

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

May 16, 2007

**STATE OF NEVADA'S MEMORANDUM PROVIDING
ANSWERS TO QUESTIONS IN THE PAPO'S APRIL 19, 2007 ORDER**

The State of Nevada's ("Nevada's") answers to the Pre-License Application Presiding Officer's ("PAPO's") April 19, 2007 written questions are set forth below. As the April 19, 2007 Order required, Nevada answers questions 1, 4, and 5 of Paragraph A. In addition, as permitted by the Order, Nevada also offers comments on question 2 of Paragraph A.

Question 1

The PAPO correctly understands the pertinent provisions of the Proposed Third Case Management Order ("PTCMO"), but it is not clear to the State that the dispute resolution process in proposed 10 C.F.R. § 2.1010(b)(6)(i)(D) would necessarily add an additional 40 days, although the proposed changes to Part 73 could make the process for gaining access to safeguards information ("SGI") quite complex.

Under the PTCMO, when there is a request for access to SGI, the originator has 20 business days to make a need to know determination. If that determination is favorable, the requestor must submit the fingerprint forms and other information, and the originator then has 40

business days to conduct the criminal history check and to make the so-called trustworthiness and reliability determination, with the right of an indefinite continuation. The indefinite continuation may be needed because the requestor has the right to obtain and then challenge the FBI records, which may include a direct challenge to the agency providing the disputed information to the FBI (10 C.F.R. § 73.57(e)(2)), and responses to requestors' challenges by the information-forwarding agency (which could be a state agency) and the FBI may require an indefinite amount of time.

If access is denied by the originator, the next step is the good faith consultation, which includes preparation of a privilege log. No time is specified for this in the PTCMO. After the log is prepared, a motion for access may be filed. No time is specified in the PTCMO for the motion to be filed, but the PTCMO provides that an answer to the motion must be filed in 7 business days. However, proposed 10 C.F.R. § 2.1010(b)(6)(i)(D) provides that, for NRC Staff trustworthiness and reliability determinations, the motion shall be filed in 15 days after denial, NRC Staff may answer in 10 days, and the PAPO must rule in 15 days.¹ The proposed rule does not set the time for motions challenging Staff need to know or classification determinations, nor does it explicitly require good faith consultations or a privilege log, perhaps because the rule drafters failed to contemplate that a log would be needed in order to allow challenges to the SGI classification. Moreover, by providing that the PAPO may reverse NRC Staff trustworthiness and reliability determinations only because of an abuse of discretion, the proposed rule virtually guarantees numerous appeals to the Commission, because the rule drafters did not account for the fact that the Commission has plenary power over its own Staff, and a blanket refusal by the Commission to exercise such authority would both deny the participants due process and violate

¹ Proposed 10 C.F.R. § 2.1010 would not remove the power of the PAPO to establish different schedules under 10 C.F.R. §§ 2.307 and 2.319(k).

Section 147 a.(A) of the Atomic Energy Act, which requires NRC to impose only the minimum restrictions needed to protect SGI.

However, Nevada does not believe that the proposed rule will necessarily add an additional 40 days, provided it is not construed to require a separate track for litigation over NRC Staff trustworthiness and reliability determinations in addition to what the PTCMO would require.

There are several reasonable possibilities for expediting the process in the PTCMO. First, the requestor could submit the FBI fingerprint forms and other information needed by NRC Staff for its criminal history check and trustworthiness and reliability determination with its initial request, without waiting for Staff's need to know determination, effectively collapsing the two steps. Indeed, note 13 of the PTCMO mentions this possibility. However, this should be optional because the criminal history checks and trustworthiness and reliability determinations are expensive and intrusive, and a participant may not want to begin this process if NRC Staff may deny access on other grounds, making the other submissions possibly moot.

Second, potential parties may want to "pre-clear" people. This also should be optional because, without any information from NRC Staff or DOE describing the kinds of information that may constitute sensitive unclassified information, participants have no way of knowing who should be pre-cleared.

