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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL
PAPO CASE MANAGEMENT TELECONFERENCE

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IN THE MATTER OF: :

US DEPARTMENT OF ENERGY : Docket No. PAPO-00

(HIGH LEVEL WASTE : ASLBP No. 04-829-01-PAPO

REPOSITORY: :

PRE-APPLICATION MATTERS) :

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Wednesday, October 19, 2005

The above-entitled matter came on for
hearing, pursuant to notice, at 10:04 a.m.

BEFORE:

THOMAS MOORE, Chair

ALEX KARLIN, Administrative Judge

ALAN ROSENTHAL, Administrative Judge

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P R O C E E D I N G S

(10:04 a.m.)

1
2
3 JUDGE MOORE: All right. We'll proceed.
4 For the Court Reporter, would you all identify
5 yourself starting with the NRC staff please?

6 MR. CUMMINGS: This is David A. Cummings
7 and Harry E. Wedewer.

8 JUDGE MOORE: DOE?

9 MR. EDWARDS: This is Jeff Edwards, Mike
10 Shebelskie, and Ed Noonan. And then from the Office
11 of OGC, we have on the phone Martha Crosland and
12 Angela Kordyak.

13 MR. PUTZU: From the Division of Naval
14 Reactors, Frank Putzu with Commander Greg O'Borien and
15 Partrick Card.

16 JUDGE MOORE: Nevada?

17 MR. MALSCH: For the State of Nevada,
18 Martin Malsch.

19 JUDGE MOORE: Let's proceed.

20 To start this morning, Mr. Shebelskie you
21 had indicated at the October 13th conference that you
22 would be prepared to give us a status report on DOE's
23 preparation of primary privilege law. This is a
24 redaction of documents for which you were claiming
25 secondary privileges and the redactions for employee

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1 concerns files.

2 Can you present that to us this morning?

3 MR. SHEBELSKIE: Your Honor, this is Mike
4 Shebelskie. I must apologize. I did not realize the
5 Court wanted to --

6 JUDGE MOORE: That's all right. When can
7 you provide us that?

8 MR. SHEBELSKIE: We're preparing a written
9 submission. And I will endeavor to have it filed by
10 week's end.

11 JUDGE MOORE: That will be fine. Thank
12 you.

13 MR. SHEBELSKIE: Thank you.

14 JUDGE MOORE: Then let's move on to how we
15 shall proceed with the matters at hand and a schedule
16 for doing so. Let's start with you again, Mr.
17 Shebelskie. Have you had an opportunity to consult
18 and reach agreement with a recommendation with all the
19 other participants on how you think we should be
20 proceed?

21 MR. SHEBELSKIE: Yes, sir.

22 JUDGE MOORE: Please go ahead.

23 MR. SHEBELSKIE: Actually if Mr. Edwards
24 could address that, he was a participant in all those
25 conversations as well.

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1 JUDGE MOORE: That would be fine. Mr.
2 Edwards, please go ahead.

3 MR. EDWARDS: Thank you, Judge Moore. We
4 have had a number of internal conversations and then
5 one group conversation with the staff and the state.
6 And let me give you a status of where we are.

7 First, with respect to the UCNI documents,
8 if I could let me just -- if I was not clear about one
9 thing at the hearing last week, let me clarify that.
10 I think I was asked is the Yucca Mountain facility a
11 production or utilization facility. And if I was not
12 clear that it is not either of those facilities, let
13 me clarify that right now. It is not.

14 And we've had some discussions about the
15 UCNI documents based on that along the lines we talked
16 about last week. We're doing a re-review of the ten
17 UCNI documents that we currently have. I don't have
18 a definitive answer yet but I have been told that it
19 is in all likelihood the result will be that the UCNI
20 documents that have been labeled UCNI are either not
21 UCNI or will not remain on the LSN.

22 And so the UCNI documents should go away.
23 And we do not anticipate that there will be additional
24 UCNI documents or documents with UCNI information
25 going forward.

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1 With respect to OOU documents, the
2 assignment I think from last week was to consider
3 whether the OOU designation or OOU information can be
4 dealt with under the second case management conference
5 order. We've looked at that. We've had discussions
6 with the state and staff about that.

7 We are prepared to redact the OOU
8 documents, which is what is contemplated under the
9 second case management conference order with respect
10 to secondary privileges documents.

11 We've considered whether it would be
12 appropriate to deal with the OOU documents under that
13 order or under a subsequent order, a third order, that
14 would treat the OOU information in a manner similar to
15 how the secondary privilege information is dealt with
16 under the second order.

