

September 29, 2004

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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

September 29, 2004 (1:41PM)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:

Louisiana Energy Services, L.P.

(National Enrichment Facility)

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Docket No. 70-3103-ML

ASLBP No. 04-826-01-ML

APPLICANT'S MOTION TO COMPEL ADDITIONAL SECTION 2.704(a) DISCLOSURES
BY NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.705(h), Louisiana Energy Services, L.P. ("LES" or "Applicant") hereby moves the Licensing Board for an order compelling Nuclear Information and Resource Service and Public Citizen ("NIRS/PC" or "Intervenors") to make certain additional disclosures pursuant to 10 C.F.R. § 2.704(a). Specifically, LES requests that the Licensing Board order NIRS/PC to identify (1) all individuals likely to have information relevant to any admitted NIRS/PC contention; (2) all documents authored by, or otherwise in the possession of, NIRS/PC¹ that are relevant to any admitted NIRS/PC contention and which have not been previously identified or produced; and (3) all documents withheld by NIRS/PC under a claim of privilege (via an appropriate privilege log).

¹ For purposes of this motion, "NIRS/PC" shall mean any NIRS/PC official, director, employee, agent, servant, representative, attorney, consultant, or other person directly or indirectly employed or retained by NIRS/PC, or anyone else acting on behalf or otherwise subject to its control. "Consultant" shall mean any person who provides professional, scientific, or technical input, advice and/or opinion to NIRS/PC, whether that person is employed specifically for this case or is a regular NIRS/PC employee or official.

II. BACKGROUND

On September 2, 2004, in accordance with 10 C.F.R. § 2.704(a)(3) and the Licensing Board's General Schedule² for this proceeding, the parties, including NIRS/PC and LES, made certain mandatory initial disclosures. To comply with this obligation, LES provided NIRS/PC with (1) a detailed list of individuals likely to have discoverable information; (2) copies of non-privileged documents relevant to all admitted NIRS/PC contentions (approximately 5,000 pages of non-proprietary and proprietary materials that included e-mails and other electronically-recorded information); (3) a list of publicly available documents relevant to the admitted NIRS/PC contentions; and (4) a list of documents to be withheld from public disclosure as confidential/proprietary. NIRS/PC, for its part, identified only four individuals, *i.e.* its designated expert witnesses for this proceeding, as likely to have relevant information. Additionally, NIRS/PC produced copies of only a handful of relevant documents (which included no e-mails or other electronically-recorded information), and did not identify any documents as being withheld under a claim of privilege.³

On September 13, 2004, six *business* days after the parties' mandatory initial disclosures, counsel for LES, in accordance with 10 C.F.R. § 2.705(h), contacted counsel for

² See Memorandum and Order (Memorializing and Ruling on Matters Raised in Conjunction with August 3, 2004 Conference Call and Setting General Schedule for Proceeding), App. A (General Schedule – Louisiana Energy Services, L.P. Proceeding) (Aug. 16, 2004).

³ While numbers of pages of documents are not themselves indicative of responsiveness, the fact that NIRS/PC have eight (8) admitted contentions with numerous bases suggests that they may have in their possession additional relevant materials that have yet to be disclosed.

NIRS/PC to discuss the need for additional disclosures by NIRS/PC.⁴ In an e-mail dated September 14, 2004, counsel for NIRS/PC confirmed that he "agreed to supplement NIRS/PC's response to Rule [2].704 disclosure to add names of client personnel aware of matters in issue and to identify or produce responsive materials from the files of NIRS/PC, including identification of materials withheld as privileged." *See* E-mail from Lindsay Lovejoy (counsel for NIRS/PC) to James Curtiss, David Repka, and Martin O'Neill (counsel for LES), "Subject: LES discovery" (Sept. 14, 2004) (attached). Counsel for NIRS/PC indicated that he would complete the additional disclosures "by early next week [i.e., September 20-22, 2004]." *Id.* However, as of the date of this motion, NIRS/PC have yet to make the additional promised disclosures pursuant to Section 2.704(a) and have failed to respond to repeated requests (oral and via e-mail) by LES for further information.

