



**GULF STATES UTILITIES COMPANY**

RIVER BEND STATION      FOSTER WELLS L 24 250      ST FRANCISVILLE, LOUISIANA 70776

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January 28 1992  
RBG- 36,329  
File Nos. G9.5, G9.23.2

U.S. Nuclear Regulatory Commission  
Document Control Desk  
Washington, D.C. 20555

Gentlemen:

River Bend Station - Unit 1  
Docket No. 50-458

Gulf States Utilities Company (GSU) submits this request for an exemption from certain NRC fitness-for-duty requirements pursuant to 10 C.F.R. § 26.6. Specifically, GSU requests an exemption from the provisions of 10 C.F.R. § 26.29(b) to allow the Company, in a confidential manner, to provide to the Louisiana Office of Employment Security information concerning the results of a former employee's drug tests administered pursuant to the fitness-for-duty requirements contained in 10 C.F.R. Part 26 and Company policy. The reasons supporting this exemption request are set forth below. Consistent with Section 26.6, GSU submits that the granting of the exemption sought herein is authorized by law, will not endanger life or property or the common defense and security, and is otherwise in the public interest.

Background

On September 27, 1991, GSU's Medical Review Officer (MRO) reported that a GSU employee assigned to the River Bend Station had tested positive for cocaine on an unannounced random drug test administered by GSU as part of its NRC required fitness-for-duty program. (At that time, the individual admitted to our Director of Employee Relations and the Fitness for Duty Supervisor that he had

To protect the privacy of this individual, we have elected not to provide the former employee's name in this submittal. This information would be provided to the NRC pursuant to 10 CFR § 2.790(a)(6) upon request.

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he had used cocaine.) The initial and confirmation testing was performed by Doctors and Physicians Laboratory, which has been certified by the U.S. Department of Health and Human Services (HHS) as required by 10 C.F.R. § 26.24(f). In response to this incident, the employee's access authorization was suspended for twenty days and the individual was referred to the GSU Employee Assistance Program for counseling and assistance during the suspension period. The employee returned to work on October 15, 1991.

On November 4, 1991, this individual tested negative for cocaine on an unannounced follow-up drug test administered by GSU. On December 3, 1991, this employee tested positive for cocaine on another unannounced follow-up drug test. The initial and confirmation testing was performed by Doctors and Physicians Laboratory. On December 9, 1991, the MRO reported the positive test result, and the employee's access authorization was suspended as of that date. The employee requested on December 9 that his retained specimen be submitted for testing. In response to his request, the specimen was submitted to Northwest Toxicology, Inc., which has also been certified by HHS pursuant to 10 C.F.R. § 26.24(f). On December 12, 1991, the MRO reported the subject's split specimen as positive for cocaine. As a result of this individual's second confirmed positive drug test for cocaine use, GSU discharged the employee on December 12, 1991. This employee's discharge was consistent with the U.S. Nuclear Regulatory Commission's fitness-for-duty regulations.

After being discharged, this individual applied for unemployment benefits from the Louisiana Office of Employment Security. At that time, the individual produced documentation from a local drug analysis laboratory. This documentation purportedly indicated that on November 4, 1991 and December 3, 1991, a specimen provided by this individual had tested negative to a similar drug test administered by the Industrial & Family Medical Clinic. (GSU understands that the Industrial & Family Medical Clinic is certified by HHS.) Thus, if the collection of the urine specimens was properly supervised, the test results reported by the Industrial & Family Medical Clinic directly conflict with the results of the December 3, 1991 drug test performed on the employee by GSU under the Company's approved fitness-for-duty program.

The Louisiana Office of Employment Security awarded unemployment benefits to the former GSU employee. We appealed this award on January 17, 1992. The Louisiana Office of Employment Security has informed GSU that the Company must produce documentation confirming the employee's positive drug test results (See La. Rev. Stat. 23:1501 (10a), a copy of which is attached.) Unless GSU produces the test results, the agency will uphold the grant of unemployment benefits to this former employee. GSU is seeking this exemption to do so in order to avoid the creation of a precedent in this case that is detrimental to GSU and to the integrity of its drug screening process.

A direct conflict exists in this instance between the provision of Louisiana law cited above and Section 26.29 of the NRC regulations.<sup>2/</sup> The Louisiana Office of Employment Security does not fall under any of the categories of entities authorized under 10 C.F.R. § 26.29 to receive fitness-for-duty information collected by GSU. Moreover, the Administrator of the Office of Employment Security has informed GSU that the former employee has refused to sign a release authorizing the transmittal of this information to the agency. Thus the language of 10 C.F.R. § 26.29 prohibits the Company from releasing the information. GSU also understands that the agency will not issue a subpoena for the release of this data.