17 The second order specifically in a couple
18 places excludes its application to protective,
19 unclassified, sensitive information. In addition, the
20 appendices to that order, while they contemplate or
21 address certain FOIA exemptions, they don't address
22 two or three I don't think and certainly not all eight
23 that could possibly be applicable to OOU.

24 What we were going to suggest, and we've
25 talked with the state and staff about, is dealing with

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1 the OUO information under a third case management
2 conference order but treat it similar to how secondary
3 privilege is dealt under the second.

4 It would extend -- well, it would be a
5 little bit different because it would specifically
6 contemplate the process that is in the second order
7 but it would also contemplate access pursuant to
8 protective order, full access pursuant to protective
9 order which is not in the second order.

10 And I think there is agreement with the
11 state and staff on that approach.

12 Third, with respect to the NNPI
13 information, let me make a couple comments. And then
14 I'll ask Mr. Putzu to add on. What we -- the two --
15 well, three thing. First is -- four things. The
16 first is the Navy Nuclear Propulsion Program is
17 prepared to engage in redaction.

18 Second is this belief on their part that
19 the number of documents that fall within the NNPI
20 category is going to drop, will be reduced. It will
21 not disappear.

22 Third is we have worked on coming up with
23 a definition, if you will, of need-to-know with
24 respect to NNPI documents. We've talked with the Navy
25 folks and we've also talked with the state and staff

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1 about that with respect to the NNPI documents. And I
2 think we'll be able to reach agreement on a specific
3 definition of need-to-know that we can put in a
4 protective order with respect to that information.

5 And fourth is there was concern, you might
6 remember, expressed at the hearing by Mr. Malsch
7 regarding the requirement that excludes non-U.S.
8 citizens from access to these documents. And there
9 has been further exploration with that -- on that
10 topic.

11 First, we had a list of Nevada's experts
12 that has previously been published. And we've had
13 some conversation with Mr. Malsch about that list,
14 about one, whether it is active, and two -- not
15 active, whether it is current, and two, whether he can
16 identify for us the non-U.S. citizens on that list who
17 would need access to NNPI. And three, are there any
18 additional people who he thinks needs that
19 information. And he's going to get back to us with
20 that.

21 And based on that information, depending
22 on what it is, we think we'll be able to resolve that
23 issue, too. And I'll let Mr. Putzu address that.

24 MR. PUTZU: Your Honor, this is Frank
25 Putzu, Division of Naval Reactors.

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1 I really don't have too much to add to
2 that. It was a pretty comprehensive point. We really
3 just need the identity -- identifying information of
4 the non-U.S. experts -- the non-U.S. citizens that are
5 intending to testify as experts.

6 We do have the preliminary list for lack
7 of a better word that does identify some United
8 Kingdom witnesses. But we do have a process that we
9 intend to follow and are glad to work with the state
10 to try to reach resolution on that.

11 JUDGE MOORE: When you're mapping this out
12 in a third proposed case management order, protective
13 order, and affidavit of non-disclosure and spelling
14 out this process, please keep in mind that it is
15 possible that there will be at this point unknown
16 potential parties stepping forward with an expert that
17 might fall into that category.

18 If it doesn't happen, all to the good.
19 But if it does, we have to be prepared to meet it.
20 And the provisions and criteria in which you spell out
21 what you want should keep that in mind.

22 MR. PUTZU: Yes, Your Honor. I understand
23 the existence of potential parties that may also
24 employ non-U.S. citizens. And I think the Court makes
25 an excellent point that the protective order needs to

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1 encompass that as well.

2 JUDGE MOORE: Realistically and as a
3 practical matter, I think that's less likely to happen
4 with others than with the State of Nevada who may well
5 not be faced with the same precise problems that the
6 state has. But if you are prepared for that, that
7 would be most helpful.

8 MR. PUTZU: Yes, sir, understood.

9 JUDGE MOORE: Judge Karlin has something.

10 JUDGE KARLIN: Well, yes, a question Mr.
11 Edwards and Mr. Putzu, you've covered a lot of ground
12 and that's very valuable. It looks like you've had
13 some good analysis and discussion.

14 What are you proposing? Maybe you were
15 going to get to that. Do you have a joint or
16 individual proposal that you would be submitting to
17 cover this ground?

18 MR. EDWARDS: Yes, what may make sense,
19 Judge Karlin, is let's let the staff address the SGI
20 and then we can talk about a proposal that encompasses
21 all of it.

