

May 16, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE PRE-LICENSE APPLICATION  
PRESIDING OFFICER BOARD

_____	)	Docket No. PAPO-00
In the Matter of	)	
U.S. DEPARTMENT OF ENERGY	)	ASLBP No. 04--829-01-PAPO
	)	
(High Level Waste Repository:	)	NEN-03
Pre-Application Matters)	)	
_____	)	

SECOND RESPONSE OF THE NUCLEAR ENERGY INSTITUTE TO  
MATTERS IDENTIFIED DURING MAY 4, 2005  
CASE MANAGEMENT CONFERENCE

On April 13, 2005, the Pre-License Application Presiding Officer Board ("PAPO Board") issued an order scheduling the first case management conference for May 4, 2005. Thereafter, on April 19, 2005, the PAPO Board issued an order directing the Department of Energy ("DEN"), the Nuclear Regulatory Commission ("NRC") Staff, the State of Nevada ("NEV"), and potential parties to be prepared to discuss at the case management conference eighteen specific matters related to the privilege logs and associated procedures for resolving privilege disputes.<sup>1</sup>

Prior to the close of the first case management conference, the PAPO Board requested, *inter alia*, that parties and potential parties submit briefs on two issues: (1) whether the initial Licensing Support Network ("LSN") certification must include a redacted version of any document that would require redaction under the Freedom of Information Act ("FOIA"); and (2) the meaning of "potential parties" as

<sup>1</sup> Memorandum (Matters to Addressed at First Case Management Conference) (Apr. 19, 2005) ("Memorandum").

it applies in this proceeding and specifically to whether potential parties should receive privileged documents under a protective order and affidavit of non-disclosure. The Board also ordered the parties to submit a proposed protective order and affidavit of non-disclosure covering all protected categories of non-Safeguards Information.

The Nuclear Energy Institute ("NEN") believes that the initial LSN certification need not include a redacted version of any document requiring redaction under FOIA and, therefore, adopts the arguments and conclusions set forth in DEN's brief on this topic. NEN's instant submission addresses the meaning of potential parties as it applies in this proceeding and specifically to whether potential parties should receive privileged documents under a protective order and affidavit of non-disclosure. NEN concludes that only parties to the Yucca Mountain licensing proceeding should be allowed access to privileged documents under protective order and affidavit of non-disclosure.

## **I. INTRODUCTION**

During the first case management conference, significant discussion was devoted to the definition of "potential party" and whether potential parties should be permitted access to privileged material under protective order.<sup>2</sup> The PAPO Board questioned its authority to preclude potential parties from gaining access to

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<sup>2</sup> U.S. Dep't of Energy (High Level Waste Repository: Pre-Application Matters), Transcript of First Case Management Conference (May 4, 2005) at 247-67 (hereinafter "Tr.>").

privileged material if potential parties agreed to review such material in compliance with the dictates of a protective order.<sup>3</sup>

The PAPO Board's concern was based on a literal reading of 10 CFR 2.1001. Section 2.1001 defines "potential party" as "any person who, during the period before the issuance of the first pre-hearing conference order under §2.1021(d), is given access to the [LSN] and who consents to comply with the regulations set forth in subpart J of this part, including the authority of the Pre-License Application Presiding Officer designated pursuant to §2.1010." While the regulations establish only these limited criteria to qualify as a "potential party,"<sup>4</sup> the PAPO Board also recognized that the regulations should not be read to permit a "Yankee Stadium" full of participants obtaining access to protected documents.<sup>5</sup> Given the postulation that many individuals may have an interest in this proceeding,<sup>6</sup> this is not merely an academic concern.

As set forth in Section II below, NEN believes that a sensible balance must be struck between the need for (1) a fair and meaningful opportunity for interested individuals to participate in the Yucca Mountain proceeding, and (2) administering the proceeding in a manner that is both effective and efficient. Because the documentary material at issue here contains privileged information and, consequently, will be made available only under protective order, that documentary

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<sup>3</sup> *Id.* at 252 (Judge Rosenthal), 255, 257 (Judge Karlin).

<sup>4</sup> As the members of the PAPO Board and the parties recognized, the requirement for a potential party to be given access to the LSN is moot, for the LSN is accessible via the world wide web. *See, e.g.*, Tr. at 248.

<sup>5</sup> Tr. at 252 (Judge Rosenthal).

