

April 25, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD

In the Matter of	)	Docket No. PAPO-00
	)	
U.S. DEPARTMENT OF ENERGY	)	ASLBP No. 04-829-01-PAPO
	)	
(High-Level Waste Repository: Pre-Application Matters)	)	NRC-01
	)	

NRC STAFF SUPPLEMENT REGARDING PROPOSED  
ORDER REGARDING PRIVILEGE LOGS

INTRODUCTION

Pursuant to an Order issued by the Pre-License Application Presiding Officer Board ("PAPO"), the Nuclear Regulatory Commission staff ("Staff") hereby submits its supplement identifying and explaining the material differences between its proposed case management order, submitted on April 7, 2005, and the comments of the State of Nevada. As discussed below, the proposed case management order is consistent with the Commission's regulations and provides for the fair and timely resolution of discovery disputes. It should, therefore, be adopted by the PAPO.

BACKGROUND

On January 24, 2005, the PAPO issued an order directing the Department of Energy ("DOE"), the Staff, the State of Nevada ("State"), other potential parties, interested Indian Tribes and interested units of local government to meet and confer for the purpose of developing and agreeing upon a joint proposed format for privilege logs and associated procedures for resolving privilege disputes.<sup>1</sup> See January 24th Order, at 9. On March 28, 2005, DOE, the Staff and the

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<sup>1</sup> On March 11, 2005, the PAPO issued an order directing DOE, the Staff and the State to  
(continued...)

State submitted a “Joint Report of the Department of Energy, the State of Nevada, and the NRC Staff in Response to the First Case Management Order” informing the PAPO that, although they have agreement on most issues, they would be submitting separate proposed case management orders on April 7, 2005. On April 7, 2005, DOE and the Staff submitted proposed case management orders. “NRC Staff Proposed Order Regarding Privilege Logs,” and attached “Second Case Management Order,” April 7, 2005 (Staff Proposed Case Management Order); “Department of Energy’s Submittal of Proposed Case Management Order Regarding Privilege Designations and Challenges,” April 7, 2005 (DOE Proposed Order). Although the State did not file a separate proposed case management order, the State filed comments on the draft case management order on April 7. “State of Nevada Comments on Draft Case Management Order,” April 7, 2005 (State Comments).<sup>2</sup> In these filings, the parties indicated that while they had reached substantial agreement on most issues, there were two areas of disagreement among the parties. Accordingly, the parties committed, pursuant to the PAPO’s order, to provide supplements explaining the differences. The Staff’s discussion of the differences is set forth below.

#### DISCUSSION

The Staff’s Proposed Case Management Order is substantially similar to the draft case management order that was distributed previously among the participants to the two meetings and posted on the DOE, Staff and State websites. DOE, the Staff and the State have reached agreement on nearly every issue relating to the proposed case management order. However, two

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<sup>1</sup>(...continued)

submit a joint order by March 28, 2005 or, in the event they fail to submit a joint order, to submit separate proposed case management orders by April 7, 2005. See March 11<sup>th</sup> Order, at 1. The Order further provided that if a party submitted a separate proposed case management order, it must also file a supplement identifying and explaining the material differences between its proposed order and the other proposed orders. *Id.* at 1-2.

<sup>2</sup> Although the State did not submit a separate proposed case management order, it indicated its agreement with the draft submitted by DOE, with the exception of the two issues discussed in this filing. Nevada Comments at 1.

specific areas of disagreement remain. These two areas involve the timing of production of certain privileged documents on the LSN and the application of the attorney work product privilege to a certain type of documents.

A. Production of Documents on the LSN

The first area of disagreement is found in sections II.E.3. and III.H.4 of the Staff's Proposed Case Management Order. These sections discuss the provision, pursuant to a request, of redacted documents that are subject to a claim of privilege. Section II.E.3 provides that

A participant will be allowed a reasonable time to make the redacted version electronically available on the LSN following the request [pursuant to 10 C.F.R. § 2.1018(a)(1)(iii)], provided that participant provides copies of the redacted version (which for this purpose may be paper copies) to the requesting participant within 7 business days of the request.

Staff Proposed Case Management Order at 4. Section III.H.4. provides that:

If a document subject to the deliberative process privilege contains factual information that can be reasonably segregated from the deliberative portions of the document, the participant claiming the privilege will produce, upon request, pursuant to 10 C.F.R. § 2.1018(a)(1)(iii), a redacted copy of the document on the LSN.