22 JUDGE MOORE: Mr. Edwards, are you
23 prepared -- since at this point in time all 40 SGI
24 documents are yours -- to develop, independent of the
25 staff, in consultation with the state, if you all can

1 agree, your proposals as well for SGI?

2 MR. EDWARDS: Where we are on that is not
3 independent of the staff, no. We actually intended to
4 further the staff with respect to the treatment of the
5 SGI information.

6 JUDGE MOORE: Okay. Then let's hear from
7 Mr. Cummings at this point.

8 MR. CUMMINGS: Yes, Your Honor. We've
9 talked internally with the staff and with both the
10 state and DOE. And first, as we discussed at the case
11 management conference, we do believe a separate SGI
12 protective order would be best as it seems that there
13 is little to no overlap any longer between the NNPI
14 and SGI documents. So we would, therefore, pursue the
15 development of a separate order.

16 And as far as -- you've charged the staff
17 with kind of reevaluating whether there were any
18 elements we could maybe seek alternatives or
19 compromise to and the staff does concede that we will
20 go ahead and redact documents. We will redact SGI
21 documents.

22 However, the staff believes it should
23 pursue the access and handling requirements that we
24 first proposed in the protective order and at the case
25 management conference. That we would incorporate

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1 those elements into the new draft SGI protective
2 order.

3 JUDGE MOORE: Anything else? Mr. Malsch,
4 what is your position on all of this?

5 MR. MALSCH: Well, I'm hopeful we can work
6 these things out especially with respect to DOE. I
7 think we're very hopeful that we can work out issues
8 with respect to citizenship of consultants and
9 experts. And I'll be talking to DOE about that in the
10 next few days.

11 As far as the staff is concerned, we may
12 have still a few issues along the lines of those we
13 raised earlier. And there might be a further issue
14 about fingerprinting but I think that is yet to be
15 developed because I think the staff position is itself
16 kind of evolving. And so we may be able to work that
17 out with the staff under the scope of negotiations of
18 a separate order on SGI.

19 But I'm a little less hopeful about this
20 than I am in the case of DOE. But we'll have to see
21 how it develops.

22 JUDGE MOORE: Okay. I guess the next
23 steps is let's talk schedule for accomplishing this.
24 Back to you Mr. Shebelskie. What is -- if you've had
25 a chance to consult with the other participants, do

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1 you have a proposed schedule?

2 MR. SHEBELSKIE: Yes, sir, Your Honor, the
3 parties did confer yesterday about that. And worked
4 up a schedule that includes -- and Mr. Edwards or Mr.
5 Cummings could give you the detail -- but the concept
6 is giving public notice and access to a proposed draft
7 here in the short run, allowing a period of some
8 public comment on them.

9 And then a preestablished telephone
10 conference call similar to what we did with some of
11 the draft orders last summer. And then ultimately
12 submittal of what would hopefully be a uniform
13 proposed order that everybody had signed off on.

14 And Mr. Edwards and Mr. Cummings I think
15 have the particulars of the proposed date that they
16 had in mind.

17 JUDGE MOORE: Okay. Mr. Cummings? Mr.
18 Edwards?

19 MR. EDWARDS: David, do you have those?

20 MR. CUMMINGS: Yes, Your Honor. This is
21 David Cummings. The schedule that all the three
22 parties worked out, both Mr. Malsch, Mr. Edwards, and
23 myself was that drafts, initial drafts of both a joint
24 -- well, for one point of clarification, Your Honor,
25 were you seeking a single case management order to

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1 cover the separate protective orders? Or were you
2 looking for separate case management orders?

3 JUDGE MOORE: It really doesn't matter.
4 If they're separate, one dealing with the UCNI, if
5 there is any, OUO, and NNPI and one dealing with SGI,
6 they could be melded. It would certainly be easier if
7 it was Chapter 1 and Chapter 2 of the same order.

8 But you've indicated that the staff
9 believes that a separate protective order will be
10 necessary. And hence that would also probably
11 indicate a separate affidavit of non-disclosure. So
12 that being the case, it could all be part of the same
13 document and developed independently. And then joined
14 as Chapter 1 and 2.

15 MR. CUMMINGS: I believe that makes sense,
16 Your Honor.

17 In that case, what we would propose is
18 that a single case management order with the separate
19 protective orders and separate non-disclosure
20 affidavits would be due on November 9th with a two-
21 week public comment period to close on November 23rd
22 with one week and five days, taking us to December 5th
23 for the final resolution of public comments and
24 allowing for the conference call that Mr. Shebelskie
25 mentioned.

