

August 14, 2007

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD**

|                                      |   |                                 |
|--------------------------------------|---|---------------------------------|
| <b>In the Matter of</b>              | ) | <b>Docket No. PAPO-00</b>       |
|                                      | ) |                                 |
| <b>U.S. DEPARTMENT OF ENERGY</b>     | ) | <b>ASLBP No. 04-829-01-PAPO</b> |
|                                      | ) |                                 |
| <b>(High Level Waste Repository:</b> | ) |                                 |
| <b>Pre-Application Matters)</b>      | ) |                                 |

**THE DEPARTMENT OF ENERGY’S RESPONSE TO THE COMMENTS  
OF OTHER PARTICIPANTS ON THE PROPOSED  
THIRD CASE MANAGEMENT ORDER**

On August 7, 2007, the Pre-License Application Presiding Officer (PAPO) Board issued an Order providing that any potential party that filed comments on the Proposed Third Case Management Order (PTCMO) could file a response to the comments filed any other potential party. This is Department of Energy’s (DOE) response to the comments of the State of Nevada and the Staff of the Nuclear Regulatory Commission.

1. Nevada comment on Definition of NNPI (Part I, Paragraph D, Page 1). Nevada’s proposed definition of NNPI generally tracks the definition that DOE proposed, with two exceptions. DOE believes that its proposed definition fulfills the objective behind Nevada’s proposed definition while obviating those two issues.

First, Nevada’s proposed definition continues to use the phrase “in the possession of or under the control of” the Naval Nuclear Propulsion Program. As explained in DOE’s comments, that phrase might be construed in a way that excludes derivative documents that reflect NNPI but that are prepared by other participants (which documents thus may not be “in the possession of

or under the control of’ the Naval Nuclear Propulsion Program). Nevada seemingly agrees that the protections and restrictions of the PTCMO should extend to derivative documents created by other participants that reflect NNPI. DOE’s proposed definition would eliminate any possible contrary argument. Alternatively, the Board could include a statement in the definitional section to the effect that the categories of SUI extend to documents prepared by participants that reflect SUI obtained in the course of the licensing proceeding.

Second, Nevada’s definition describes the Naval Nuclear Propulsion Program as a component of the Department of Defense (DOD) when it is more accurately described as a joint program of DOE and the Department of the Navy.

2. Nevada and NRC Staff comments on Definition of OUO (Part I, Paragraph E, Page 2).

The comments of Nevada and the NRC Staff on this definition corroborate the rationale for DOE’s proposed definition. Rather than trying to describe in the PTCMO all of the various categories of information that might qualify as OUO information, employing a definition that refers to FOIA Exemptions 2 and 3 without elaboration avoids these debates and encompasses whatever information qualifies under those exemptions, and no more. Also, the current proposed definition includes a sentence that excludes SGI, NNPI and UCNI from the scope of OUO information for purposes of the TCMO. DOE’s proposed definition, therefore, will not create confusion by potentially encompassing these other categories of SUI.

3. Redaction obligation (Part III, Paragraph B, Page 7). Nevada relies on a faulty premise in objecting to DOE’s comment to modify the redaction obligation by “good faith diligent effort” standard. Nevada treats the redaction obligation as a condition of LSN certification. The Subpart J regulations, however, do not require production of redacted documents as a condition of certification. Those regulations require that a bibliographic header only be made available for

privileged and other protected documents. 10 CFR § 2.1003(a)(4). Under Nevada's view, DOE could not make its LSN certification if a single SUI document in its LSN collection remains unredacted, even though the document could be obtained in unredacted form through a protective order in the interim. The Board previously recognized that the participants' certification obligations (including those of DOE) are subject to a good faith standard. *See* Order Granting Nevada Motion to Strike, LBP-04-20, 60 NRC \_\_\_\_ (Aug. 31, 2004) at 16. The Board should adhere to that view for the special situation posed by security sensitive information at the time of DOE's certification and adopt DOE's proposed language.

**Respectfully submitted,**

**U.S. DEPARTMENT OF ENERGY**

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| <b>Pre-Application Matter)</b>       | ) |                                 |

**THE DEPARTMENT OF ENERGY'S RESPONSE TO  
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I certify that copies of the foregoing THE DEPARTMENT OF ENERGY'S RESPONSE TO THE COMMENTS OF OTHER PARTICIPANTS ON THE PROPOSED THIRD CASE MANAGEMENT ORDER in the above captioned proceeding have been served on the following persons on August 14, 2007 by Electronic Information Exchange.

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