<sup>6</sup> *See generally* Tr. at 249-50, 252, 254, 262.

material deserves special treatment compared to other documentary material made available via the LSN. Therefore, NEN believes that the balance weighs in favor of limiting access to protected documentary material now and throughout the pre-application phase of the proceeding only to those participants who are parties as a matter of right pursuant to 10 CFR sections 2.1001 and 2.309(d)(2)(iii),<sup>7</sup> i.e., DEN, NRC, NEV, the affected local units of government, and affected Indian Tribes. Later, if potential parties are formally admitted as parties to the proceeding under 10 CFR 2.309, access to privileged material would likely be granted.

On the other hand, for the reasons described in Section III below, if the PAPO Board determines that potential parties may obtain access to privileged material under protective order during the pre-application phase of the proceeding, each potential party should be required to make an individualized showing that (1) it meets the criteria employed under Commission regulation to grant discretionary intervention in an adjudicatory proceeding,<sup>8</sup> and (2) it has a specific need for the specific document.

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<sup>7</sup> 10 CFR 2.1001 states "Party for the purpose of this subpart means the [DEN], the NRC staff, the host State, any affected unit of local government as defined in Section 2 of the Nuclear Waste Policy Act of 1982, as amended (42 U.S.C. 10101) ["NWPA"], any affected Indian Tribe as defined in section 2 of the [NWPA], and a person admitted under § 2.309 to the proceeding on an application for construction authorization for a high-level radioactive waste repository at a geologic repository...provided that a host State, affected unit of local government, or affected Indian Tribe files a list of contentions in accordance with the provisions of § 2.309." 10 CFR 2.309(d)(2)(iii) permits the host State, affected local governmental units, and affected Indian Tribes intervention so long as they submit admissible contentions. *See also infra* note 15.

<sup>8</sup> 10 CFR 2.309(e).

## II. THE NEED FOR HEIGHTENED PROTECTION OF PRIVILEGED DOCUMENTS IN THE PRE-APPLICATION PHASE JUSTIFIES LIMITING ACCESS TO PRIVILEGED DOCUMENTS TO PARTIES

With respect to discovery during the high-level waste repository proceeding, the Commission's regulations state that,

Parties, potential parties, and interested governmental participants, pursuant to the methods set forth in paragraph (a) of this section, may obtain discovery regarding any matter, *not privileged*, which is relevant to the licensing of the likely candidate site.<sup>9</sup>

Thus, privileged information is afforded special protection. Limited access, such as via protective order, to such privileged information is typically provided to parties in NRC adjudicatory proceedings.<sup>10</sup> As part of the PAPO Board's effort to efficiently manage discovery during the pre-application phase of this proceeding, it is appropriate for the level of access to privileged documents to reflect the fact that certain participants have been granted party status by regulation in the pre-application phase, while others have not.

The regulations specifically define "party" as DEN, NRC, NEV (as the "host State"), any affected unit of local government as defined in the NWPA, and any affected Indian Tribe as defined in the NWPA, along with any other person formally admitted into the proceeding under 10 CFR 2.309.<sup>11</sup> However, as previously discussed, the definition of "potential party" could be read to permit just about any member of the public to qualify under the regulation.<sup>12</sup>

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<sup>9</sup> 10 CFR 2.1018(b)(1) (emphasis added).

<sup>10</sup> See, e.g., 10 CFR 2.1018(c)(1).

<sup>11</sup> 10 CFR 2.1001.

<sup>12</sup> See *id.* See also discussion *supra* pp. 3-4; but *c.f.* discussion *infra* p. 8 and note 20.

Providing access to a protected document to anyone and everyone who asks for it, even if under protective order and regardless of whether or not they intend to participate or have sufficient interest in the proceeding, would, in effect, make the material public and strip the privileged information of its protected status.<sup>13</sup> Given that a privileged document would effectively cease to be privileged if anyone consenting to a protective order could have access to it, NEN believes no potential party should be provided such access.<sup>14</sup> Consequently, to maintain the protected status of privileged information, the PAPO Board should limit access to privileged documents only to parties.

This result makes sense. The Commission's definition of "party" reflects its determination that certain participants' interests at this stage of this proceeding are more apparent than others.<sup>15</sup> Indeed, in including the host State, affected local unit of government, and affected Indian Tribes in the definition of "party", the Commission has obviated the need for those participants to demonstrate compliance

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<sup>13</sup> See *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) ("the logic of FOIA' mandates that where information requested 'is truly public, then enforcement of an exemption cannot fulfill its purposes.") (quoting *Niagara Mohawk Power Corp. v. DOE*, 169 F.3d 16, 19 (D.C. Cir. 1993)).