Under Louisiana law, employees discharged for "misconduct" are not entitled to unemployment benefits. By contrast, employees who have been discharged for reasons other than misconduct may be eligible for benefits. Failing a drug test would be considered "misconduct" in this instance. GSU has taken the position that this former employee is not entitled to unemployment benefits under the standards set forth in Louisiana law. To preclude this individual's taking unfair advantage of the state's unemployment benefit program, and to prevent the individual from using the NRC's regulation as a sword instead of a shield, we seek a one-time exemption from NRC regulations in order to be able to provide the Louisiana Office of Employment Security with the data in question. The information would be proffered as confidential. GSU also seeks the right to have GSU personnel familiar with this situation (such as the MRO) testify before the Louisiana Office of Employment Security concerning the events in this case, if such testimony is deemed necessary.

### Request for Exemption

#### 1. Applicable Regulations

Gulf States requests a one-time exemption from the requirement set forth in 10 C.F.R. § 26.29(b) that licensees

shall not disclose the personal information collected and maintained [under Part 26] to persons other than assigned Medical Review Officers, other licensees or their authorized representatives

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<sup>2/</sup> This conflict appears to be peculiar to NRC power plant licensees. The Company would not, for example, be precluded from providing the State with this type of information if it involved a GSU employee working at a fossil fuel plant. In fact, GSU has provided such information on other occasions.

legitimately seeking the information as required by this Part for unescorted access decisions and who have obtained a release from current or prospective employees or contractor personnel, NRC representatives, appropriate law enforcement officials under court order, the subject individual or his or her representative, or to those licensee representatives who have a need to have access to the information in performing assigned duties, including audits of licensee's, contractor's, and vendors's programs, to persons deciding matters on review or appeal, and to other persons pursuant to court order. This section does not authorize the licensee, contractor, or vendor to withhold evidence of criminal conduct from law enforcement officials.

GSU proposes to release the test results in question to the Louisiana Office of Employment Security for the express and sole purpose of substantiating that this former employee was discharged for cause under the Company's fitness-for-duty policy, and that this individual is therefore not entitled to receive unemployment benefits from the State of Louisiana.

## 2. Circumstances Warranting the Granting of this Exemption

NRC officials have confirmed that the circumstances presented by this case were not contemplated by the NRC Staff when it drafted the provisions of 10 C.F.R. § 26.29(b). Additionally, our research concerning the regulation, the Statement of Considerations, and other interpretive documents relevant to this NRC regulation reveals no indication that such a situation or outcome was anticipated or contemplated. We urge the Commission to allow the provision of this information to the State in this instance. The effect of a refusal to do so would be to reward an individual who, not once but twice, has violated NRC regulations and frustrated the purpose of Part 26, which is to provide reasonable assurance that nuclear power plant personnel will perform their tasks in a reliable and trustworthy manner and that they are not under the influence of any substance which in any way adversely affects their ability to safely and competently perform their duties.

An exemption from the disclosure limits of Section 26.29(b) is warranted in this instance. Consistent with 10 C.F.R. § 26.6, such an exemption is authorized by law, will not endanger life, property, or the common defense and security, and is otherwise in the public interest. Nor does any other NRC regulation prohibit the release of this information for an approved purpose. GSU has determined that

the granting of this request for exemption will not have any environmental impact.

Allowing the one-time disclosure of this individual's drug test results to the Louisiana Office of Employment Security will not violate the underlying purpose of 10 C.F.R. § 26.29(b) in this case. GSU will attempt to assure that the information concerning this former employee is treated confidentially. Moreover, fairness dictates that GSU should be permitted to provide the information sought by the agency. It wishes to produce evidence that will confirm the validity of the Company's drug testing procedure and the validity of the chain of custody of the employee's drug test samples.

GSU also wishes to produce evidence indicating that this individual failed to appeal the positive drug determinations. Under the GSU fitness-for-duty policy, a person who tests positive for an illegal drug or alcohol is given an opportunity to appeal. This policy is consistent with Section 26.28 of NRC regulations. Despite the existence of this right, the employee in question failed to file any appeal. Moreover, although this individual had the right to file a grievance procedure against the Company, GSU understands that the union found no cause to pursue the grievance.

In sum, the documentation that GSU wishes to be allowed to provide in this case will demonstrate that the former employee in question is not entitled to unemployment benefits under Louisiana law. The release of this information to the Louisiana Office of Employment Security will help to ensure that this individual does not profit unfairly at the expense of GSU and the State of Louisiana. Such an action promotes the public interest.

Furthermore, the denial of this exemption request might result in some financial effect upon GSU, which we do not believe was intended by the NRC Staff when it adopted 10 C.F.R. § 26.29. The Company's unemployment insurance premiums could possibly be increased if this individual (and other individuals in the future) were allowed to receive unemployment benefits. (The unemployment tax to employers is based upon the overall "history" of the particular employer in terms of the numbers of individuals laid off or terminated by the Company.) As noted above, the agency has indicated its intention to approve the individual's request for benefits if the information in question is not provided.

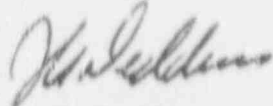
#### Conclusion

For the reasons stated above, GSU requests that the NRC grant this request for a one-time exemption from the prohibitions of 10 C.F.R. §26.29(b) to allow the release to the Louisiana Office of Employment Security of certain information concerning a former employee's drug testing results. We ask that the NRC

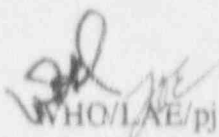
inform us of its decision within 30 days, so that the appeal can be processed in a timely fashion.

