

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 09/19/05

SERVED 09/19/05

Before Administrative Judges:

Thomas S. Moore, Chairman
Alex S. Karlin
Alan S. Rosenthal

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository:
Pre-Application Matters)

Docket No. PAPO-00

ASLBP No. 04-829-01-PAPO

September 19, 2005

MEMORANDUM AND ORDER

(Matters to be Addressed at
September 29, 2005 Case Management Conference)

On August 24, 2005, the Pre-License Application Presiding Officer (PAPO) Board issued an order setting a case management conference for Thursday, September 29, 2005, and indicating that we would issue a separate order specifying the questions the parties, potential parties, and interested governmental participants (collectively, Participants) should be prepared to address at the conference.¹ This order specifies the questions to be addressed.

The September 29th conference will focus primarily on the development of fair and efficient case management procedures for the resolution of disputes over identifying, protecting and, if appropriate, granting access to safeguards information (SGI), unclassified controlled nuclear information (UCNI), official use only information (OUOI), and naval nuclear propulsion information (NNPI) (collectively, Sensitive Information) during the pre-license application phase

¹ Licensing Board Order (Scheduling Case Management Conference and Requesting Comment on Location of Conference) (Aug. 24, 2005) (unpublished).

of in this proceeding. Pursuant to our direction,² the U.S. Department of Energy (DOE), the State of Nevada, and the staff of the U.S. Nuclear Regulatory Commission (NRC Staff) have submitted a proposed joint protective order for protecting Sensitive Information (Jointly Proposed Order) and comments on it.³ Their proposal consists of a protective order and a non-disclosure affidavit, but does not include procedures for the resolution of disputes relating to Sensitive Information. Although there are disagreements among these three Participants, and areas where further work is necessary, the Jointly Proposed Order and the comments of these Participants provide a useful foundation upon which to build. The Board contemplates that, in addition to a protective order, it will issue a case management order, analogous to portions of our second case management order,⁴ that establishes procedures for the fair and efficient resolution of disputes concerning Sensitive Information by the potential parties themselves, and, as necessary, by the Board.

In addition to the issues raised by the Jointly Proposed Order, Participants shall be prepared to address the matters set forth below. As the likely possessors of all Sensitive Information, DOE and the NRC Staff shall consult, as appropriate, with their respective experts in the field of Sensitive Information in preparing to address these questions. Further, DOE and the NRC Staff shall have such experts attend the conference. At or before the conference, each Participant shall provide the Board (and to the extent not privileged, other Participants)

² Licensing Board Memorandum and Order (Scheduling Second Case Management Conference and Issues to be Briefed) at 3 ¶ E (May 11, 2005) (unpublished).

³ [DOE]'s Submission of a Proposed Joint Protective Order for Protected Sensitive Information (July 8, 2005); [DOE]'s Statement in Support of the Proposed Protective Order for Protected Sensitive Information (July 8, 2005); State of Nevada Memorandum in Support of its Alternative Language in the Proposed Protective Order or Protected Sensitive Information (July 8, 2005); NRC Staff Supplement to Joint Proposed Protective Order for Protected Sensitive Information (July 8, 2005).

⁴ Second Case Management Order (Pre-License Application Phase Document Discovery and Dispute Resolution) (July 8, 2005).

with any memoranda of understanding, guidance documents, agreements, procedures, or other documents relevant to its answer or position. The Participants should be prepared to provide us with citations to the legal authorities that support their answers.

1. Other Participants. DOE's submission of the Jointly Proposed Order at page 1, states that "[o]ther interested participants . . . have not had an opportunity to review and comment" on that proposal. Why were other potential parties not given an opportunity to participate in the process that produced the proposal? Are DOE, the State, and the NRC Staff sufficiently representative of the potential parties that might be impacted by the Jointly Proposed Order?

2. Estimated Numbers. What are the current estimates of DOE and the NRC Staff as to the total number of documents that each expects to claim as privileged or protected from disclosure for each type of Sensitive Information? If you expect the number of such documents to increase (a) after the application is filed, or (b) after contentions are admitted, estimate those numbers as well.

3. Inclusion on LSN. The Board has already ruled that, during the pre-license application phase, documents claimed to contain privileged or protected SGI must be produced on the LSN in header only format under 10 C.F.R. § 2.1003(a)(4)(iii).⁵ How many header only documents has the NRC Staff placed on the LSN? Is the NRC Staff compliant with our SGI ruling? With regard to all other forms of Sensitive Information, do you agree that it also must be produced on the LSN in header only format?⁶ If not, explain the statutory or regulatory basis for your position.

