

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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 STAFF SUPPLEMENT TO JOINT PROPOSED PROTECTIVE ORDER FOR  
PROTECTED SENSITIVE INFORMATION

INTRODUCTION

The Nuclear Regulatory Commission staff (“Staff”) hereby submits its supplement identifying and explaining material differences between the language proposed by the Staff in the Protective Order for protected sensitive information filed on July 8, 2005, by the Department of Energy (“DOE”), and the language proposed by the State of Nevada (“State”).

BACKGROUND

On May 11, 2005, the Pre-License Application Presiding Officer Board (“PAPO”) issued an order directing that DOE, the Staff, and the State shall, and any other potential party, interested Indian Tribe or interested governmental unit may, file a joint proposed protective order and affidavit of non-disclosure covering Safeguards Information (“SGI”), Official Use Only (“OUO”), Unclassified Controlled Nuclear Information, (“UCNI”), and any similarly sensitive unclassified information. See May 11, 2005, Memorandum and Order, at 3. On June 30, 2005, DOE requested an extension of time until July 8, 2005, to file the proposed protective order. The request was granted by the PAPO on July 1, 2005.

DOE, the Staff and the State were unable to reach complete agreement on all issues related to the proposed Protective Order. Accordingly, DOE, the Staff and the State agreed that DOE

would file the joint proposed Protective Order and Affidavit of Non-Disclosure, and all three participants would separately file a supplement explaining the material differences in their respective proposed language.

### DISCUSSION

DOE, the Staff and the State have reached agreement on nearly every issue relating to the proposed Protective Order and Non-Disclosure Affidavit. However, two specific areas of disagreement remain. These two areas involve the determination of “need to know” necessary to gain access to protected sensitive information. These two areas are identified by the use of bold text in the proposed Protective Order filed by DOE. In the discussion that follows, the Staff provides a brief explanation of the differences between the Staff and the State with respect to disputed language.

#### A. Presumption Of “Need To Know”

The State seeks to include language in section B.5., that would provide a presumption of a “need to know” all sensitive protected information included in or specifically referenced and relied upon in the license application, except that after contentions are admitted this presumption is limited to information relevant to a particular party’s admitted contentions. The determination of “need to know” is integral in permitting access to Safeguards Information (“SGI”), Official Use Only (“OUO”) information designated by DOE, and unclassified Naval Nuclear Propulsion Information (“NNPI”). The Staff believes that the process for determining “need to know” that should apply to granting access to SGI, should also be applied in granting access to DOE’s OUO, and NNPI.<sup>1</sup> The Staff contends the State’s proposed language would lessen the protective requirements imposed by NRC regulations, and contravene clear Commission guidance on the proper restriction of access

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<sup>1</sup> With the exception that a requirement of demonstration of technical competence, as set forth in section B.1.i. of the proposed Protective Order, is only required for access to SGI. UCNI has separate access requirements as set forth in the proposed Protective Order and Non-Disclosure Affidavit.

to SGI to those persons showing an indispensable need for the information.

“Need to know” for SGI is defined in 10 C.F.R. § 73.2, as a finding that it is *necessary* for a recipient to have the SGI to perform official duties, i.e. participate in an NRC hearing. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC 62, 71-72 (2004). The Commission has consistently expressed “a strong interest in limiting access to safeguards and security information” and has further explained that “the likelihood of inadvertent security breaches increases proportionally to the number of persons who possess security information, regardless of security clearances and everyone’s best efforts to comply with safeguards requirements.” *Catawba*, 59 NRC at 73; *See Pacific Gas and Electric Company* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, *review declined*, CLI-77-23, 6 NRC 455 (1977).

The language proposed by the State is incompatible with the requirements of 10 C.F.R. § 73.21(c), which states that “no person may have access to [SGI] unless the person has an established ‘need to know’ for the information” and is one of the classes of individuals listed in 10 C.F.R. § 73.21(c)(1)(i)-(vi). There is no presumption of “need to know” contained in the regulatory requirements. The regulations in 10 C.F.R. § 2.1010(b)(6) state that *in addition* to protective terms and conditions contained in a protective order deemed appropriate by the PAPO, SGI *shall also* be protected by the requirements of 10 C.F.R. § 73.21. As the Commission stated in the Statements of Consideration of the Final Rule for Protection of Unclassified Safeguards Information, October 22, 1981, “the physical protective measures and need to know standards of proposed 73.21 would apply to Safeguards Information in adjudicatory hearings.” 46 Fed. Reg. 51,718, 51,719. To create a class with an established presumption of “need to know” would be contrary to the purpose and intent of the Protective Order and Non-Disclosure Affidavit, and weaken the protective requirements contained in Commission regulations that control and restrict access to SGI.

