

# **Official Transcript of Proceedings**

## **NUCLEAR REGULATORY COMMISSION**

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OFFICE OF SECRETARY  
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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In the Matter of: : Docket No. PAPO-00

PAPO :

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Nuclear Regulatory Commission

Teleconference

Wednesday, October 8, 2008

BEFORE:

THOMAS MOORE, Chairman

ALEX KARLIN, Administrative Judge

ALAN ROSENTHAL, Administrative Judge

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9 On behalf of the State of Nevada:

10 MARTIN MALSCH, ESQ.

11

12 On behalf of Nye County:

13 MALACHY MURPHY, ESQ.

14

15 On behalf of the United States Department of Energy:

16 ALEX S. POLONSKY, ESQ.

17

18 On behalf of Nuclear Energy Institute:

19 MICHAEL BAUSER, ESQ.

20

21 ALSO PRESENT:

22 JEFF VANNIEL, Nye County

23

24

25

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P R O C E E D I N G S

12:01 P.M.

CHAIRMAN MOORE: We will proceed. With me is Judge Rosenthal and Judge Karlin.

As you should all be aware, the Commission in CLI 08-21 remanded the matter of protective order covering classified information to the PAPO Board to develop such a protective order.

The purpose of this phone call hopefully will be brief and that we would like to discuss with you how best to proceed at this point.

First question for the staff, can you give us the status of any outstanding security clearance applications applicable to this proceeding, please?

Would all speakers please identify themselves before speaking for the Court Reporter. Thank you.

MS. BUPP: This is Margaret Bupp for the NRC staff.

Last month we informed the Commission of the status of our outstanding security clearance requests. There hasn't been any substantive change in those since the last update to the Commission.

As it stands now for the State of Nevada, Mr. Malsch's security clearance application is

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1 currently with the Office of Personnel Management for  
2 its investigation. There's one party who has not get  
3 completed their paperwork to begin the OPM  
4 investigation.

5 Nye County has also submitted several  
6 security clearance requests. Those are in various  
7 stages. I don't have the list in front of me of who  
8 is in what stage, but they're all in process.

9 CHAIRMAN MOORE: Can you give us some idea  
10 of when the first one might be granted or denied?

11 MS. BUPP: A lot of it depends on when we  
12 get things back from OPM. I think Mr. Malsch will be  
13 first in line because he's furthest along in the  
14 process. As soon as we get the information back from  
15 OPM we'll act expeditiously on reviewing that  
16 information.

17 CHAIRMAN MOORE: Let's try a ballpark  
18 figure. Is it likely to happen in calendar 2008?

19 MS. BUPP: It's been at OPM for a while  
20 now, so they should have it back to us within calendar  
21 year '08. If that happens, we will act on it within  
22 calendar year '08.

23 CHAIRMAN MOORE: With that definitive  
24 answer, we'll move on.

25 ADMIN. JUDGE KARLIN: May I ask a

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1 question?

2 CHAIRMAN MOORE: Certainly, Judge Karlin.

3 ADMIN. JUDGE KARLIN: This is Judge  
4 Karlin.

5 Ms. Bupp, perhaps you can tell us, how  
6 long has it been pending at OPM?

7 MS. BUPP: I don't have that directly in  
8 front of me but it has been a while, several months.

9 ADMIN. JUDGE KARLIN: Perhaps Mr. Malsch  
10 can fill us in on that.

11 Do you know, Mr. Malsch?

12 MR. MALSCH: I don't know about the  
13 internal processing, but it seems to me my application  
14 was filed well over a year ago.

15 ADMIN. JUDGE KARLIN: All right, thank  
16 you.

17 ADMIN. JUDGE ROSENTHAL: This is Alan  
18 Rosenthal.

19 Ms. Bupp, is there any normal period of  
20 time that OPM takes or more precisely is there any  
21 kind of understanding between the NRC and OPM as to  
22 what period of time they're going to take or what  
23 period of time they're going to try -- within which  
24 they're going to try to complete the process?

25 MS. BUPP: OPM generally takes around nine

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1 months as a ballpark, but it can take longer, it can  
2 take less time, depending on how long their  
3 investigation takes. They process all NRC requests  
4 just like they would from any request from any other  
5 federal agency.

6 ADMIN. JUDGE ROSENTHAL: And there's no  
7 priority being given to these matters?

8 MS. BUPP: There's no priority being given  
9 to any matter for any request from any other federal  
10 agency.

11 ADMIN. JUDGE KARLIN: This is Judge Karlin  
12 again.

13 Ms. Bupp, we had a oral argument a year or  
14 more ago with regard to the time it would take OPM to  
15 process some of these applications in the context of  
16 NNPI, UCNI, SGI, that sort of thing. Is this the same  
17 time frame, same process or is there a different  
18 process when you're dealing with classified?