⁵ Tr. at 311-16.

⁶ The Jointly Proposed Order states that an "electronic bibliographic header may be required." Jointly Proposed Order at 7 n.14 (emphasis added).

4. Burden of Proof. Who should have the burden of proving that documentary material, claimed to be privileged or protected Sensitive Information, may be withheld? Does the burden of persuasion shift depending on the particular issue in controversy (see, e.g., infra issues in 5(a)-(f))?

5. General Dispute Resolution Procedures. What procedures and mechanisms (e.g., early requests for background checks) should be established in a case management order to prevent and resolve disputes relating to each category of Sensitive Information,⁷ including disputes as to:

- a. Whether an item of documentary material qualifies for the privilege or protection.
- b. Whether the requester has a “need-to-know.”
- c. Whether the requester is trustworthy and reliable.
- d. Whether the requester has the technical competence to evaluate the information (i.e., is “qualified”).
- e. Whether the requester has the appropriate information protection systems.
- f. Whether a document has been over-redacted.

6. DOE Authority Over UCNI. NRC regulations specify that the PAPO Board “shall rule on any claim of document withholding to determine. . . [w]hether the material is privileged or otherwise excepted from disclosure under § 2.1006.” 10 C.F.R. § 2.1010(b)(3). Meanwhile, 10 C.F.R. § 1017.14(c) specifies that the Secretary of Energy “has final authority to resolve all disagreements concerning” the identification, control, and decontrol of UCNI. Are these two provisions inconsistent? If so, how should the Board reconcile these regulations?

⁷ The Jointly Proposed Order merely states, at 7 ¶ D, that, “The PAPO Board, another Presiding Officer in this proceeding, or the Commission shall resolve any disputes arising under this Protective Order.”

7. Originator. Are DOE, the State, and the NRC Staff proposing that the “originator” of a document containing Sensitive Information has a veto over whether it is to be made available?⁸ If so, under what authority? If not, must the PAPO Board give any deference to the originator’s determinations? Under what authority?

8. Transformation Into SGI. Does UCNI or NNPI that is submitted to the NRC Staff become SGI? Does submission of the document to the NRC change the Board’s authority over, or the proper treatment of, the information?⁹

9. SGI vs. Other Sensitive Information. Why does the Jointly Proposed Order include special provisions relating to technical competence (Jointly Proposed Order ¶ B.1.i) and background checks for trustworthiness and reliability (Jointly Proposed Order ¶ B.1.ii) for SGI, but not for UCNI and NNPI?

10. Qualification for a Claimed Privilege. With respect to each category of Sensitive Information, what are the minimum essential elements needed for a claimant to establish a prima facie case that the information in a document should be withheld from the LSN or from a requester?¹⁰

11. Redaction. With respect to each category of Sensitive Information, except for those cases where the Sensitive Information is inextricably intertwined with the other information, are

⁸ For example, the Jointly Proposed Order states that (a) the originator of the protected Sensitive Information must approve of the requester’s “information protection system,” Jointly Proposed Order at 3, (b) the originator makes the “determination” that the requester has a “need to know,” Jointly Proposed Order at 4 n. 9 and at 4-5 n.10, and (c) in cases of information that is both SGI and otherwise Sensitive Information, the NRC Staff will “consult” with the “originator,” Jointly Proposed Order at 4-5 n.10.

⁹ The Jointly Proposed Order addresses this at pages 4-5 n.10.

¹⁰ Cf. 10 C.F.R. § 2.705(b)(4) (“When a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . the party shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.”).

DOE and the NRC Staff required to make available on the LSN a redacted version that removes all Sensitive Information?

