

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 02/09/07

ATOMIC SAFETY AND LICENSING BOARD

SERVED 02/09/07

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

February 9, 2007

ORDER

On February 6, 2007, the Pre-License Application Presiding Officer (PAPO) Board issued an order setting a case management conference for 9:00 a.m. EST, Monday, March 5, 2007, and indicating that we would issue a separate order specifying the matters the participants should be prepared to discuss at the conference. This order specifies the matters to be addressed.

As indicated in our February 6, 2007, Order, the Licensing Support Network Administrator (LSNA) will provide us an update of the recent history and current status of the document processing activity with respect to the public and nonpublic document collections indexed on the Licensing Support Network (LSN). Should any of the participants have questions for the LSNA, they will be given a brief period to ask them.

The named participants should be prepared to discuss the following matters:

1. Document Certification and License Application Filing Dates

At the second case management conference on May 18, 2005,¹ and as confirmed in our subsequent case management order,² we directed the Department of Energy (DOE) to file a monthly status report setting forth its current best good faith estimate of when DOE would certify its LSN document collection and file its license application. In its June 1, 2005, first monthly status report, DOE estimated that it would certify its document collection on the Licensing Support Network (LSN) in August 2005 and that it would submit its license application six months after making its certification.³ In August 2005, DOE began hedging its estimate⁴ and then, in November 2005, DOE announced that, because of certain design changes in the waste canisters to be used at the repository, it was unable to estimate realistically when it would file its license application or certify its LSN document collection.⁵ This situation continued until April 2006 when DOE indicated that it expected to file a license application after the end of Fiscal Year 2007 and that it would “be better able to estimate the likely date for filing the License Application, and of certifying its LSN collection, when it completes a new baseline schedule,” sometime the coming summer.⁶ Thereafter, in a July 19, 2006, interim status report, DOE announced that it intended to certify its LSN collection by December 21, 2007, and submit its

¹ See Tr. at 308-310.

² See Second Case Management Order (Pre-License Application Phase Document Discovery and Dispute Resolution) (July 8, 2005) at 23 (unpublished) [hereinafter cited as SCM Order].

³ See The Department of Energy’s First Monthly Status Report Regarding LSN Certification and License Application Submittal (June 1, 2005) at 1-2 [hereinafter DOE First Status Report].

⁴ See The Department of Energy’s Third Monthly Status Report Regarding LSN Certification and License Application Submittal (Aug. 1, 2005) at 1-2.

⁵ See The Department of Energy’s Sixth Monthly Status Report Regarding LSN Certification and License Application Submittal (Nov. 1, 2005) at 1.

⁶ See The Department of Energy’s Eleventh Monthly Status Report Regarding LSN Certification and License Application Submittal (Apr. 3, 2006) at 1.

license application by June 30, 2008.⁷ Since July 2006, DOE's monthly status reports have repeated this same estimate.

We are now ten months from DOE's estimated date for certifying the availability of its documents on the LSN, and sixteen months from its estimated date for filing its license application. DOE should be prepared to announce its current best good faith estimate of (a) the most likely date on which DOE will certify its LSN document collection and file its license application and (b) the earliest date on which it might certify its LSN document collection and file its license application. DOE should also be prepared to address whether it can provide us and the other participants with 180 days advance notice of the date upon which it will certify its LSN document collection and file its license application. If DOE asserts that it cannot provide such notice, it should be prepared to explicate the reasons underlying the assertion.

2. Amendments to the Second Case Management Order

The Second Case Management Order, as amended,⁸ addresses, inter alia, the discovery of LSN documents for which a primary privilege claim or a secondary privilege claim is asserted. The order also addresses the treatment of employee concern program documents and allegation program documents (hereinafter both EPC documents). The Order sets forth schedules for (a) the filing of privilege logs by DOE for documents for which a primary privilege is asserted;⁹ (b) the filing of redacted versions of documents by DOE for documents for which a secondary privilege is asserted;¹⁰ and (c) the filing of redacted versions of EPC documents by

⁷ See The Department of Energy's Interim Status Report Regarding LSN Certification and License Application Submittal (July 19, 2006) at 1.

⁸ See Order (Regarding Requests to Reconsider Second Case Management Order) (July 20, 2005) (unpublished) [hereinafter July 20, 2005 Order].

⁹ See SCM Order at 12.

¹⁰ See id. at 16.