19 MS. BUPP: This is a different process.  
20 It is a more detailed investigation and therefore it  
21 does take longer time than the time frame that we were  
22 discussing with regard to SGI information.

23 ADMIN. JUDGE KARLIN: All right, thank  
24 you.

25 CHAIRMAN MOORE: This is Judge Moore. The

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1 Board is concerned about impacting any of the parties  
2 or potential parties filing contentions which should  
3 be happening in the not too distant future. As we  
4 understand it, a notice of hearing could issue  
5 literally at any time. That being the case, we would  
6 like to hear from the parties how they wish to proceed  
7 with this matter.

8 Let's start with DOE, please.

9 MR. POLONSKY: This is Alex Polonsky,  
10 Your Honor.

11 We haven't yet addressed this issue, but  
12 the parties have been working behind the scene, and  
13 certainly I should clarify that DOE, the State of  
14 Nevada and the NRC staff have been conferring over the  
15 past weeks about how to incorporate changes into the  
16 proposed protective order based on the directive from  
17 CLI 08-21.

18 I believe and Mr. Malsch and Ms. Bupp will  
19 correct me, but I believe we have agreement on  
20 proposed text changes that we could submit to the  
21 Board, that if the Board enacted we would all be  
22 satisfied with it and we believe it would meet the  
23 directive from CLI 08-21.

24 MR. MALSCH: This is Marty Malsch. I can  
25 also state that I think we have agreement on the form

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1 of a protective order addressing classified  
2 information. But in specific response to the Board's  
3 question, all I can say would be that we had  
4 previously suggested to the Commission, and I'm not  
5 sure they've acted on that, one way or the other, that  
6 in the event that the Notice of Hearing is published,  
7 but applications for security clearances are still  
8 pending, the only solution would be to postpone the  
9 filing of contentions with respect to classified  
10 information until the security clearance applications  
11 have been granted or denied.

12 CHAIRMAN MOORE: Or well, Mr. Malsch, they  
13 could be filed under 309, 10 CFR 309, is that not  
14 correct?

15 MR. MALSCH: That's possible.

16 CHAIRMAN MOORE: Okay, let's -- do any  
17 other -- does the staff wish to be heard on this?

18 MS. BUPP: On which issue, the agreement  
19 on the protective order or the --

20 CHAIRMAN MOORE: No, on how you propose we  
21 proceed?

22 MS. BUPP: With the protective order?

23 CHAIRMAN MOORE: Correct.

24 MS. BUPP: As Mr. Polonsky and Mr. Malsch  
25 stated, we have reached an agreement between DOE,

1 Nevada, and the staff as to language that could be  
2 either removed or added to the previous draft  
3 protective order that would be acceptable to all the  
4 parties.

5 CHAIRMAN MOORE: The Board is troubled not  
6 only by that, the language specifically in paragraph  
7 five which can be deleted to remove -- it's a  
8 relatively simple matter, the question that the  
9 Commission roped off and take it out of the protective  
10 order, but this protective order is not parallel and  
11 in line with the protective orders and case management  
12 orders that were issued by the PAPO Board for other  
13 matters such as UCNI and NPI and OUO. And it seems to  
14 us that since obviously in the Commission's decision  
15 they foresaw that this protective order would have  
16 utility beyond the moment, but throughout the Yucca  
17 Mountain proceeding that it makes much more sense to  
18 have a case management order and a protective order  
19 that are parallel and in line and consistent with an  
20 approach with those that have gone before, for  
21 example, the PAPO's third case management order and  
22 the three protective orders as appendices to that case  
23 management order.

24 So we're concerned that you're creating  
25 something that will be more difficult and not in sync

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1 with the way the process has gone to date and will  
2 continue to go as Yucca Mountain goes forward.

3 Does DOE wish to speak to that?

4 MR. POLONSKY: Your Honor, this is Alex  
5 Polonsky. We'd like to hear a little bit more, if you  
6 would not mind, telling us what those specific  
7 concerns are. We've used the protective order for  
8 classified information as being different because the  
9 level of information is different and requires  
10 different treatment and different safeguards,  
11 procedural safeguards. But with that --

12 (Off the record comment.)

13 CHAIRMAN MOORE: I am sorry, Mr. Polonsky,  
14 we have a parallel system so the public can hear the  
15 conference, but not be heard, but apparently one of  
16 them has just interrupted us so one second while we  
17 get it straightened out.