Third, NRC Staff should agree that, when it finds no need to know but the requestor appeals to the PAPO, it will continue to process any fingerprint forms and submissions with respect to its trustworthiness and reliability determinations. This will avoid delay if the PAPO reverses the NRC Staff on need to know.

Fourth, the PTCMO could be modified to provide for a separate, possibly earlier track for litigation before the PAPO on need to know, while any the criminal history check and trustworthiness and reliability determination are still pending before NRC Staff.

The process could be simplified, and likely expedited, if the PAPO (or Commission) would rule that, at least for the pre-licensing phase, Nevada and other governmental participants have a need to know any sensitive unclassified information with a header in the LSN. These participants have an unquestioned interest in the proceeding, any SGI represented by a header on the LSN is by definition relevant to the application, and there are no contentions to either limit the scope of relevant documents or to assess the qualifications of experts needing access.²

Finally, the process will be expedited to the extent that individuals are exempted from the criminal history check and trustworthiness and reliability determinations.

Question 2

(a), (b) and (d) Nevada interprets proposed 10 C.F.R. § 73.59(b)(4) in a manner consistent with the PTCMO; *i.e.*, as permitting an exemption from the fingerprinting and background check requirements (and related trustworthiness and reliability determination) for

² The PTCMO requires Nevada and other affected governments to show that the SGI is necessary to formulate contentions. Since any SGI represented by a header on the LSN was deemed relevant by the entity providing it, and any relevant information may support a contention, it is not clear to Nevada that this requirement is anything more than a bureaucratic formality designed to comport with prior NRC Staff practice of making case-by-case need to know determinations. Nevertheless, Nevada did not object to the requirement, or to the related requirement that the requestor have technical competence to evaluate the SGI, on the assumption that NRC Staff will act reasonably and not use these requirements to advance its litigating position in the proceeding. NRC Staff's requirement of a specific need to know cannot be reconciled with DOE's more reasonable requirement, as applicable to UNCI, in Section IV.D of the PTCMO. This gives rise to a legal question whether Staff's position can be sustained given the striking resemblance of sections 147 and 148 of the Atomic Energy Act, both of which require minimum restrictions. As the PTCMO notes, Nevada reserved the right to challenge the legality of Staff's need to know requirement in the pre-licensing phase, but recognized that further development of this issue, if necessary, should await future requesters and documents.

“individuals designated by a Governor of a State as representatives of that State.” PTCMO ¶ IV A 1.(d). This exemption would include both employee and non-employee representatives, consultants, experts, counsel, and assistants to the foregoing.

Proposed 10 C.F.R. § 73.59(b)(4) exempts “the Governor of a State or his or her designated State employee representative,” but it is not clear whether this means that the Governor’s representative must be a State employee or that the representative must represent a State employee designated by the Governor (for example, the Executive Director of the Nevada Nuclear Waste Project Office). The latter interpretation is supported by the language from the Statement of Considerations quoted by the PAPO. Moreover, the approach in the PTCMO is also permitted by other provisions in the proposed rule. The fingerprinting and background check requirements and related trustworthiness and reliability determinations are triggered by proposed §§ 73.22 and 73.23, both of which require fingerprinting and criminal history checks “[e]xcept as the Commission may otherwise authorize” and provide for trustworthiness and reliability determinations based on a background check “or other means approved by the Commission.” See §§ 72.22(b)(1), 72.22(b)(2), 73.23(b)(1) and 73.23(b)(2). Reliance on the State to designate only such individual representatives as may be trusted with SGI would clearly be something that the Commission could “otherwise authorize” and would be a “means approved by the Commission,” assuming that there is no automatic exemption in proposed § 73.59(b)(4).³ Moreover, these alternatives could be authorized by the PAPO because it has delegated authority under Part 73 (see 10 C.F.R. § 73.3 and the definition of “Commission” in § 70.4).⁴ Such an

³ Proposed 10 C.F.R. §§ 2.705, 2.709, and 2.1010 unaccountably fail to mention the exceptions in 10 C.F.R. § 73.5 and in proposed 10 C.F.R. §§ 73.22(b)(1), 73.22(b)(2), 73.33(b)(1) and 73.23(b)(2).