The determination of “need to know” is by its nature a case-specific, contextual, determination that must take into account the totality of the circumstances, and does not lend itself

to generalizations. The language proposed by the State is incompatible with Commission precedent. Recently, the Commission, noting the importance of establishing clear and consistent decisions on dissemination of SGI in adjudications, elected to provide guidance to licensing boards and presiding officers in resolving disputes concerning “need to know” determinations. *Catawba*, 59 NRC at 74-75. The Commission noted “it is appropriate for NRC Staff experts to make the initial ‘need to know’ decisions.” *Id.* at 75. The inclusion of the State’s proposed language would remove those with the greatest expertise from the process of determining “need to know.” Obviously, as provided for in the Protective Order and Non-Disclosure Affidavit, disputes as to “need to know” would be referred to the PAPO, but only after the initial determination was made and challenged. The Commission has noted that “it is imperative that access to safeguards documents be as narrow as possible...” and that “disclosure must be ‘necessary’ or ‘required’.” *Id.* Furthermore, the Commission has stated that “the touchstone for a demonstration of ‘need to know’ is whether the information is indispensable” and that, “We must limit distribution of [SGI] to those having an actual and specific, rather than a perceived, need to know.” *Id.* at 73. “A party’s mere desire to have information or its belief that the information is needed to provide context or background may have little or no bearing on a “need to know” determination, which must distinguish “wants” from needs.” *Id.* at 72. The Commission further stated “a party’s ‘need to know’ may be different at different stages of an adjudicatory proceeding, depending on the purpose of the request for information.” *Id.* The creation of a presumption of “need to know” would serve to lower the threshold standard for access to a level commensurate with “want” and not need.

Finally, the inclusion of the phrase in the State’s proposed language that would limit access once contentions are admitted, is counter-intuitive. The scheme proposed by the State would grant unfettered access to any and all SGI as soon as the license application is submitted without individual “need to know” determinations being made, and would then seek to subsequently restrict access after contentions are admitted. As the Commission clearly stated, “it is imperative that

access to safeguards documents be as narrow as possible.” *Id.* at 75. The Commission has cautioned “In the security arena, boards ought not to tolerate ‘fishing expeditions’” that would grant access to individuals that have not demonstrated an indispensable need for the information. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 31 (2004). Furthermore, once SGI has been disclosed, the “bell cannot be unrung.” See *Catawba*, 59 NRC at 71. The scheme proposed by the State would serve the opposite purpose, opening access to the widest possible audience, and then ineffectively seeking to mitigate the widespread disclosure after it is too late to restrict access.

In opposing the State’s proposed language, the Staff does not seek to prevent access to protected sensitive information that is specifically referenced and relied upon in the license application, so long as a “need to know” is established. Instead, the Staff believes that the Protective Order and Non-Disclosure Affidavit as proposed by the Staff strikes the appropriate balance between granting access to sensitive information to those who have an actual “need to know,” while maintaining proper restrictions on access from those who do not in fact need the information to participate in the adjudication. To create a presumption of “need to know” could potentially encourage individuals who simply may be curious or who do not genuinely need the information, and would not otherwise have sought access, to take possession of the sensitive information, thereby increasing the likelihood of unauthorized release of the information.

#### B. Requirement Of Technical Competence To Use SGI

The Staff has proposed in Section B.1.i. that to be qualified for access to SGI, the counsel, consultants, assistants and others representing the participant must be demonstrated to possess the technical competence necessary to evaluate the portions of the SGI that he or she may be shown. The State has proposed alternative language for section B.1.i. of the Protective Order, that legal counsel for a participant has a presumed “need to know,” absent technical competence necessary to evaluate the information that he or she may be shown. Again, the State seeks to

create a presumption of “need to know,” a presumption that is contrary to the Commission’s requirements for controlling and limiting access to SGI, as argued above. To permit inclusion of the State’s proposed language would create an unchallengeable claim of “need to know” for all SGI, sought at any time, and for any purpose, so long as the request originated from legal counsel for a participant. Based on expressed policy concerns and strong inferences in the Commission’s precedent, the Staff contends that expertise is an integral component of the “need to know” and that legal counsel are not exempt by virtue of an impermissible presumption of “need to know.”