18 We'll proceed. Specifically, Mr.  
19 Polonsky, we are well aware that the standards for  
20 classified information under subpart I of part 2 of  
21 the Commission's regulations are different. However,  
22 we don't see that in and of itself as any substantial  
23 reason why we shouldn't make the process and the  
24 protective order parallel to the ways for UCI, NNPI,  
25 and OUO, and presumably if the PAPO Board or one of

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1 the Yucca Mountain boards deals with safeguard  
2 information downstream that would also be the goal.

3 ADMIN. JUDGE KARLIN: This is Judge  
4 Karlin, if I may. We went to some effort before your  
5 time, Mr. Polonsky with Mr. Shebelskie and others to  
6 work out the form for case management orders for  
7 primary privileges, secondary privileges, NNPI, UCNI,  
8 OUO, etcetera, and each of them had a form which  
9 involved a case management order and then an attached  
10 protective order, and then an attached nondisclosure  
11 agreement. So there is an administrative efficiency  
12 for us and perhaps for the remainder of this  
13 proceeding to approach it this, classified  
14 information, in the same way.

15 So I think our concern is fixing this  
16 protective order is not merely a matter of adding one  
17 sentence which says pursuant to CLI 08-21. This will  
18 not prejudice the following two issues. And we also,  
19 I think, have concerns that this protective order  
20 basically has no role for the presiding officer to do  
21 anything except to point a -- what do you call it --  
22 a PSO, a proceeding security officer, who is a paper  
23 shuffler and all of the decisions and activities are  
24 with the FSO. And so I'm not sure if there's any  
25 dispute resolution mechanisms if, for example, the FSO

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1 does not deliver or upon some required action within  
2 10 days making a determination of a need to know or  
3 making something else. We think that the case  
4 management order format provided a mechanism for such  
5 issues to be presented, resolved and then if not  
6 resolved, presented to the presiding officer.

7 I think that when we ask whether or not  
8 the parties are prepared to revise the protective  
9 order in the next few weeks, we don't mean just by  
10 adding a sentence that says CLI 08-21 will be abided  
11 by. We have some other concerns and I wonder if, for  
12 example, Nevada or any of the other parties have any  
13 such concerns?

14 Mr. Malsch?

15 MR. MALSCH: I guess the issue for us was  
16 perhaps we had thought that we leave all these issues  
17 open until a dispute arose rather than being specific  
18 about the context in which the dispute would be raised  
19 before a licensing board, but I guess I see your  
20 point. There really is no reason at this point to  
21 leave those issues unspecified. Granted, there  
22 remains the issues that the Commission specified as  
23 open matters, but as I said, the context of procedures  
24 for reaching that point I guess could be specified  
25 more along the lines of the other case management

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1 orders. So I think that would be an improvement.

2 ADMIN. JUDGE KARLIN: And if the issue is  
3 really not ripe in the sense that there are -- no one  
4 is close, it appears, to even getting a clearance, is  
5 this the best time to sort this matter out or try to  
6 sort this matter out when perhaps Nevada will be busy  
7 preparing contentions and the other party then  
8 responding to those contentions, is it something that  
9 needs to be resolved now?

10 I know that DOE mentioned there was some  
11 urgency in its May 30 motion and that did seem to make  
12 some sense at that time, but now that the Commission  
13 did not act until September 8th and the notice of  
14 hearing is imminent, apparently, I'm not sure whether  
15 the urgency has lapsed and whether or not this can be  
16 set off until your work on contentions and answers to  
17 contentions is dealt with.

18 MR. POLONSKY: Your Honor, this is Mr.  
19 Polonsky, if I may?

20 ADMIN. JUDGE KARLIN: Yes.

21 MR. POLONSKY: My understanding of the  
22 clearance process is that Ms. Bupp may find out  
23 tomorrow that OPM has approved Mr. Malsch's security  
24 clearance and the fact that he is in the pipeline  
25 means that we ought to be moving forward to finalize

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1 a protective order so that once that clearance is  
2 granted the State of Nevada can start the process of  
3 getting access to the classified information. Without  
4 the protective order in place, it would just further  
5 delay the drafting of contentions on classified  
6 information to the extent that Nevada feels that it is  
7 going to be drafting contentions after it has had  
8 access to that information.

9 ADMIN. JUDGE KARLIN: But it would  
10 certainly have the option of 2.309(f)(2), new and  
11 amended contentions, or even 2.309(c), if timeliness  
12 was not appropriate. I suspect that additional  
13 contentions will be filed throughout the pendency of  
14 this proceeding. This would just be one of that sort  
15 of new or amended contention.