12. Dispute Resolution Procedures for Need-to-Know. With respect to each category of Sensitive Information:

- a. For SGI, “need-to-know” is defined as “necessary in the performance of official, contractual, or licensee duties of employment.” 10 C.F.R. § 73.2. Please explain how a party can have “official duties of employment” to formulate or to raise contentions? What such duties could a potential party have?
- b. The Commission has recognized that a party to an NRC proceeding can have a need to know SGI in order to formulate contentions.¹¹ Does this same principle apply to a potential party in this proceeding? Does it also apply to UNCI and NNPI?
- c. A key purpose of the pre-license application phase is to “enabl[e] the comprehensive and early review of the millions of pages of relevant licensing material by the potential parties to the proceeding, so as to permit the earlier submission of better focused contentions resulting in a substantial saving of time during the proceeding.”¹² At this “stage,”¹³ do potential parties have the “duty” to review all information, including Sensitive Information, that is “included in or

¹¹ See Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 71 (2004), where the Commission noted with approval that “the NRC Staff was not reluctant to give [the intervenor] access to Duke’s safeguards-protected security submittals outlining Duke’s security proposals for its MOX amendments” and the “only issue” was the intervenor’s need-to-know certain “additional [SGI] information.” Id. at 71.

¹² 54 Fed. Reg. 14,925, 14,926 (Apr. 14, 1989).

¹³ Catawba, CLI-04-6, 59 NRC at 72 (“[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.”)

specifically referenced and relied upon in the license application,”¹⁴ to determine if it raises safety, health, or environmental concerns, and if so, to formulate appropriate contentions? Is “indispensability”¹⁵ merely a synonym for “needed?”

- d. What statute or regulation supports the assertion that a potential participant must have a need to know OUOI?
- e. Is “need-to-know” the same for SGI, UCNI,¹⁶ OUOI, and NNPI¹⁷?
- f. Access to classified information is authorized upon a showing, inter alia, that it “may be required for preparation of a party’s case.”¹⁸ Meanwhile, access to SGI is authorized upon a showing, inter alia, that it is “necessary in the performance of official, contractual, or licensee duties of employment.”¹⁹ Is the showing of need-to-know required for SGI more stringent than that for classified information?

13. Dispute Resolution Procedures for Trustworthiness and Reliability Determinations.

With regard to each category of Sensitive Information:

¹⁴ Jointly Proposed Order at 6 ¶ B.5.

¹⁵ See Catawba, CLI-04-6, 59 NRC at 73. See also Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-29, 60 NRC 417, 422 (2004).

¹⁶ Special access to UCNI is dependent, inter alia, on an evaluation of “[t]he purpose for which the UCNI is needed (e.g., will the UCNI be used for commercial or other private purposes or will it be used for public benefit to fulfill statutory or regulatory responsibilities).” 10 C.F.R. § 1017.16(b)(3)(ii).

¹⁷ “[I]t is DoD [Department of Defense] policy to provide technical data governed by this part to individuals and enterprises that are determined to be currently qualified U.S. contractors, when such data relate to a legitimate business purpose” 32 C.F.R. § 250.4(c). DoD also provides such data to “any Federal, State, or local government agency that requires such data for regulatory or other official governmental purposes.” 32 C.F.R. § 250.4(d).

¹⁸ 10 C.F.R. § 2.905(b)(1).

¹⁹ 10 C.F.R. § 73.2.

- a. What objective standards are used to make the trustworthiness and reliability determination (i.e., what criteria must an individual satisfy)? Are they different for SGI, UCNI, and NNPI?
- b. What “clearance” procedures exist²⁰ or should be established, if any, to determine whether the potential participant is trustworthy and reliable?²¹
- c. Do different procedures apply to SGI, UCNI, and NNPI, or is there one consolidated process available?²²
- d. How do, or should, these procedures differ from those for classified information?
- e. If a potential party seeks to understand the requirements for, and/or to initiate, the clearance process, who should they contact at NRC or DOE? What forms, if any, need to be used and submitted?
- f. Does DOE or NRC normally require private parties to pay the costs of such clearance procedures? Do you propose to do so here? What are the costs? What provision is made for those unable to pay?

14. Dispute Resolution Procedures for Adequacy of Information Protection Systems.

With regard to each category of Sensitive Information:

²⁰ We note that the regulations do not seem to require FBI criminal history checks for individuals to whom disclosure is ordered pursuant to a Board protective order. Compare 10 C.F.R. § 73.21(c)(1)(i) (allowing access to SGI to be given by a “nuclear power reactor applicant or licensee” upon completion of an FBI criminal history check), with 10 C.F.R. § 73.21(c)(1)(vi) (allowing access to SGI pursuant to a protective order without requiring FBI criminal history checks).

