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OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

June 4, 2007

Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
Attn: Rulemakings and Adjudications Staff

Subject: RIN 3150-AH57

Dear Madam Secretary:

Please accept the following as late comments by the State of Nevada in response to the NRC's notice of proposed rulemaking on protection of Safeguards Information ("SGI"), published in the Federal Register on October 31, 2006 (71 Fed. Reg. 64004). Nevada's comments focus on NRC's proposed trustworthiness and reliability determinations, and there is good cause for consideration of these comments because, until just a few weeks ago, Nevada had been assured by NRC Staff that it would exempt individuals designated by the Governor from such determinations, as the law allows. NRC Staff has now apparently changed its position.

First, Nevada urges the NRC to continue its previous policy of exempting from its trustworthiness and reliability reviews (and related fingerprinting and criminal history checks) those individuals designated by the Governor of a State as needing access to SGI, regardless of whether those individuals are State employees. This is a matter of respect and comity. The NRC should be able to trust the duly elected Governor of a Sovereign State to designate only those individuals who may be trusted with access to SGI.

Second, Nevada believes that the proposed 15-day deadline for a presiding officers decision in proposed 10 CFR §§ 2.709 and 2.1010 is not reasonable considering that the NRC Staff itself will not commit to any reasonable deadline for its own determination.

Third, Nevada believes that the "abuse of discretion" review standard in proposed 10 CFR §§ 2.709 and 2.1010 is unwise and unlawful. This proposal ignores the fact the

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Commission itself has plenary power over its Staff, so that a limited scope of presiding officer review will merely lead to an unnecessary and time consuming proliferation of appeals to the Commission to exercise its plenary power.

If the Commission itself were unwilling to entertain such appeals on a timely basis, the proposal will lead to a denial of parties' rights to a fair hearing and the assistance of counsel. This is because the proposal would then have the effect of giving Staff, as a party in an adjudicatory hearing, broad discretion to deprive an opposing party of both expert witnesses and legal counsel needed to present its case. This would make a mockery of the hearing process and would violate section 555 of the Administrative Procedure Act.

The proposal also confuses the roles of an adversary party and an independent adjudicator. Under the Administrative Procedure Act and Atomic Energy Act, the Commission may delegate adjudicatory decision power to a presiding officer (such as an atomic safety and licensing board), and define the scope of its review of that presiding officer's decision in a narrow fashion. However, when Staff participates as a party in an adjudicatory proceeding, it is not performing an adjudicatory function but a litigating function, and therefore there is no basis to limit the scope of review of any Staff decision. There will always be a concern that Staff's trustworthiness and reliability determinations will be part of its litigating strategy. This concern can be addressed only if the presiding officer or the Commission may exercise plenary power to reverse Staff.

There is no explanation why, on contested matters, Staff's safety reviews should be subject to plenary review, without an abuse of discretion review standard, while its trustworthiness and reliability determinations should be subject to an abuse of discretion review standard. Both categories of issues often involve matters of judgment, and there is no basis to distinguish between them.

Finally, section 181 of the Atomic Energy Act requires NRC standards to be the "minimum impairment of the procedural rights which would be available if...safeguards information ...were not involved." NRC offers no explanation how its abuse of discretion standard meets this stringent test. Indeed, since no similar standard applies to aspects of the NRC Staff's review that do not involve SGI, and the presiding officers and Commission can be equally trusted to safeguard SGI when they review Staff decisions, the proposed abuse of discretion cannot possibly be the minimum impairment.

Sincerely,

Robert R. Loux  
Executive Director