

RAS 10436

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Paul B. Abramson
Dr. Charles N. Kelber

In the Matter of

LOUISIANA ENERGY SERVICES, L.P.

(National Enrichment Facility)

Docket No. 70-3103-ML

ASLBP No. 04-826-01-ML

September 9, 2005

MEMORANDUM AND ORDER

(Ruling on Motion to Maintain Protected Status of Certain Applicant Documents)

Pending before the Licensing Board is an August 22, 2005 motion by applicant Louisiana Energy Services, L.P., (LES) seeking continued designation of certain documents in this proceeding as “protected materials” withheld from public disclosure. On August 12, 2005, intervenors Nuclear Information and Resource Service and Public Citizen (NIRS/PC) issued notice to LES contesting the designation of certain documents, which were previously disclosed to NIRS/PC by LES between January and April 2005, as “protected materials” under the terms of the Board’s May 21, 2004 protective order governing the use and disclosure of such materials.¹ Pursuant to the terms of that protective order, on August 22, 2005, LES filed with the Board a motion seeking to demonstrate that the particular contested documents warrant

¹ Specifically, NIRS/PC contests the “protected materials” designation of four documents: (1) a Memorandum of Understanding between LES and AREVA; (2) a Memorandum of Agreement between LES and Waste Control Specialists; (3) a spreadsheet used by LES in estimating the unit cost of disposal of depleted uranium oxide (U₃O₈), denominated LES-PRO-00778; and (4) a second cost estimate spreadsheet with slightly different input/output numbers, denominated LES-PRO-00662. See Memorandum on Behalf of [NIRS/PC] in Response to Motion by [LES] to Maintain Designation of Certain Documents as Proprietary (Aug. 29, 2005) at 2.

continued protection from public disclosure, including affidavits supporting withholding the documents. See Motion on Behalf of [LES] in Response to Intervenor Notice Contesting Designation of Certain Applicant Documents as Protected Materials (Aug. 22, 2005) [hereinafter LES Motion]. Thereafter, on August 29, 2005, NIRS/PC filed a response to the LES motion, arguing that the documentary materials at issue do not meet the requirements for “protected materials” set forth in the Board’s protective order in that, among other things, the information contained in those documents is already publicly available and, in the case of LES-PRO-00662, was not properly supported by an affidavit. See Memorandum on Behalf of [NIRS/PC] in Response to Motion by [LES] to Maintain Designation of Certain Documents as Proprietary (Aug. 29, 2005) [hereinafter NIRS/PC Response]. The NRC staff elected not to file a response.

On September 2, 2005, the Board issued an order directing LES and the staff to respond to the argument by NIRS/PC that document LES-PRO-00662 should not be protected because LES had filed no supporting affidavit, and thus had not carried its burden of proof relative to, the continued protection of that document. See Licensing Board Order (Request for Responses; Modification of Electronic Service Address) (Sept. 2, 2005) at 1 (unpublished). In accordance with that order, on September 6, 2005, LES filed a response in which it expressed its belief that the affidavit filed in support of LES-PRO-00778 was sufficient to support the protection of LES-PRO-00662 given that the two documents did not differ significantly, but also included an additional supporting affidavit specific to LES-PRO-00662. See Response of [LES] to Licensing Board Order Regarding the Basis for Continued Protection of LES-PRO-00662 From Public Disclosure (Sept. 6, 2005). In its September 7, 2005 response, the staff essentially agreed with LES, stating that even if LES had not satisfied its burden and filing requirements relative to LES-PRO-00662 in its August 22 filing, it had made a good faith effort to do so and that, combined with the September 6 affidavit in support of that document, was

sufficient to demonstrate the need for continued protection of that document. See Staff Response to Licensing Board's September 2, 2005 Order (Sept. 7, 2005) at 3.

Upon consideration of these party filings, the Board finds that continued treatment of the documents at issue as "protected materials" pursuant to the terms of the Board's May 2004 protective order is appropriate at this juncture. As we have discussed on prior occasions, the Board is of the opinion that an appropriate way to address issues relative to the proprietary status of certain documents is to entertain such challenges subsequent to issuance of the Board's partial initial decision, at which time NIRS/PC may contest the proprietary designation of any documents previously identified by LES as "protected materials." See, e.g., Tr. at 1723. This approach, which has been successfully followed in the context of other proceedings before the Licensing Board Panel, can avoid potential procedural delays involved with specific challenges and interlocutory appeals of the Board's rulings on those challenges.

At this juncture, this factor certainly counsels continued protection of the documents at issue, particularly given that NIRS/PC could have requested public disclosure some time ago. Although NIRS/PC correctly asserts that the May 2004 protective order contains no deadline for requesting disclosure of protected documents, see NIRS/PC Response at 9, the fact that NIRS/PC could have asked for public release of the documents several months ago, coupled with the time the parties and Board must devote to the rapidly approaching evidentiary hearing, counsels that the Board defer ruling on the status of these documents until after issuance of the Board's partial initial decision.²

² Additionally, to the degree the NIRS/PC public disclosure request appears to be fueled by a desire to have the Board hold the upcoming evidentiary hearing on the remaining contested issues in open sessions in the Hobbs, New Mexico area, see id. at 1-3, even putting aside the sparse public attendance at the February 2005 evidentiary hearing held in Hobbs, and the fact that the Board intends, if at all possible, to hold hearing sessions on uncontested issues in this proceeding in the Hobbs area in spring 2006, see Tr. at 1699, 1724, at this late juncture this argument does not weigh sufficiently in favor of addressing challenges to the protected

Finally, we note that the procedural issue raised by NIRS/PC regarding the purported lack of an affidavit supporting the continued protection of LES-PRO-00662 has been resolved to the Board's satisfaction. Even if the affidavit of Rod M. Krich filed in conjunction with the LES August 22 motion was not sufficient to satisfy the LES obligations under paragraph N of the May 2004 protective order, the September 6 affidavit of Mr. Krich and the corresponding LES motion demonstrate to the Board's satisfaction that any procedural defect has been cured.³

Accordingly, the August 22, 2005 LES motion to maintain the protected status of documents in response to the August 12, 2005 NIRS/PC notice contesting that designation is granted,⁴ subject to the post-October 2005 evidentiary hearing renewal of challenges to the

status of documents.

³ Though the September 6 LES motion and corresponding affidavit were not in a strict sense timely filed under paragraph N of the May 21 protective order, which requires that any motion and supporting affidavit be filed within 10 days of the date a party contests the protected designation of certain materials, the Board finds LES had a good faith belief that the affidavit of Mr. Krich filed August 22 supported the protection of LES-PRO-00662 and, therefore, the September 6 motion and affidavit are not untimely.

⁴ In its motion, LES noted that it was that date providing redacted versions of LES-PRO-00662 and LES-PRO-00778 to NIRS/PC, the unredacted contents of which would be subject to public disclosure. See LES Motion at 10.

designation of proprietary material relating to this portion of the proceeding in accordance with further Board directives.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁵

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

September 9, 2005

⁵ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant LES; (2) intervenors NIRS/PC; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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LOUISIANA ENERGY SERVICES, L.P.) Docket No. 70-3103-ML
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON MOTION TO MAINTAIN PROTECTED STATUS OF CERTAIN APPLICANT DOCUMENTS) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Docket No. 70-3103-ML
LB MEMORANDUM AND ORDER (RULING ON MOTION TO
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Dated at Rockville, Maryland,
this 9th day of September 2005