DOE and the NRC Staff.¹¹ These schedules were based upon DOE's representations that it would certify its LSN document collection in August 2005¹² and its representation as to the time it needed to prepare privilege logs and redacted versions of documents.¹³

As we noted at the October 13, 2005, case management conference, which was held just over three months after the schedules were established and at a time when DOE had yet to certify its LSN document collection, "in light of that delay those schedules are perhaps overly generous."¹⁴ Eighteen months have now elapsed since we issued the schedules in the Second Case Management Order and DOE still has not certified its document collection. Thus, to date, DOE has had fifteen more months to prepare privilege logs and redacted versions of documents than of the three months contemplated and specified in the original schedule.

All participants should be prepared to address an appropriate amended schedule for the preparation of privilege logs and redacted versions of documents.

3. Timing for Lifting Suspension of Supplementation Requirement

After initially certifying its LSN document collection in accordance with 10 C.F.R. § 2.1009(b), Part VI.A of the Second Case Management Order requires each potential party to supplement its collection by the first of each month and to certify that it has done so to the PAPO Board.¹⁵ In a February 9, 2006, Order, we suspended the supplementation requirement because of DOE's asserted inability at that time to estimate realistically when it would certify its

¹¹ See *id.* at 18; July 20, 2005 Order at 2.

¹² See Tr. at 9-10 (May 4, 2005); DOE First Status Report at 1-2; The Department of Energy's Second Monthly Status Report Regarding LSN Certification and License Application Submittal (July 1, 2005) at 1-2.

¹³ See SCM Order at 12 n.3.

¹⁴ See Tr. at 679.

¹⁵ See SCM Order at 21-22.

LSN document collection.¹⁶

Those participants who have certified their LSN document collection should be prepared to discuss the time at which we should reinstate the monthly supplementation requirement.

4. Participants' Proposed Third Case Management Order

Following discussions with us at the October 13, 2005, case management conference and our October 19, 2005, telephone conference, DOE, the NRC Staff, and the State of Nevada agreed, with our approval, to prepare a joint proposed third case management order dealing with the handling of protected sensitive information in the pre-license application phase of this proceeding.¹⁷ The proposed order addresses four categories of sensitive information: (a) Safeguards Information (SGI); (b) Unclassified Controlled Nuclear Information; (c) Official Use Only Information; and (d) Naval Nuclear Propulsion Information (NNPI).¹⁸ In addition the proposed order includes proposed protective orders and an affidavit of non-disclosure for use in using the various types of sensitive information.¹⁹ The month before the participants filed the joint proposed order, however, DOE announced it was unable to estimate when it would certify the LSN document collection or file its license application. Because it was unknown when, if ever, DOE would certify its document collection, we took no further action on the participants' December 19, 2005, filing.

On October 31, 2006, the Commission published a proposed rule dealing with access to SGI for which the public comment period closed January 2, 2007.²⁰ Similarly, we understand that there may be a future rulemaking detailing proposed procedures for intervenors in agency

¹⁶ See Order (Suspending Monthly Supplementation Requirement) (Feb. 9, 2006) (unpublished).

¹⁷ See Order (Schedule for Filings) (Oct. 25, 2005) (unpublished).

¹⁸ See Joint Proposed Third Case Management Order (Dec. 19, 2005).

¹⁹ See id.

²⁰ See 71 Fed. Reg. 64,004 (Oct. 31, 2006).

adjudications to gain timely access to certain documents containing sensitive unclassified information. Obviously, these agency actions may be highly relevant to the procedures set out in the joint proposed case management order as well as the procedures that we ultimately adopt for the handling of protected sensitive information.

Accordingly, the NRC Staff should be prepared to report on the current status and timetable for the final SGI rulemaking and the current status and timetable for completing any other agency activities dealing with protected sensitive information in agency adjudications. Additionally, the Staff as well as the other participants should be prepared to discuss the impacts (i.e., areas of agreement, inconsistencies, and conflicts) of the proposed and/or final SGI rule on the draft joint proposed case management order.

5. Additional Issues

A participant who wishes to raise additional issues at the conference should file a brief statement of the issue along with any other information necessary for a reasonable understanding of the issue by 5:00 p.m. EST, Monday, February 26, 2007. Although we will decide which, if any, additional issues merit discussion at the conference, all participants should be prepared to address the issues filed by other participants.

It is so ORDERED.

For the Pre-License Application
Presiding Officer Board

[Original signed by:]

Thomas S. Moore, Chairman
Administrative Judge

Rockville, MD

February 9, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

I hereby certify that copies of the foregoing PAPO BOARD ORDER (MATTERS TO BE DISCUSSED AT THE 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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