It is important to note initially, that even in the language proposed by the State, the State agrees that a necessary element of determining “need to know” is a demonstration of technical competence to evaluate the information, with the exception of legal counsel. The Staff has already provided in its proposed language that legal counsel and assistants working with a technically competent, qualified consultant, do not need to independently demonstrate their technical competence. Thus, there is no undue burden placed on the counsel representing a participant. It is clear that in order to use the information in crafting contentions or at hearing, the counsel will have to either have the ability to independently evaluate the information, or seek the assistance of a qualified expert consultant.

As noted above, the Commission has consistently expressed “a strong interest in limiting access to safeguards and security information” and has stated that distribution of SGI must be limited “to those having an actual and specific, rather than a perceived, need to know.” *Catawba*, 59 NRC at 73. The Staff maintains that a non-expert, legal counsel could not establish actual and specific “need to know” if they are not competent to evaluate the information to which they are seeking access. As the Staff has previously argued, in demonstrating “need to know” one must show why the information is indispensable, necessary or required. *Id.* at 73, 75. Critically, the Commission has stated that under its “‘necessity’ definition, ‘need to know’ is a much narrower standard than general relevance.” *Id.* at 72. Yet it is a general relevance standard that the State

urges on the PAPO by asserting that non-expert legal counsel should have a presumed “need to know” for SGI.

Boards should be cautious in granting access to SGI, taking special steps that the Commission noted “ordinarily require[] special procedures for attorneys and experts.” *Id.* at 75. The Commission noted that boards should restrict access to such sensitive information solely to those individuals qualified to review it. *Id.* at 73; *See Diablo*, 5 NRC 1398, 1406. The Commission has also cautioned “In the security arena, boards ought not to tolerate ‘fishing expeditions’ by untutored lay persons.” *Catawba*, 60 NRC at 31 (emphasis added). To create an exception to the “need to know” determination for legal counsel, would not only constitute an impermissible presumption, as argued above, but would also permit laypersons access to specific SGI for which they are unqualified to review, access the Commission clearly sought to prevent.

Other portions of the Commission’s reasoning in *Catawba* further expose the flaws in the State’s argument. The Commission has held that a party is responsible for establishing the technical competence of its witness prior to their being granted access to safeguards information. *See Catawba*, 60 NRC at 30. It makes little sense to impose this requirement on a witness, as the State agrees should be done, while allowing legal counsel to access the same information without an equivalent requirement or without assistance from someone with the requisite technical competence.

In conclusion, the Staff does not seek to impose any undue burden on petitioners, instead it seeks only to ensure that individuals that gain access to SGI, including legal counsel, will have the competence to evaluate it and thus properly use it in the hearing process. The State does not dispute the use of a standard of technical competence in determining “need to know”, instead it only seeks to carve out a narrow exception through the use of presumed “need to know.” However, this attempt to create an impermissible presumption of “need to know,” while limited to legal counsel seeking SGI, suffers from the fatal flaws the Staff has discussed in regard to the State’s proposed

presumption language in section B.5. of the Protective Order. Furthermore, the proposed exception for demonstration of technical competence would contradict Commission guidance that boards should restrict access to those qualified to review the information.

CONCLUSION

For the reasons discussed above, the language proposed by the Staff should be adopted by the PAPO, and the language proposed by the State should be removed from the proposed Protective Order and Non-Disclosure Affidavit.

Respectfully submitted,

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Dated at Rockville, Maryland  
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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF SUPPLEMENT TO JOINT PROPOSED PROTECTIVE ORDER FOR PROTECTED SENSITIVE INFORMATION" in the above captioned proceeding have been served on the following persons this 8<sup>th</sup> day of July, 2005, by electronic mail, and/or Electronic Information Exchange as denoted by an asterisk (\*).

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