*Id.* at 9. These two provisions contemplate that a potential party<sup>3</sup> will provide electronic copies of redacted documents after a request is made for the document pursuant to 10 C.F.R. § 2.1018(a)(1)(iii). However, the provision of redacted documents is not linked to the requirement in section 2.1009(b) to certify that documentary material specified in section 2.1003 has been made electronically available. The State asserts that these provisions should not be adopted by the PAPO. The State is concerned that since these provisions do not specify when redacted material will be made available on the LSN, "many thousands of pages of DOE

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<sup>3</sup> Potential party is defined as any person who, during the period before the issuance of the first pre-hearing conference order is given access to the Licensing Support Network and has consented to comply with regulations set forth in Subpart J. 10 C.F.R. § 2.1001. For the purposes of this filing, the use of the term "potential party" also includes parties (*i.e.*, DOE, the Staff and the State), as well as interested governmental participants. All of these groups have the right to engage in discovery pursuant to 10 C.F.R. § 2.1018(a)(1).

documentary material will not be electronically available on the LSN until some considerable period (perhaps even months) after the LSN certification.” Nevada Comments at 2. This approach, according to Nevada, is contrary to the regulations. Nevada, therefore, proposes that a new section II.E.4 be added that provides:

Notwithstanding paragraph 3. above and paragraph III.H.4., if Commission document discovery rules for formal adjudications or the Freedom of Information Act would require a participant to redact privilege documentary material and produce redacted versions, the participant shall make the redacted version electronically available on the LSN (I) at the time of initial certification, (ii) whenever additional materials are made available pursuant to 10 C.F.R. § 2.1003(e), and (iii) at the time of updated certification (submittal of the license application.)

*Id.*

The proposed approach for the provision of redacted documents, however, is consistent with the LSN regulations. Subpart J only requires that a potential party asserting that a document is subject to a privilege provide a bibliographic header. 10 C.F.R. § 2.1003(a)(4). The regulations further provide that documents that were not placed on the LSN because of a claim of privilege could be requested by a potential party. 10 C.F.R. § 2.1018(a)(1)(iii). It is thus clear that for documentary material for which a claim of privilege is asserted, the regulations only require, at the time of certification, that a bibliographic header be provided. Section 2.1003 requires DOE, as well as the NRC Staff and potential parties, to make available “an electronic file including bibliographic header for all documentary material.” 10 C.F.R. § 2.1003(a)(1). “Documentary material” is defined in Subpart J as any information upon which a potential party intends to rely and/or supports that potential party’s position, any information which does not support that potential party’s position and certain reports and studies.<sup>4</sup> 10 C.F.R. § 2.1001. Section 2.1003 further provides that for each

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<sup>4</sup> With respect to the initial definition of “documentary material,” the Commission stated that documents that fell within the definition of “documentary material” must be placed on the LSS (the original term for the document management system). *Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste*, 54 Fed. Reg. 14925, 14933-34 (April 14, 1989). Specifically, the Commission  
(continued...)

documentary material for which a claim of privilege is asserted, only an electronic bibliographic header is required. 10 C.F.R. § 2.1003(a)(4).<sup>5</sup> However, this does not mean that a potential party has no ability to request access to those documents for which a privilege has been asserted. Section 2.1018 permits a potential party to request access to those documents for which bibliographic headers only have been submitted pursuant to section 2.1003. 10 C.F.R. § 2.1018(a)(1)(iii). This reading of section 2.1003(a)(4) is in accord with the recent orders issued by the PAPO in this proceeding. See *U.S. Dep't. of Energy* (High Level Waste Repository: Pre-Application Matters), LBP-04-20, 60 NRC 300, 311 & n.21 (“[I]f the participants claims that a document is privileged, only a header need be provided.”); “First Case Management Order (Regarding Preparation of Privilege Logs), slip op. at 3 (Jan. 24, 2005).<sup>6</sup>

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<sup>4</sup>(...continued)  
provided:

For the purposes of the information that will be in the LSS, “documentary material” means any material or other information generated by or in the possession of an LSS participant that is relevant to, or likely to lead to the discovery of information that is relevant to, the licensing of the likely candidate site for a geologic repository. . . . In determining which documents must be placed in the LSS by a LSS participant, the document must fall within the definition of “documentary material” in 2.1001.

