

July 13, 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:)	NRC-01
Pre-Application Matters))	

THE NRC STAFF'S MOTION FOR RECONSIDERATION OF
THE SECOND CASE MANAGEMENT ORDER

INTRODUCTION

Pursuant to the opportunity provided by the Pre-License Application Presiding Officer ("PAPO") Board in its second case management order ("Order") of July 8, 2005, the Staff files this motion for reconsideration. See Second Case Management Order, slip op. at 24 (July 8, 2005). The NRC Staff ("Staff") contends that a revision to Appendix I, footnote 1 of the Order is merited in order to avoid impairing the Staff's ability to refer information related to potential safety and wrongdoing concerns to the appropriate NRC offices. Further, the Staff contends that the PAPO Board should adopt the language for footnote 1 proposed by the Staff in the June 1, 2005 Joint Proposed Protective Order¹ that also would be consistent with the equivalent footnote as agreed upon in the Proposed Joint Protective Order for Protective Sensitive Information of July 8, 2005.

¹ [Staff Proposal] The provisions of this Protective Order do not apply to NRC employees, contractors, or consultants with respect to protected material that the NRC is entitled to receive apart from its role as a litigant in this proceeding (e.g. information available to, or required to be submitted to, the NRC by statute, regulation, or license condition or information submitted to the NRC in support of a requested licensing action). Disclosure of such protected material is governed by 10 C.F.R. §§ 2.390, 2.709, 9.17, and 9.25. The provisions of this Protective Order do apply to NRC employees, contractors, or consultants with respect to protected material that NRC would not be entitled to receive except by virtue of an Order in this proceeding.

Separately, the NRC Staff requests the PAPO reconsider its ruling concerning the certification requirement associated with the duty to supplement. *Id.* at 21-22. Specifically, the Staff requests the PAPO reconsider its requirement that each potential party certify “to the PAPO Board that it has duly supplemented its documentary material *on the LSN.*” *Id.* (emphasis added). This motion has been discussed with the State of Nevada and the Department of Energy each of which expressed no opinion on this motion with regard to revising Appendix I, footnote 1 and each of which supports this motion with regard to the certification requirement.

DISCUSSION

A. Revision to Appendix I, footnote 1

As presently worded, the final sentence of footnote 1 in combination with the non-disclosure agreement, impedes Staff involved in the litigation, and who have access to employees concerns documents, from sharing that information with other appropriate NRC offices, even if that data could relate to safety concerns and instances of willful violations. This barrier is inconsistent with Commission precedent, federal authority and internal NRC directives.

Support for the Staff’s position is found in the analogous case of *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma site) where, “The central issue before the Commission [was] the appropriate role, if any, of the Licensing Board in determining whether the Staff may refer confidential information obtained in discovery to NRC investigatory offices.” CLI-95-16, 42 NRC 221, 224 (1995). In that case, a licensee and the Staff had offered alternative language in a protective order. Text proposed by the licensee, and subsequently accepted by the Licensing Board, required the Staff to obtain the Board’s approval before sharing “protected discovery material” obtained by those involved in the action with other Staff who required access to such information in the performance of their regulatory duties. *Id.* at 223-224.

The Commission subsequently rejected the licensee's approach in concluding, "The Commission does not agree, however, that the protective order should establish the Licensing Board as a screen between NRC Staff and NRC investigatory offices." *Id.* at 225. The Commission further noted, "As the Licensing Board itself recognized, it could not exercise its 'protective order' powers to prohibit the Staff from referring to other Staff offices information obtained through discovery that has immediate public health and safety implications...The Commission concludes that the same is true of investigatory or enforcement information." *Id.* at 226. Finally, the Commission stated, "The Board and GA [General Atomics] cite various judicial cases on protective orders, but none bars an agency receiving discovery documents in its own adjudicatory proceeding from referring them to its investigative offices." *Id.* at 226-227.

Yet, that is the effect of the present footnote 1 language that would preclude Staff involved in the litigation from sharing safety or wrongdoer information, that may be discovered in the course of reviewing employee concerns program material, with technical and investigatory Staff. To be sure, the Licensing Board's means of limiting the Staff's access in *Sequoyah* was different in that it required Licensing Board approval prior to referral between Staff. See *Sequoyah Fuels Corp. and General Atomics*, 42 NRC at 222. However, the effect of the present language of footnote 1 is even more restrictive in that it precludes any sharing of information discovered by Staff directly involved in the litigation with those not covered by a non-disclosure agreement. Moreover, it is impractical to require an ever-expanding circle of non-litigation Staff to execute non-disclosure agreements as a potential investigation based on referral information proceeds or alternatively to involve fewer Staff in the investigation.² See

² It should be noted as well, that the Staff already has well-established guidance for preserving the confidentiality of allegation-sensitive material outlined in Management Directive 8.8. See NRC Management Directive 8.8 (Rev. Feb. 4, 1999). Separately, even if the confidentiality procedures in Appendix I, footnote 2 were observed, allowing a participant to file with other participants only the number of non-disclosure agreements it had executed, another participant could nevertheless gain premature

(continued...)

United States, v. McGovern, 87 F.R.D. 590, 592 (M.D. Pa. 1980) (“there is a large and very large and very real public interest in having an expeditious and comprehensive investigation of the Three Mile Island incident”); *General Public Utilities Corp.* (Three Mile Island Nuclear Station, Unit No. 2), CLI-83-24, 18 NRC 315, 322 (1983) (“To carry out its public health and safety mandate the NRC must be able to investigate matters expeditiously...”).