III. ARGUMENT

The additional initial disclosures sought by LES in this motion should be compelled by the Licensing Board. As a general matter, Section 2.704(a)(3) provides that "[a] party is not excused from making its disclosures because it has not fully completed its investigation of the case, because it challenges the sufficiency of another party's disclosures, or because another party has not made its disclosures." With respect to the particular disclosures sought herein, Section 2.704(a)(1) provides that parties are required to provide "[t]he name and, if known, the address and telephone number of *each individual* likely to have discoverable information relevant to disputed issues alleged with particularity in the pleadings, identifying the subjects of the information." 10 C.F.R. § 2.704(a)(1) (emphasis added). As noted above,

⁴ In accordance with 10 C.F.R. § 2.705(h), counsel for LES thus certifies that LES has in good faith conferred with NIRS/PC in an effort to resolve this discovery dispute without action by the presiding officer.

NIRS/PC identified only four individuals in connection with Section 2.704(a)(1), all of whom are named NIRS/PC expert witnesses. By its terms, however, Section 2.704(a)(1) is not limited to a party's anticipated expert witnesses. Therefore, if other individuals are likely to possess relevant information, then NIRS/PC should identify them. Further, to the extent there are additional relevant "documents, data compilations, and tangible things in the possession, custody, or control" of NIRS/PC, those materials should also be provided to LES.⁵ See 10 C.F.R. § 2.704(a)(2).

Insofar as NIRS/PC intend to withhold any information under a claim of privilege, Section 2.705(b)(4) provides clear instructions in this regard. That provision states:

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, *the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed* in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. *Identification of these privileged materials must be made within the time provided for disclosure of the materials*, unless otherwise extended by order of the presiding officer or the Commission.

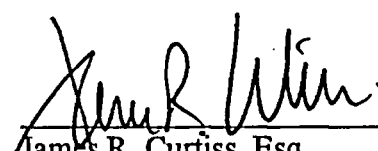
10 C.F.R. § 2.705(b)(5) (emphasis added). Accordingly, to the extent NIRS/PC intends to withhold information otherwise discoverable under Part 2 as privileged or protected, it must provide LES with an adequate privilege log to comply with Section 2.704.

⁵ Under the *Federal Rules of Civil Procedure*, on which the NRC's mandatory disclosure provisions are based, "documents" include "writings, drawings, graphs, charts, photographs, phonographs, and other data compilations from which information can be obtained." FED. R. CIV. P. 34(a). The term "data compilations," in turn, is intended to capture computerized data and other electronically-recorded information. See *Kleiner v. Burns*, 48 Fed. R. Serv. 3d 644, 2000 WL 1909470, at *4 (D. Kan. Dec. 15, 2000). Finally, "tangible things" include any object that can be inspected, copied, tested, or sampled. See FED. R. CIV. P. 34(a).

IV. CONCLUSION

For the foregoing reasons, the Licensing Board should compel NIRS/PC to make the additional Section 2.704(a) disclosures sought herein. Since depositions are already underway in this proceeding, LES requests the Licensing Board to order such disclosure to occur prior to October 6, 2004. Indeed, in response to an inquiry from counsel for LES, counsel for NIRS/PC previously indicated that NIRS/PC would supplement its mandatory initial disclosures accordingly. This representation is clearly an explicit acknowledgment by NIRS/PC that the additional disclosures sought by LES in this motion are necessary to comply with Section 2.704(a)(1).

Respectfully submitted,



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Dated at Washington, District of Columbia
this 29th day of September 2004

Stovall, Martha

From: Lindsay Lovejoy [lindsay@lindsaylovejoy.com]
Sent: Tuesday, September 14, 2004 12:26 PM
To: Curtiss, James; Repka, David; O'Neill, Martin
Subject: LES discovery

Jim—

This is to confirm our discussion of yesterday in which I agreed to supplement NIRS/PC's response to Rule 704 disclosure to add names of client personnel aware of matters in issue and to identify or produce responsive materials from the files of NIRS/PC, including identification of materials withheld as privileged. I expect to be able to finish this task by early next week.

Regards,
—Lindsay

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ATTACHMENT

9/29/2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:

Louisiana Energy Services, L.P.

(National Enrichment Facility)

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "APPLICANT'S MOTION TO COMPEL ADDITIONAL SECTION 2.704(a) DISCLOSURES BY NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN" in the captioned proceeding have been served on the following by e-mail service, designated by **, on September 29, 2004 as shown below. Additional service has been made by deposit in the United States mail, first class, this 28th day of September 2004.

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Washington, DC 20555-0001

Commissioner Edward McGaffigan, Jr.
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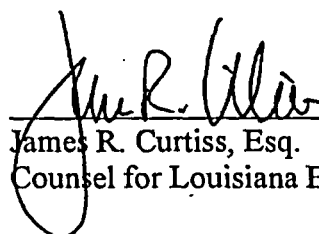
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