²¹ “[I]t is important . . . that the Board assure itself of the reliability of the requestor of the safeguards information. This ordinarily requires special procedures for attorneys and experts. Boards therefore should restrict access to qualified, ‘cleared,’ representatives of intervenors. And boards should stress that such representatives may handle the confidential information only under the conditions and restrictions laid out in NRC regulations.” Catawba, CLI-04-6, 59 NRC at 75.

²² The Jointly Proposed Order only appears to contemplate background checks by NRC with regard to access to SGI. Jointly Proposed Order at 5 n.12.

- a. What objective standards are used to determine the adequacy of an information protection system (i.e., what criteria must be satisfied)? Are they different for SGI, UCNI, and NNPI?
- b. What procedures exist or should be established, if any, to allow a potential party to confirm that it has a satisfactory “information protection system” (e.g., the appropriate physical facilities other procedures and methods for the handling and storage of the information)?²³
- c. Do different procedures apply to SGI, UCNI, and NNPI, or is there one consolidated process available?
- d. How do, or should, these procedures differ from those for classified information?
- e. If a potential party seeks to understand the requirements for, and to initiate approval of, their information protection system, who can they contact at NRC or DOE?
- f. Does DOE or NRC normally require private parties to pay the costs of such procedures? Do you propose to do so here? What are the costs? What provision is made for those unable to pay?

15. OUOI Basis. Is there a separate statutory and regulatory basis for the claim that OUOI is privileged or protected, or is the claim based solely on one or more of the nine Freedom of Information Act exemptions, e.g., 10 C.F.R. § 2.390(a)(1)-(9)? If there is a separate statutory and regulatory basis, what is it? If not, why is there a need for separate dispute resolution procedures for OUOI?

²³ “[E]ach person who . . . acquires [SGI] shall ensure that [SGI] is protected against unauthorized disclosure. To meet this general performance requirement, [each person] shall establish and maintain an information protection system that includes the measures specified in paragraphs (b) through (i) of this section.” 10 C.F.R. § 73.21(a).

16. NRC Documents. On or before September 29, 2005, the NRC Staff shall provide copies of any memorandum of understanding or agreement between NRC and DOE or the U.S. Navy dealing with Sensitive Information, as well as any procedures, protocols, or other guidance documents of any kind concerning the handling and protection of such information.

17. DOE and NAVSEA Documents. On or before September 29, 2005, the DOE shall provide copies of internal DOE Orders 471.1A, 471.2A , and 471.3 and all associated procedures, guidelines, and manuals. At that same time DOE shall provide copies of NAVSEAINST 5511.3 and 5511.32B and all associated procedures, guidelines, and manuals.

18. NRC vs. DOE OUOI. With respect to OUOI, should different procedures or criteria apply to the resolution of disputes regarding NRC OUOI and DOE OUOI?

19. “Qualified Witnesses.” 10 C.F.R. § 2.1010(b)(6) states that protective orders should contain such terms and conditions as “may be necessary and appropriate to limit the disclosure to potential participants, interested governmental participants, and parties in the proceeding, or to their qualified witnesses and counsel.”²⁴

- a. The Jointly Proposed Order asserts, “[a]s part of a determination of ‘need to know’ 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.”²⁵ Is the above cited regulation the source of this assertion? Is Catawba, CLI-04-6, 59 NRC at 75, the source of this assertion? If not, what is?²⁶

²⁴ 10 C.F.R. § 2.1010(b)(6) (emphasis added).

²⁵ Jointly Proposed Order at 4-5.

²⁶ The Commission has stated “[o]ur precedents, drawing on guidance from the Federal Rules of Evidence, place the burden of demonstrating that a witness is qualified to serve as an expert on the party who offers the witness” and “the witness’s sponsor must demonstrate to the Licensing Board’s satisfaction that the witness possesses the technical competence necessary

- b. The word “qualified” in the regulation does not modify the phrase “potential participants, interested governmental participants, and parties.” Is the Jointly Proposed Order consistent with this regulatory provision?
- c. The word “qualified” in the regulation does not refer to non-witnesses, such as an expert or other person, used by the potential participant, interested governmental participant, or party to assess whether the Sensitive Information raises cognizable issues, but who is not expected to serve as a witness.²⁷ Is the Jointly Proposed Order consistent with this regulatory provision?
- d. Does the word “qualified” modify the word “counsel?”
- e. What legal authority supports the assertion that need-to-know, defined in 10 C.F.R. § 73.2 and referenced in 10 C.F.R. § 73.21(c)(i), imposes a requirement of technical competence? Can a potential party have a need to know certain SGI without possessing all of the qualifications necessary to be an expert witness on security matters?

