

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING 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))	July 8, 2005

**STATE OF NEVADA MEMORANDUM IN SUPPORT
OF ITS ALTERNATIVE LANGUAGE IN THE PROPOSED
PROTECTIVE ORDER ON PROTECTED SENSITIVE INFORMATION**

On July 8, 2005, NRC Staff, the Department of Energy (“DOE”), and Nevada jointly submitted a proposed protective order (and non-disclosure affidavit) addressing “protected sensitive information,” defined as unclassified information that is protected from unauthorized disclosure under (1) section 147 of the Atomic Energy Act (safeguards information), (2) section 148 of the Atomic Energy Act (unclassified controlled nuclear information or “UCNI”), (3) parts of DOE Order 471.3 relating to unclassified Official Use Only security matters exempt from disclosure under Exemption 2 of the Freedom of Information Act (“OUO”), or (4) various provisions restricting disclosure of unclassified naval nuclear propulsion information (“NNPI”). Nevada participated in the drafting of the proposed order and, as the order indicates, offered alternative language highlighted in boldface type. The portions at issue are limited, and Nevada agrees fully with the

remainder of the proposal.¹ This Memorandum is offered in support of Nevada's alternative language.

I. LEGAL COUNSEL NEED TO KNOW

The proposed order (at B.1.i.) requires a "need to know" for access to safeguards information. This is further defined in such a way that a participant's legal counsel cannot have any "need to know" unless he or she is associated with an expert with appropriate technical qualifications to evaluate the information in question, or he or she is technically qualified in his or her own right. Nevada objects to this on several grounds.

First, as explained below, the limitation violates section 181 of the Atomic Energy Act. The limitation has the effect of depriving most counsel (those without technical qualifications) of the right they would otherwise have to evaluate information that may be critical to effective representation and advocacy and decide whether an expert should be retained and, if so, what kind of expert would be best. It also deprives counsel of the right they would otherwise have to review the information without technical expert assistance to determine if legal contentions may be raised.² Thus, the proposal has the effect of impairing participants' right to counsel guaranteed by section 555 (b) of the Administrative Procedure Act and section 2.314 (b) of the Commission's Rules of Practice. Section 181 of the Atomic Energy Act requires that any such impairment of a

¹ There was substantial discussion about the precise applicability of the referenced DOE orders since they were drafted with DOE employees and contractors in mind. Nevada understands these orders will apply in this proceeding to the extent they may logically and reasonably apply to someone who is not an employee or contractor of DOE. In particular, the administrative penalties for disclosure of OUO provided under DOE Order 471.3 at paragraph 4.g. and Attachment 2, paragraph, 7 do not apply to Nevada.

² At this early stage of the proceeding it would be entirely speculative to assume that counsel could make an adequate judgment about litigation strategy and retention of experts based on information that would be available to the public.

procedural right be the “minimum” necessary to protect the information from authorized disclosure. Yet, the impairment here is far from the minimum. Since, apart from the limitation in question, counsel seeking access will be required to subscribe to the order, sign the non-disclosure affidavit, and possess attributes that demonstrate high confidence that he or she can be trusted to protect the information (see order at B.1.ii.), the additional restriction is clearly unnecessary.

That the restriction is clearly more than the minimum authorized by section 181 is also illustrated by the fact that no similar restriction applies to (1) unclassified controlled nuclear information under section 148 of the Atomic Energy Act (see 10 C.F.R. Part 1017); (2) similarly sensitive information generated by the Department of Homeland Security (*see* 49 C.F.R. § 1520.11(a)(5)); or (3) classified information (including restricted data) than is even more sensitive than the information in question (see 10 C.F.R. Part 2, Subpart I).

Second, the limitation violates the right to counsel guaranteed by section 555 (b) of the Administrative Procedure Act and section 2.314 (b) of the Commission’s Rules of Practice. The argument here is similar to the one above. The right to counsel guaranteed by the Administrative Procedure Act is susceptible to reasonable limits, and no one would responsibly argue that counsel who refused to agree to the order or sign the non-disclosure affidavit should be granted access to safeguards information nevertheless. However, any limits on the right to counsel should be based on some concrete concern about unauthorized disclosure. *See e.g., Professional Reactor Society v. NRC*, 939 F.2d 1047 (D.C. Cir. 1991) (invalidating NRC’s witness and attorney sequestration rule) and *SEC v. Csapo*, 533 F.2d 7 (D.C. Cir. 1976). Given the other requirements for access in

the order, there is no concrete concern about unauthorized disclosure that could justify the limitation in question. *See In re Guantanamo Detainees Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004) (counsel have a need to know classified information). Finally, nothing in the text of 10 C.F.R. § 2.314 (b) suggests or supports the limitation at issue here.

Accordingly, Nevada asks that the order (at B.1.i.) be revised to read as follows:

Established a “need to know” the information. Legal counsel for a participant has a need to know. Testifying and consulting experts representing a participant have a need to know if they have the technical competence to evaluate the information in question. Whenever legal counsel or experts have a need to know, their assistants (including necessary support staff) working on the information also have a need to know.

II. NEED TO KNOW THE APPLICATION

Nevada asks that the order include a seemingly simple provision (insert in order as a new paragraph B.5) that “there is 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.” This would apply whenever a “need to know” is required, so it would apply to access to safeguards information, routine access to UCNI, access to OUO, and access to NNPI.

The basis for such a requirement may be simply stated. The Commission has consistently held that when drafting contentions a participant has “an ironclad obligation to examine the application.” *E.g., Duke Energy Corporation (Oconee Nuclear Station, Unite 1, 2, and 3)*, CLI-99-11, 49 NRC 328, 338 (1999). If a participant has an ironclad obligation to examine the application he or she must have access to the application so this obligation can be met. And, as DOE itself has emphasized (citing extensive NRC

precedent), “[i]t is the license application as filed ‘that is at issue in [NRC] adjudications.’” Department of Energy’s Brief in Opposition to Nevada’s Motion to Compel Production of the Draft License Application, or in the Alternative, for a Declaratory Order” at 4. *See also* 10 C.F.R. § 63.31. Thus, access to the license application is essential both to file and to litigate admitted contentions. If access to certain information is essential for meaningful participation and compliance with the Commission’s pleading rules, there must be a need to know that information. Moreover, denying access to the license application is contrary to the injunction in section 181 of the Atomic Energy Act to impose only a “minimum” restriction on the procedural rights that would otherwise apply.³

Respectfully submitted,



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³ Strictly speaking, section 181 applies only to such unclassified information as is protected under sections 147 and 148. But it would be illogical to treat OUO and NNPI more strictly than safeguards information and UCN. And, while UCNI, OUO, and NNPI constitute DOE-originated information, and would ordinarily be subject solely to DOE rules and orders, the Nuclear Waste Policy Act gives NRC ample authority over disclosure of DOE’s information to the extent such information bears on the Yucca Mountain license application. E.g., NWPA sections 114(d) and 114(f)(5); 10 C.F.R. 2.1018(b).

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing State of Nevada Memorandum in Support of its Alternative Language in the Proposed Protective Order on Protected Sensitive Information has been served upon the following persons by electronic mail:

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