*Id.* In 1998, the Commission revised the definition of “documentary material” to include information upon which a party, potential party, or interested governmental participant intends to rely in support of its position in the licensing proceeding, any information known to that party that is relevant to but does not support that party’s position, and certain reports and studies. *Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository*, 63 Fed. Reg. 71729, 71733 (1998). Nothing in this rule change indicates that the Commission intended to change the purpose of the term “documentary material,” *i.e.*, to define the categories of documents that were subject to the LSN rule.

<sup>5</sup> Section 2.1003(a)(4) only requires bibliographic headers and not text, with privileged information redacted, because unlike section 2.1001(a)(1), section 2.1003(a)(4) does not explicitly require the submission of an electronic file. The Commission revised section 2.1001(a)(1) to make it clear that both a bibliographic header and the text of the documents must be submitted. 63 Fed Reg. at 71732.

<sup>6</sup> Although not controlling, the LSN Guidelines also recognize that only bibliographic  
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Thus, the disputed portions of the Staff's Proposed Case Management Order are consistent with the regulations in that they provide for the provision of the non-privileged information pursuant to a request made under section 2.1018(a)(1)(iii), but do not require that the redacted documents themselves be placed on the LSN as a condition for meeting Section 2.1009(b). Further, the Staff believes that the disputed sections provide a reasonable approach to the provision of redacted documents. These provisions, if adopted by the PAPO, would require potential parties to provide redacted documents, upon request, within 7 days. Section III H. 4. also explicitly recognizes the obligation under Freedom of Information Act law to segregate from requested deliberative documents the deliberative portions from the factual information if reasonable. Adoption of these two provisions is, thus, not only in accordance with the Commission regulations, but will result in the provision of a large majority of information without the need to involve the PAPO in numerous discovery disputes.

B. Litigation Work Product Privilege

The parties were also unable to agree upon one category of documents that may be subject to the litigation work product privilege. Section III.I.2.f of the Staff's Proposed Case Management Order recognizes a work product privilege for documents prepared by other representatives of a participant. See Staff Proposed Case Management Order at 10. The State does not recognize this privilege and suggests that it does not exist. Nevada Comments at 2. However, the proposal for the litigation work product privilege is consistent with traditional discovery privileges recognized in the Commission's regulations. Section III.I.2.f. recognizes a privilege for "Confidential litigation work product prepared by other representative of participant." Staff Proposed Case Management Order at 10. Section 2.705 of the Commission's regulations protects from disclosure documents

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<sup>6</sup>(...continued)  
headers are required for sensitive documents. LSN Guidelines, Section 14.5 (February 2005 Revision) at 14-6.

prepared in anticipation of or for the hearing by or for “another party’s representative (including his attorney, consultant, surety, indemnitor, insurer or agent.”). 10 C.F.R. § 2.705(b)(3). This privilege is also consistent with Rule 26 of the Federal Rules of Civil Procedure which provides the same protection. Fed. R. Civ. P. 26(b)(3). See *Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 76 (D.C..C. 2003)(“By its own terms, then [Rule 26(b)(3)] the work product privilege covers materials prepared by or for *any party or by or for its representative*; they need not be prepared by an attorney or even for an attorney.”) *emphasis in the original*. See also *United States v. Nobles*, 422 U.S. 225, 238-39 (1975). Section III.I.2.f of the proposed draft order simply incorporates this privilege. It should, therefore, be adopted by the PAPO.

#### CONCLUSION

For the reasons discussed above, the disputed sections of the Staff’s Proposed Case Management Order are consistent with the Commission’s regulations. Overall the Proposed Case Management Order promotes good management and efficiency in the resolution of documentary privilege disputes during the pre-license application phase of the expected application by DOE for a license to construct a repository for high-level radioactive waste at Yucca Mountain, Nevada. It should, therefore, be adopted by the PAPO.

Respectfully submitted,

**/RA/**

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Dated at Rockville, Maryland  
this 25<sup>th</sup> day of April, 2005

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(High-Level Waste Repository: Pre-Application Matter)	)	NRC-01

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF SUPPLEMENT REGARDING PROPOSED ORDER REGARDING PRIVILEGE LOGS" in the above captioned proceeding have been served on the following persons this 25<sup>th</sup> day of April, 2005, by electronic mail, and/or Electronic Information Exchange as denoted by an asterisk (\*).

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