<sup>14</sup> It would be much easier to enforce the terms of a protective order against parties to the proceeding than against potential parties, and this adds to the necessity for limiting access to protected material only to parties. As recognized by the PAPO Board, see Tr. at 260, protective orders often limit access to privileged documents only to counsel for parties "presumably because the Commission can more effectively sanction attorneys who violate such orders." *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 485 (1981), *reconsideration of decision not to review sua sponte denied*, CLI-81-28, 14 NRC 933 (1981) (citing the provisions contained in former 10 CFR 2.713(c)(3), now codified at 2.314(c)(3)).

<sup>15</sup> See *Final Rule, Submission & Management of Records & Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste*, 54 Fed. Reg. 14,925, 14,938 (Apr. 14, 1989) (discussing the permission of intervention as a matter of right for affected local units of government and affected Indian Tribes, and the automatic party status granted to the host State, DEN, and NRC).

with the Commission's standing requirements in this proceeding.<sup>16</sup> But the Commission has left open the question of whether potential parties can demonstrate standing sufficient to meet the required tests for intervention in the proceeding.<sup>17</sup> In sum, NEN believes it is appropriate to treat those participants with party status differently than the potential parties with respect to the ability to enter into protective orders to obtain access to privileged material.<sup>18</sup>

Potential parties who are later granted formal intervention in the proceeding may gain access to privileged material under protective order. During the pre-application phase, potential parties will not be materially disadvantaged. Indeed, the Commission has stated that the mandatory disclosure of material onto the LSN, excluding material protected from public disclosure, for the high level waste repository proceeding is sufficient discovery "to provide a party with adequate information to prepare its position...."<sup>19</sup>

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<sup>16</sup> 10 CFR 2.309(d)(2)(iii).

<sup>17</sup> *See id.*

<sup>18</sup> Read together, two High-Level Waste Geologic Repository proceeding regulations indicate that access to protected information should be limited to parties to the proceeding. First, 10 CFR 2.1006(b) provides that any document for which a claim of privilege has been asserted, but denied in whole or in part, must be provided either to the other participants or to the PAPO for entry into a "Protective Order file," pursuant to the PAPO's authority. Second, 10 CFR 2.1013(d) provides that online access to the electronic docket, including a "Protective Order File," must be provided to the "Presiding Officer, the representatives of the parties and interested governmental participants, and the witnesses while testifying, for use *during the hearing.*" (Emphasis added). Thus, even information deemed not to be privileged, but worthy of placement in a "Protective Order File," is kept out of the public domain and is shown only to hearing participants.

<sup>19</sup> *Final Rule, Changes to Adjudicatory Process*, 69 Fed. Reg. 2,182, 2,195 (Jan. 14, 2004). Compared to the documentary material that parties and potential parties will make publicly available via the LSN, the number of privileged documents will be relatively small. Estimates provided at the May 4, 2005 case management conference indicate that approximately 142,000 documents might be subject to a claim of privilege out of the few million documents to be placed on the LSN. Tr. 6-8. A privilege log will sufficiently describe documents being withheld under a claim of privilege, thus potential parties will know to which documents they have been denied access.

**III. ANY PAPO BOARD ORDER GRANTING A POTENTIAL PARTY ACCESS TO A PROTECTED DOCUMENT SHOULD BE CONDITIONED ON A SHOWING OF SUFFICIENT INTEREST BY THAT POTENTIAL PARTY**

Should the PAPO Board determine that potential parties are to be offered access to privileged documents, the PAPO Board should require the potential party to make a heightened showing to ensure privileged documents remain sufficiently protected.

Notwithstanding the literal definition of "potential party" contained in 10 CFR 2.1001, the Commission has indicated that a difference exists between a member of the public and a "potential party." In discussing the availability of material during the pre-license application phase of the proceeding, the Commission stated, "under the final rule, information can be made available to all members of the *public*, even in the pre-license application phase. Practical considerations, including the operating capacities of the systems, may require that priority be given to *potential parties*...."<sup>20</sup> The PAPO Board should consider the need to limit access to protected documents one such "practical consideration." Accordingly, the PAPO Board should require potential parties to make a heightened showing to gain such access. Pursuant to 10 CFR 2.1018(c), the PAPO Board has the authority to require such a showing.