20. Need to Hire Expert Before Issue is Preliminarily Identified? Assume that a potential party is concerned about certain potential safeguards aspects of the application but, not knowing whether a genuine safeguards problem may exist, has not yet gone to the time and expense of hiring a consulting expert (much less a testifying expert). In these circumstances,

to evaluate [Safeguards Information].” Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 & 30 (2004) (emphasis added).

²⁷ Compare Rule 26(b)(4)(B) of the Federal Rules of Civil Procedure (concerning non-witness consultants) with the Commission’s statements concerning Safeguards Information (“Our precedents, drawing on guidance from the Federal Rules of Evidence, place the burden of demonstrating that a witness is qualified to serve as an expert on the party who offers the witness” and “the witness’s sponsor must demonstrate to the Licensing Board’s satisfaction that the witness possesses the technical competence necessary to evaluate [Safeguards Information].”) Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 & 30 (2004) (emphasis added).

under 10 C.F.R. § 2.1010(b)(6), what degree of “technical competence,” if any, must a potential party have in order to have access to the Sensitive Information? What degree of technical competence, if any, must counsel for the potential party have? What is the statutory or regulatory basis for any such requirement?

21. Participant. The Jointly Proposed Order uses the term “participants” but defines it circularly. On the one hand, “participants . . . shall be permitted access” to Sensitive Information if they meet the conditions of the proposed order.²⁸ On the other hand, “participant” is defined to mean “any party, potential party, or interested governmental participant . . . that is permitted . . . to receive documents.”²⁹ Is any potential party who meets the requirements of the Jointly Proposed Order entitled to access to Sensitive Information?

22. Schedule for Submission. What is an expeditious schedule for the Participants to develop a joint proposal for (a) a case management order establishing procedures for the fair and efficient resolution of disputes concerning Sensitive Information, (b) appendices that will serve as the privilege log formats for each category of Sensitive Information, (c) a protective order, (d) an affidavit of non-disclosure, and (e) appendices that identify the appropriate security personnel at DOE and NRC, how such personnel should be contacted, and all information that must be provided by a potential party to initiate the procedures for requesting access to Sensitive Information, obtaining clearances, and obtaining initial approval of information protection systems.

23. Deadline for Compliance. What is an appropriate deadline, after certification, for requiring a potential party that withholds a document on the ground that it contains privileged or

²⁸ The conditions are that (a) the “originator” approves their information protection system, (b) the requester execute a Non-Disclosure Affidavit, and (c) the requester meets all of the other “conditions” in the Jointly Proposed Order. Jointly Proposed Order at 3-4.

²⁹ Jointly Proposed Order at 3 n.6 (emphasis added).

protected Sensitive Information either (a) to list the document on a privilege log that provides a prima facie substantiation of the claimed privilege, or (b) to provide a full text of the document to a requester under the terms of an appropriate protective order and provide a redacted version to the LSN?

Finally, we note that pursuant to 10 C.F.R. § 2.1011(c) the LSN Administrator has raised several questions with the Board concerning requests he has received from DOE to delete certain documents from those currently publicly available on the LSN or to convert them to header only. We previously dealt with a dispute concerning one instance of this.³⁰ The Participants should be prepared to address this subject at the September 29 conference.

Because of the number of items to be discussed and the short time in which to address them at the conference, the Participants should confer in advance of the conference regarding these matters to identify areas of agreement and disagreement so that responses to our inquiries can be succinct and repetitive responses scrupulously avoided. We are confident that, when called upon to answer or to comment, all counsel will cooperate in keeping their

³⁰ Tr. at 302-08.

comments and answers to questions very brief and to the point so it will not be necessary for us to direct and to enforce short, rigid time limits on responses.

It is so ORDERED.

For the Pre-License Application
Presiding Officer Board

[Original signed by]

Thomas S. Moore, Chairman
Administrative Judge

Rockville, Maryland
September 19, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (REGARDING MATTERS TO BE ADDRESSED AT SEPTEMBER 29, 2005 CASE MANAGEMENT CONFERENCE) have been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (*)).

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Docket No. PAPO-00
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Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 19th day of September 2005