While *Sequoyah* involved proprietary instead of employee concerns information, the unambiguous principle articulated by the Commission in reversing the Licensing Board in that case was that protective orders could not preclude the referral of information between Staff directly involved in a litigation, and those who are not. Indeed the referral of information between Staff is mandated as can be seen in Management Directive 8.8 which requires Staff who discover wrongdoing to promptly notify the Office of Investigations (See NRC Management Directive 8.8 at 65) and is more generally contained in statutory and regulatory authorities which set basic standards of ethical conduct for Federal Employees. See Pub. L. No. 96-303, 94 Stat. 855; 5 C.F.R. § 2635.101. Surveying these same authorities in his subsequently adopted *Sequoyah* dissent, Judge Bollwerk concluded, “As a consequence, in reviewing a particular discovery document, if a *member of the staff litigating this case* comes across information that evidences a violation or potential violation of any statutory or regulatory requirement, that individual is under a *duty to disclose that information to appropriate staff investigative or enforcement personnel.*” *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-95-05, 41 NRC 253, 272 (1995) (Bollwerk, J., concurring in part and dissenting in part) (emphasis added); See generally, *Resolution Trust Corp. v.*

²(...continued)
notification of an ongoing NRC Staff investigation as indicated by the filing of a large number of non-disclosure agreements. Present NRC Office of Investigation practice is to generally not notify the potential subject of an investigation that such a process was underway until such time as is necessary.

Thornton, 798 F.Supp. 1, 4 (D.D.C. 1992) (deferring to an agency's ability to share information regarding an investigation where internal practice already allowed for such).

B. Modification of Certification Requirement

The NRC Staff requests the PAPO reconsider its ruling concerning the certification requirement associated with the duty to supplement. See Second Case Management Order, slip op. at 24 (July 8, 2005). Specifically, the Staff requests the PAPO reconsider its requirement that each potential party certify "to the PAPO Board that it has duly supplemented its documentary material *on the LSN*." *Id.* (emphasis added). In its August 31, 2004 order, the PAPO ruled that in the LSN means "that a documentary material must be indexed on the central LSN site. . . ." *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-04-20, 60 NRC 300, 332 (2004). Accordingly, documentary material created after a potential party's initial certification must first be indexed by the LSN administrator (LSNA) in order to meet the requirement to supplement. Thus, in order to comply with the PAPO's deadline to supplement by the first of each month and to certify that this has been done, a potential participant would have to make any new documentary material available to the LSNA for indexing at some time before the first of each month and rely on the LSNA to index the new documentary material by the first of the month.

Because the indexing function of the LSNA is beyond the control of any of the potential parties, potential parties would be placed in the position of relying on the actions of a third party to comply with the PAPO's order. It is quite possible that a potential party could make its new documentary material available at an agreed-upon time before the first of the month with the understanding that the LSNA will be able to index and make available on the LSN the new

documentary material by the first of each month.³ However, there could be instances where such would not be the case and thus, through no fault on its part, a potential party would not be able to make the required certification, and thus would be in violation of the PAPO's order.⁴

Because of these concerns, the Staff requests the PAPO reconsider its requirement that a potential party certify by the first of each month that it has supplemented its documentary material on the LSN. Potential parties will still be obligated to supplement their documentary material at monthly intervals by making it available to the LSNA for indexing and placement on the LSN. However, the obligation to certify to the PAPO that the documentary material is "on the LSN" by the first of each month should be modified. The certification to the PAPO that would be due the first of each month should state that "the potential party has supplemented its documentary material by providing [number of documents] to the LSNA for indexing and placement on the LSN." This modification preserves the intent of the PAPO's order by ensuring that the LSN is timely supplemented at regular intervals, but at the same time recognizes that there are certain actions associated with placing documentary material on the LSN that are beyond the control of a potential party.

³ With respect to indexing DOE's initial document collection, the LSNA stated that it was his "target . . . to index 30,000 documents a day and 150,000 documents per week." *Dep't of Energy*, LBP-04-20, 60 NRC at 333 n. 52. See also Transcript, High Level Waste Repository Pre-License Application Matters, July 28, 2004 at 108-109.

⁴ With respect to the LSNA's target of being able to index 30,000 documents a day and 150,000 documents a week, the LSNA stated that he could not guarantee that performance and that "it is entirely speculative to come to the conclusion that that was something somebody could rely on." Tr. at 108. The Staff recognizes that it is unlikely that a potential parties' supplementation of new documentary material will be on the order of DOE's initial document collection. However, problems could arise if multiple parties are trying to supplement at the same time. The Staff is simply noting that technical and other issues could delay the placement of supplementary documentary material on the LSN by the deadline established by the PAPO. See also "Response of Licensing Support Network Administrator to July 19, 2004 Questions from Pre-License Application Presiding Officer Licensing Board, July 23, 2004, at 11 ("The rate at which the LSN can index materials is dependent on a variety of variables.").

CONCLUSION

For the foregoing reasons, Appendix I, footnote 1 and the certification requirement associated with the modification of certification requirements as contained in the second case management order should be revised as is contended.

Respectfully submitted,

/RA/

Harry E. Wedewer
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 13th of July 2005.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "THE NRC STAFF'S MOTION FOR RECONSIDERATION OF THE SECOND CASE MANAGEMENT ORDER" in the above captioned proceeding have been served on the following persons this 13th day of July 2005 by electronic mail, and/or Electronic Information Exchange as denoted by an asterisk (*).

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