The appropriate showing should occur in two parts. First, the potential party should demonstrate that it meets the criteria established by the Commission to

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<sup>20</sup> *Final Rule, Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository*, 63 Fed. Reg. 71,729, 71,730 (Dec. 30, 1998) (emphasis added).



determine whether an intervenor should be granted discretionary intervention in a proceeding.<sup>21</sup> Thus, for example, the PAPO Board might conclude that one potential party's "participation may reasonably be expected to assist in developing a sound record," which would weigh in favor of granting that person access to a privileged document under protective order.<sup>22</sup> Conversely, the PAPO Board might conclude that another potential party's "interest[s] will be represented by existing parties," thus weighing against granting that person access to a protected document.<sup>23</sup>

Second, the PAPO Board should require the potential party to make a showing of its need for a protected document similar to that required for obtaining access to an applicant's security plan.<sup>24</sup> The potential party would have to provide more than "a mere conclusory statement of relevance" and should show how the requested document (based on the description provided in the privilege log) is relevant to that party's areas of concern.<sup>25</sup>

The PAPO Board should use its

broad discretion in establishing and applying rules for such public participation, including rules for determining which community representatives are to be allowed to participate and how many are reasonably required to give

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<sup>21</sup> 10 CFR 2.309(e).

<sup>22</sup> 10 CFR 2.309(e)(1)(i).

<sup>23</sup> 10 CFR 2.309(e)(2)(ii).

<sup>24</sup> *See, e.g., Pacific Gas and Electric Co., (Diablo Canyon Nuclear Power Plant), ALAB-410, 5 NRC 1398, 1404 (1977), review declined, CLI-77-23, 6 NRC 455 (1977).*

<sup>25</sup> *See id.*

the [PAPO Board] the assistance it needs in vindicating the public interest.<sup>26</sup>

To avoid burden or delay, the PAPO Board should demand specificity from potential parties and limit discretionary access to only protected documents relevant to the particular concerns of the potential party.<sup>27</sup> Further, the PAPO Board should exercise its discretion based on its assessment of the facts and circumstances of each particular case.<sup>28</sup>

#### IV. CONCLUSION

To strike a sensible balance between the need for fair and meaningful participation in the proceeding and the need for an effective and efficient adjudicatory process, as well as ensuring parties' rights to protect privileged documents, the PAPO Board should limit access to privileged documents during the pre-application phase to parties via protective order. Otherwise, the affected documents would cease to be privileged since any potential party could automatically gain access thereto. Alternatively, should the PAPO Board offer potential parties access to privileged documents during the pre-application phase of this proceeding, the PAPO Board should ensure that privileged documents remain sufficiently protected by requiring potential parties to make a heightened showing.

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<sup>26</sup> *Portland General Electric Co.*, (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 615 (1976) (quoting *Office of Communications of United Church of Christ v. FCC*, 359 F.2d 994, 1005-06 (D.C. Cir. 1966)).

<sup>27</sup> *Id.* at 617.

<sup>28</sup> *Id.* at 616.

The showing should follow the criteria established by the Commission to grant discretionary intervention in licensing proceedings and include a demonstration of need.

Respectfully submitted,

A handwritten signature in black ink that reads "Michael A. Bauser". The signature is written in a cursive style and is positioned above a horizontal line.

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Dated: May 16, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

May 16, 2005

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD

Before Administrative Judges:  
Thomas S. Moore, Chairman  
Alex S. Karlin  
Alan S. Rosenthal

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

CERTIFICATE OF SERVICE FOR SECOND RESPONSE OF  
THE NUCLEAR ENERGY INSTITUTE TO MATTERS IDENTIFIED  
DURING MAY 4, 2005 MANAGEMENT CONFERENCE

I hereby certify that copies of the "Second Response of the Nuclear Energy Institute to Matters Identified During May 4, 2005 Case Management Conference" have been served upon the following persons by Electronic Information Exchange and/or electronic mail as denoted by an asterisk (\*).

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SECOND RESPONSE OF THE NUCLEAR ENERGY  
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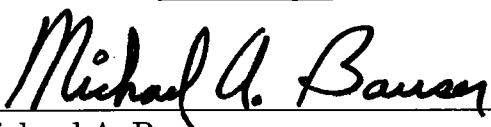
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