1 JUDGE KARLIN: Mr. Cummings, you're
2 referring to your process it would undertake with the
3 three parties here. And then submission to us?

4 MR. CUMMINGS: Oh, yes, Your Honor. We
5 would work in concert the three parties together and
6 provide a draft case management order. And then
7 individually we will have developed, in consultation
8 with the other parties, separate protective orders
9 which we would then make available probably via public
10 websites with public notice on November 9th for a two-
11 week public comment period to end on November 23rd.

12 JUDGE KARLIN: No, this is Judge Karlin
13 again. I think I understood that. My question is you
14 know we are not really involved in the process. This
15 is something that you all will be undertaking until
16 the day comes when you submit the proposed hopefully
17 joint third case management order I guess with the
18 appropriate attachments.

19 This would obviously have to be sometime
20 after I guess December 5th.

21 MR. CUMMINGS: Well, we would propose that
22 we would be submitting that to the Board, all of these
23 documents, the case management order and the separate
24 protective orders and non-disclosure affidavits on
25 December 5th.

1 JUDGE KARLIN: On December 5th?

2 MR. CUMMINGS: Yes. That would allow us
3 sufficient time to address any public comments.

4 JUDGE KARLIN: Oh, okay. So your
5 submission to us would be December 5th?

6 MR. CUMMINGS: Yes, Your Honor.

7 JUDGE KARLIN: All right. Thank you.

8 JUDGE MOORE: Now you are all in agreement
9 that that gives you all the time you'll need to get
10 this done? Because very frankly I in no way want to
11 discourage DOE from certifying this collection as
12 quickly as possible but I think realistically we're
13 not under severe time constraints here. So if more
14 time is needed, we would rather you take the time to
15 get it correct than to, if you're pushing the schedule
16 just for the schedule's sake.

17 MR. CUMMINGS: Well, Your Honor, this is
18 David Cummings. The staff would not object -- if we
19 wanted to build in some additional time for the
20 initial drafting to allow for thorough consultation
21 between the parties and for, you know, to ensure that
22 the drafting of these, you know, initial documents is
23 as good as we can get it.

24 MR. SHEBELSKIE: Judge Moore, this is Mike
25 Shebelskie.

1 JUDGE MOORE: Yes, Mr. Shebelskie?

2 MR. SHEBELSKIE: I know for the various
3 categories of protective information for DOE, we
4 really think that we are at the right place.

5 JUDGE MOORE: Okay.

6 MR. SHEBELSKIE: And we can meet this
7 schedule.

8 JUDGE MOORE: Let's try to deal with this.
9 And if more time is necessary, feel free to come in
10 and ask for it.

11 Then on December 5th, you will submit
12 something to us. We will begin to study it and
13 subsequent to that we will either have another case
14 management conference to discuss any final concerns or
15 perhaps we can do it on telephone conference. And
16 then we can decide what further action we will need to
17 take.

18 Just for the record, the panel will be in
19 Las Vegas the week of December 5th for the annual
20 panel meeting. So that will remove the panel members
21 that week. So if you need -- there's a week right
22 there you could move it back to December 12th because
23 we'll all be in Las Vegas.

24 MR. EDWARDS: David, this is Jeff. Maybe
25 what we ought to do is maybe just back everything up

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1 a week?

2 MR. CUMMINGS: I think that would make
3 sense.

4 JUDGE MOORE: Okay. Then why don't you,
5 Mr. Edwards -- first of all, Mr. Malsch, are you in
6 full accord with that schedule?

7 MR. MALSCH: Oh, yes I am.

8 JUDGE MOORE: Mr. Edwards, why don't you
9 present to us that schedule in a proposed order and
10 we'll issue it and lock it in then as an order that
11 that's the approach and the schedule.

12 MR. EDWARDS: I'll do that.

13 JUDGE MOORE: And then each of you will
14 develop it. And we again remind you that that second
15 case management order, as DOE has indicated, should be
16 the template hopefully for what you develop for both
17 the case management order, the protective orders, and
18 the affidavits of non-disclosure.

19 MR. EDWARDS: Yes, sir.

20 JUDGE MOORE: And again, using that as a
21 template, we would emphasize that it is the PAPO
22 Board's view that the requirements that people have to
23 comply with belong in the protective order and are
24 referenced then in the affidavit of non-disclosure,
25 not vice versa, the approach that you did in your last

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1 proposed protective order and affidavit of non-
2 disclosure to us.