⁴ Of course, if necessary, the Commission may also exempt the Governor’s representatives under 10 C.F.R. § 73.5.

accommodation would seem a reasonable gesture of comity toward a respected sovereign state participant before the NRC.⁵

If the PAPO has any doubts about the Commission's intent, it should refer the PTCMO to the Commission for its consideration along with NRC Staff's recommended final rule.

(c) Nevada assumed that the power given to the Governor was non-delegable, because otherwise the language calling for the Governor to decide what State employee needed to be represented in the proceeding makes little sense.

Question 4

(a) Yes. Section III.A.1 of the PTCMO requires all originators of sensitive unclassified information, including SGI, to produce redacted versions, to the extent the sensitive unclassified information can reasonably be segregated from the non-sensitive.

(b) Nevada does not know whether any federal agency, other than NRC Staff and DOE, will be a potential party. Thus far, no other federal agency has indicated an interest in being a potential party, but it seemed wise to draft the PTCMO in a way that recognized this as a possibility.

(c) Nevada assumes that the provision in note 2 of the PTCMO would apply generally to all sensitive unclassified information in the NRC Staff's possession, including SGI, but originating with another federal agency. This means that NRC Staff, which would be subject to the PTCMO, will make the need to know determination after consulting with the originating

⁵ The preamble to the proposed Part 73 rule explains that it would be the Commission's policy that "certain persons would be deemed trustworthy and reliable by virtue of their occupational status." 71 Fed. Reg. 64008. This supports the language in the PTCMO. The preamble goes on to state here that "such persons are *generally* members of government or law enforcement agencies, who *in many cases* have undergone background checks as a condition of their employment." [Emphasis added] This recognizes clearly that background checks and government employment are not always pre-requisites for the exemption.

agency. If the NRC Staff follows the recommendation of the originating agency, but is unable or unwilling to defend that agency's position before the PAPO, the other federal agency would need to make a special appearance to present its position on access to the sensitive unclassified information it originated. In making a special appearance, it would become subject to the PTCMO, to the extent of that appearance. Note, however, that the PTCMO reserves on the question of whether NRC has the power to order the disclosure of sensitive unclassified information over the objection of the originator (other than the NRC). See PTCMO at p. 2 and Section V.C.3.

Question 5

Under the PTCMO, the privilege log “establishes that each identified document is entitled to be protected from disclosure,” without revealing protected information. PTCMO Paragraph I. L. PTCMO Appendix F similarly requires that privilege logs include sufficient information to “establish “[a] justification, without revealing the sensitive unclassified information, that the information qualifies as sensitive unclassified information.” Such justification would be based on the definitions of SGI, UCNI, NNPI, and OUO in PTCMO Section I. Nevada believes that, as a practical matter, this requires a *prima facie* case, to the extent this is possible without disclosing the information sought to be protected. Nevertheless, the term “*prima facie*” is not used in the PTCMO because, given the possibly sensitive nature of the information, and the corresponding public interest in protecting the information, it did not seem appropriate to require public disclosure solely because of a default in presenting a *prima facie* case in the log. However, if a privilege log fails to present a *prima facie* case, and a motion for public access is filed pursuant to Section V.C of the PTCMO, the originator would need to supplement its basis for withholding in its response to the motion. In such a case, Nevada

expects that the PAPO would grant the requester a right of reply under Section V.C.4; otherwise, the requester will not have a fair opportunity to present its case for disclosure. Ultimately, an originator who fails to carry its burden of proof in support of non-disclosure, either in the log or in its response to the motion, will be required to disclose the document on the LSN.


Respectfully submitted,

A handwritten signature in black ink, consisting of two large, overlapping loops followed by a long, horizontal stroke extending to the right.

Martin G. Malsch
Counsel for Nevada.

CERTIFICATE OF SERVICE

In accordance with the PAPO Board's Second Case Management Order of July 8, 2005, I certify that I have filed a true and correct copy of the above and foregoing State of Nevada's Memorandum Providing Answers to Questions in the PAPO's April 19, 2007 Order on the Electronic Information Exchange on this the 16th day of May, 2007.



Susan Montesi