Please contact Mr. L. A. England of my staff at (504) 381-4145 if you should have any questions.

Sincerely,



J. C. DeDdens  
Senior Vice President  
River Bend Nuclear Group



WHO/LAE/pj

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LOUISIANA STATUTES ANNOTATED  
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REVISED STATUTES  
TITLE 9. STATE ADMINISTRATION  
CHAPTER 14. DRUG TESTING  
PART III. EMPLOYEE DRUG TESTING

s 1011. Employee drug testing: rights of the employee

A. Any employee, confirmed positive, upon his written request, shall have the right of access within seven working days to records relating to his drug tests and any records relating to the results of any relevant certification, review, or suspension/revocation-of-certification proceedings.

B. An employer may, but shall not be required to, afford an employee whose DRUG TEST is certified positive by the medical review officer the opportunity to undergo rehabilitation without termination of EMPLOYMENT.

1991 Pocket Part Credits

CR04

(9)(a) If the administrator finds that he has not, subsequent to the beginning of the next preceding benefit year with respect to which he received benefits, had work and earned wages for insured work in an amount equal to whichever is the lesser of:

(i) Three-thirteenths of wages paid to him during that quarter of his current base period in which such wages were highest; and

(ii) Six times the weekly benefit amount applicable to his current benefit year.

(b) This disqualification shall continue until such time as the claimant can demonstrate that he has had earnings as specified in this Subsection.

CR05

(10)(a) If the administrator finds that he has been discharged by a base period or subsequent employer for the use of illegal drugs. For the purposes of this Paragraph, "misconduct" shall include discharge for either on or off the job use of a nonprescribed controlled substance as defined in 21 U.S.C. 812 Schedules I, II, III, IV, and V. In order to support disqualification for drug use under this provision, the employer must prove the employee's use of the

controlled substance only by a preponderance of the evidence. In meeting this burden, the only RESULTS of employer-administered tests that shall be considered admissible evidence are those that are the result of the testing for drug usage done by the employer pursuant to a written and promulgated substance abuse rule or policy established by the employer. Discharge of an employee for refusal to submit to a DRUG TEST, as set forth above, shall be presumed to be for misconduct. Such disqualification shall continue until such time as the claimant can requalify by demonstrating that he:

(i) Has been paid wages for work subject to the Louisiana Employment Security Law (FNIPP) or the unemployment insurance law of any other state of the United States equivalent to at least ten times his weekly benefit amount following the week in which the disqualifying separation occurred.

(ii) Has not left his last work under disqualifying circumstances.

(b) Furthermore, upon requalification, such claimant's benefits, as computed pursuant to the provisions of R.S. 23:1592 and R.S. 23:1595, shall be discounted by fifty percent for the remainder of his benefit year.

(c) All sample collection and testing for drugs under this Chapter shall be performed in accordance with the following conditions:

(i) The collection of samples shall be performed under reasonably sanitary conditions.

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23:1601(10). Test RESULTS which do not exclude the possibility of passive inhalation of marijuana may not be used as a basis for disqualification under this Paragraph. However, test RESULTS which indicate that the concentration of total urinary cannabinoids, as determined by immunoassay equals or exceeds fifty nanograms/ml shall exclude the possibility of passive inhalation.

(d) Within the terms of the policy, an employer may require the collection and testing of samples for the following purposes:

(i) Investigation of possible individual employee impairment.

(ii) Investigation of accidents in the workplace or incidents of workplace theft.

(iii) Maintenance of safety for employees or the general public; or security of property or information.

(iv) Maintenance of productivity, quality of products or services, or security of property or information.

(e) All information, interviews, reports, statements, memoranda, or test RESULTS received by the employer through its drug testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceeding, except in a proceeding related to an action under R.S. 23:1601(10) in a claim for unemployment compensation proceeding, hearing, or civil litigation where drug

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use by the tested employee is relevant.

(f) No cause of action for defamation of character, libel, slander, or damage to reputation arises in favor of any person against an employer who has established a program of drug or alcohol testing in accordance with this Chapter, unless:

(i) The RESULTS of that test were disclosed to any person other than the employer, an authorized employee or agent of the employer, the tested employee, or the tested prospective employee;

(ii) The information disclosed was based on a false test result; and

(iii) All elements of an action for defamation of character, libel, slander, or damage to reputation as established by statute or common law, are satisfied.

CRO6

1985 Main Volume Credit(s)

Amended by Acts 1950, No. 498, s 9, emerg. eff. July 8, 1950; Acts 1952, No. 401, s 1; Acts 1954, No. 704, s 1; Acts 1968, No. 420, s 1; Acts 1968, No. 655, s 1; Acts 1971, No. 136, s 13, eff. Jan. 1, 1972; Acts 1974, No. 393, s 1; Acts 1974, No. 394, s 1; Acts 1976, No. 366, s 1; Acts 1977, No. 648, s