to your requests are available, at no charge to the public, through the agency’s searchable public ADAMS database (available at <https://adams.nrc.gov>). For example, the first request in the subpoena essentially seeks all documents related to federal regulation of low-level radioactive waste. However, a search of the ADAMS public database reveals more than 11,000 documents that include the term “LLRW” alone. Similarly, while your requests effectively

seek all materials related to requests made pursuant to 10 C.F.R. § 20.2002, there are more than 8,000 documents containing the term “20.2002.” Particularly given the number of documents that are already readily publicly available, there is no legitimate reason to burden hundreds of employees at an agency whose mission is solely related to public health and safety and that has no stake in the outcome of this litigation with a request for all documents in its possession related to major aspects of its regulatory function.

Finally, you have asked for the production of documents by February 6, eight business days after the subpoena was received. Given the number of documents that your subpoena appears to capture, that time frame is clearly unreasonable.

Accordingly, the agency has denied your Touhy request because it both fails to satisfy the appropriate NRC regulations and is unduly burdensome. The agency remains willing to entertain any future requests that are submitted in accordance with the agency’s designated process and to work with you to reach agreement concerning the scope of the request. If you have any questions, please discuss them with the agency’s Solicitor, Andrew Averbach, who may be reached at 301-415-1956 or andrew.averbach@nrc.gov.

Sincerely,

/RA/

Margaret M. Doane
General Counsel

cc: Anurag Maheshwary, Esq. (via e-mail)

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Sincerely,

Margaret M. Doane
General Counsel

cc: Anurag Maheshwary, Esq. (via e-mail)

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