3 MR. EDWARDS: Understood.

4 JUDGE KARLIN: And even more if the
5 substances of the process -- in as much substance I
6 think as possible. It might even be in the case
7 management order rather than even the protective
8 order. But, you know, the non-disclosure agreement is
9 not the place for all that material.

10 And while I'm on the subject, I think it
11 would be useful if we could ask you to submit your
12 proposal to us on the 12th, I guess, of December in
13 some WordPerfect format so that we might have it and
14 manipulate it if we so choose to try to tweak it a
15 little bit.

16 JUDGE MOORE: That would be in addition to
17 filing the EIE, if you wouldn't mind sending it to the
18 -- just send it to the PAPO that you're used to using
19 as a WordPerfect file. That would be helpful.

20 MR. EDWARDS: Yes, sir.

21 JUDGE MOORE: Is there anything further
22 that you would like to bring to our attention today?

23 MR. EDWARDS: I think Mr. Shebelskie has
24 one item, Judge Moore.

25 JUDGE MOORE: Mr. Shebelskie, please go

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1 ahead.

2 MR. SHEBELSKIE: Yes, sir, Your Honor. A
3 small housekeeping matter. You may remember at last
4 week's conference, at the beginning of the conference,
5 we discussed two matters about treating documents
6 currently on the LSN.

7 JUDGE MOORE: Yes.

8 MR. SHEBELSKIE: And we -- counsel
9 understood from the Board's comments that with respect
10 to the removal of previously indexed documents that we
11 had subsequently determined to be not documentary
12 material that we would proceed with the process of
13 posting the accession numbers, waiting a 60-day
14 period, and then they would be removed, assuming there
15 was no objection to any of them.

16 JUDGE MOORE: Yes.

17 MR. SHEBELSKIE: I understand that among
18 the discussions on the technical staff working on the
19 LSN project with DOE dealing with the LSN
20 administrator, there was some confusion as to whether
21 or not the Board was going to issue an order --

22 MR. SHEBELSKIE: -- before the 60-day
23 period could start? We just wanted a clarification on
24 that.

25 JUDGE MOORE: The Board will be issuing an

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1 order dealing with the subject of deletions on the
2 publically-available document collections on the LSN.
3 And will be mentioning the non-public portions of
4 parties' document collections in that order as well.

5 We hope to have that out next week and it
6 will cover the matters that we discussed and took
7 under advisement at the conference on the 13th.

8 MR. SHEBELSKIE: Very good. Thank you,
9 Your Honor.

10 And just as one last follow up on that, I
11 think the issue that it would be helpful to address in
12 that order is with respect to the accession numbers
13 that have been posted since, I believe, September 7th.
14 If the Board would specify -- if it would -- whether
15 the 60-day period starts on September 7th or the date
16 of issuance of this order.

17 JUDGE MOORE: Oh, we dealt with the 60
18 days when we spoke last May 18th. And I don't think
19 there should be any argument from the date they are
20 posted is when the clock begins to run.

21 MR. SHEBELSKIE: Thank you, Your Honor.

22 JUDGE MOORE: The 60 days that you dealt
23 with this past summer has come and gone for a first
24 batch -- we now learned I guess it was 4,000
25 approximately documents that was posted by the LSN and

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1 then you posted on your own DOE website the other
2 5,6000 accession numbers. That period has come and
3 gone. And I assume all those actions have been taken.

4 MR. SHEBELSKIE: Yes, sir.

5 JUDGE MOORE: Okay. Well, that same 60-
6 day period, I think it was always our contemplation,
7 ran from when it was posted. And so you don't need --
8 that clock isn't going to restart when we issue the
9 order for what is currently up on -- being posted.

10 MR. SHEBELSKIE: Thank you, Judge Moore.

11 JUDGE MOORE: Does anyone have any other
12 matters?

13 MR. SHEBELSKIE: No, Your Honor.

14 JUDGE MOORE: Then this conference is
15 adjourned. Again, we thank you for your cooperation.
16 We appreciate you trying to work this out. And we
17 look forward to the filing on December 12th. The
18 conference is adjourned.

19 (Whereupon, the above-entitled
20 teleconference was concluded at 10:32 a.m.)
21
22
23
24
25

CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: U.S. DOE High-Level Waste
Repository

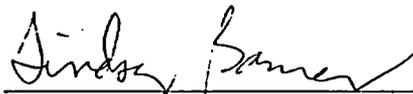
Pre-Application Matters

Docket Number: PAPO-00;

ASLBP No.: 04-829-01-PAPO

Location: Rockville, MD

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.



Lindsay Barnes
Official Reporter
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