

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

DOCKETED 07/07/04

SERVED 07/07/04

In the Matter of)
)
U.S. DEPARTMENT OF ENERGY)
)
(High Level Waste Repository:)
Pre-Application Matters))
_____)

Docket No. PAPO-00

CLI-04-20

ORDER

The Commission has promulgated regulations, found in 10 C.F.R. Part 2, Subpart J, which, among other things, provide for the use of an electronic information management system to make documents available to the participants in any eventual licensing proceeding on a high-level radioactive waste repository. Requiring participants to place pertinent documents into the Licensing Support Network (LSN) for use by the other participants obviates the need for the traditional means of document discovery and will allow potential parties to use some part of the pre-application period to review documentary information and prepare contentions for filing in petitions to intervene. In promulgating its regulations, the Commission recognized that there is a potential for disputes among the participants regarding document withholding from the LSN.

Section 2.1010 of Subpart J requires that the Commission designate an official to rule on those disputes, a Pre-License Application Presiding Officer (PAPO). Subpart J defines the PAPO as "one or more members of the Commission, or an atomic safety and licensing board (ASLB), or a named officer who has been delegated final authority in the pre-license application

phase with jurisdiction specified at the time of designation.” 10 C.F.R. §2.1010(a)(1). That official is to be designated no later than fifteen days after the Department of Energy (DOE) --- the potential applicant for a license authorizing construction of a high-level radioactive waste repository --- provides a written certification to the NRC pursuant to 10 C.F.R. §2.1009(b) that DOE has identified the pertinent documentary information and made it electronically available.¹ DOE provided that certification to NRC on June 30, 2004. The purpose of this order is to designate a PAPO and set forth the jurisdiction of that official.

Designation of the PAPO

The Commission hereby designates the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, G. Paul Bollwerk, III, as the PAPO. As set forth below, he is authorized to delegate that authority.

PAPO's Powers and Jurisdiction

The Commission authorizes the PAPO to delegate his authority in whole or in part to any member or members of the Atomic Safety and Licensing Board Panel to serve singly or jointly on one or more boards.

Pursuant to 10 C.F.R. §2.1010(e), the PAPO possesses all the general powers specified in §2.319 and §2.321(c) that the PAPO requires to carry out its responsibilities. As provided by 10 C.F.R. §2.1010(a)(1) and (b), the PAPO is granted this authority solely for the purpose of ruling on disputes over the electronic availability of documents, including disputes relating to claims of privilege and those relating to the implementation of recommendations of the Advisory Review Panel established under §2.1011(d). Pursuant to §2.1010(b), the PAPO shall rule on

¹ We note receipt of a June 2, 2004 letter from counsel for the State of Nevada requesting the Commission “to appoint a Pre-Application Presiding Officer immediately.” This Order addresses that request.

any claim of document withholding except as otherwise provided in this order or subsequent order of the Commission. In 10 C.F.R. §2.1005, the Commission has delineated classes of documents that are to be excluded from the LSN. The Commission calls attention to recent changes to that section of the regulations. See 69 Fed. Reg. 32836 (June 14, 2004). No issue lacking a direct relation to the LSN is to be entertained by the PAPO.

The Commission's interest is in assuring the availability of information and not in dissipating resources on meaningless disputes. The PAPO possesses authority under 10 C.F.R. §2.1010(e) and §2.319 to restrict irrelevant, unreliable, duplicative or cumulative arguments and to regulate the course of the proceedings and the conduct of the participants. The Commission expects the PAPO to use this authority to ensure a fair and impartial process.

Clarification Regarding Appeals of PAPO Actions

Although 10 C.F.R. §2.1010(a)(1) refers to "a named officer who has been delegated final authority on the matter to serve as the [PAPO]" (underlining added), a right of appeal from a PAPO order issued under 10 C.F.R. §2.1010 is recognized under §2.1015(b). A notice of appeal, accompanied by a supporting brief, must be filed with the Commission no later than ten days after service of the order in accordance with 10 C.F.R. §2.1015.

Termination of Jurisdiction

The jurisdiction of the PAPO shall terminate at the time that an Atomic Safety and Licensing Board has been appointed to preside over the high-level waste repository licensing proceeding², except that, unless the Chief Administrative Judge of the Atomic Safety and

² The Commission expects that none of the one or more Atomic Safety and Licensing Boards that may be needed for such proceeding will be appointed until after DOE files an application, the application has been docketed by the NRC staff, a Notice of Opportunity for Hearing has been published by the NRC, and at least one person has filed a petition to intervene and request a hearing.

Licensing Board Panel or the Commission rules otherwise, the PAPO shall retain jurisdiction over those disputes pending before it at the time a Licensing Board has been appointed for the high level waste repository licensing proceeding.

Application of Ex Parte and Separation of Functions Rules

The ex parte and separation of function rules (10 C.F.R. §2.347 and §2.348 respectively) shall apply to those limited matters falling within the PAPO's jurisdiction and to appeals to the Commission of PAPO rulings.

Technical Requirements for Legal Filings

An addendum to the order discusses and displays how the participants shall caption any filing seeking a ruling or other action from the PAPO. The caption includes, as will be noted, both the identification of the originator of the request and the number of the request by that particular originator. Subsequent responses and any other related papers should carry the same caption. This will aid electronic retrieval of the documents and facilitate identification of filings and rulings on any specified dispute.

Other requirements governing submissions shall be as the Part 2 rules provide unless the PAPO or the Commission provides otherwise.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of July, 2004.

ADDENDUM to CLI-O4-20

The caption used on the above Order appointing a PAPO should be used for all filings with the PAPO.

Beneath the caption, the participant shall number each of its requests for action by the PAPO. Thus, for example, a participant's first request should be numbered [name of participant]-01. Its second request will be numbered [name of participant]-02. By requiring each of the participants to number its requests, it will make it easy for the PAPO and the participants to refer to the various requests.

Thus were a participant to file a request, its first filing would read as follows:

U.S. Dept of Energy: High Level Waste Repository
Pre-Application Matters

Docket No. PAPO-00
Name of Participant-01