16 Mr. Polonsky?

17 MR. POLONSKY: DOE still believes that it  
18 is in everybody's interest to have the contentions  
19 that can be filed earlier filed earlier and even if  
20 there is, for example, a hearing notice filed and  
21 three weeks later security clearances are granted, we  
22 wouldn't see any reason why Mr. Malsch or others in  
23 Nye County, for example, could not start the process  
24 of looking at classified information and drafting  
25 contentions and if they need to file them as late

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1 filed or otherwise, it's the availability of the  
2 information that starts the clock as far as I  
3 understand it, for filing those new contentions.

4 CHAIRMAN MOORE: Mr. Malsch, do you agree  
5 with Mr. Polonsky or do you think that 309(f) and  
6 309(c) are adequate to protect your interests?

7 MR. MALSCH: Well, I think they could be  
8 adequate to protect our interests, but I think our  
9 view would be that looking at prior Commission  
10 decisions on the due date for contentions, the clear  
11 concept is is that we get 60 days from the Notice of  
12 Hearing to file all of our contentions with the  
13 assumption being that all the information is available  
14 for 60 days.

15 Now -- and I think that would be also that  
16 we should have 60 days availability for classified  
17 information. Now that doesn't mean that we couldn't  
18 begin looking at them earlier, but I do think we need  
19 the full 60 days. Now perhaps 2.309 would take care  
20 of that, but I do think on a going in proposition our  
21 position would be we want the full 60 days.

22 CHAIRMAN MOORE: Well, Mr. Malsch, the  
23 Board does not want to be concerned about an impact on  
24 any of the parties or potential parties if the parties  
25 or potential parties are not concerned about that

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1 impact. We didn't want to to distract any of the  
2 parties from the task at hand in filing contentions  
3 once the Notice of Hearing is filed, indeed a process  
4 that is ongoing now, we suspect and to pull them away  
5 to do this kind of task. Will it prejudice you to  
6 turn your attentions to other matters at this time if  
7 we set a schedule for the parties to prepare a joint  
8 proposed case management order and a joint proposed  
9 protective order?

10 MR. MALSCH: I think we would be prepared  
11 to do that. I do think that the task is pretty  
12 straight forward, based upon language of the previous  
13 case management order. I don't think it's going to be  
14 very complicated.

15 I guess I just request that in view of our  
16 on-going efforts to draft contentions that do we take  
17 the first crack at it and send it around for comment.  
18 If that's the way the process unfolded, I think we  
19 could accommodate --

20 CHAIRMAN MOORE: Do any of the other  
21 parties on the line, potential parties to the high  
22 level waste proceeding object to proceeding that way?

23 MR. MURPHY: This is Mr. Murphy from Nye  
24 County, Your Honor. I think that's perfectly  
25 appropriate the way to proceed. In all candor, this

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1 is probably an interesting and intellectual discussion  
2 from Nye County's perspective. We do have  
3 applications in for classified information, but  
4 there's a very, very slim likelihood that we would  
5 ever be filing contentions in those areas.  
6 Nevertheless, I think what's been outlined is an  
7 appropriate way to proceed

8 CHAIRMAN MOORE: Clarke County, do you  
9 have anything on this? NEI?

10 MR. BAUSER: Nothing to add.

11 CHAIRMAN MOORE: Well, that being the  
12 case, staff, do you object to proceeding at this  
13 point?

14 MS. BUPP: No, the staff would not object  
15 to proceeding in that direction, Your Honor.

16 CHAIRMAN MOORE: Well, then is, Mr.  
17 Polonsky, is two weeks adequate for you to draft a  
18 proposed case management order, joint proposed case  
19 management order and joint proposed protective order  
20 and see if all of you can agree and then submit it to  
21 us or do you want a longer period of time?

22 MR. POLONSKY: Your Honor, I think we can  
23 move expeditiously. I think we've had good  
24 cooperation with the State of Nevada counsel and with  
25 staff counsel. Whether two weeks is adequate I guess

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1 depends on all of our schedules, but I think within a  
2 couple of weeks we could finalize something or at  
3 least inform the Board where we disagree.

4 ADMIN. JUDGE KARLIN: This is Judge  
5 Karlin, would it be appropriate for us to say that  
6 perhaps DOE could develop a draft and exchange it or  
7 send it to the other potential parties within two  
8 weeks and then perhaps another two weeks for you to  
9 submit some joint measure that you all agree to or are  
10 unable to agree to, so that would be two weeks for DOE  
11 to send it to the other potential parties and four  
12 weeks from today to send it to us, whatever you've  
13 come up with.

14 I mean you would need to have a mechanism  
15 whereby I think all potential parties, not just the  
16 big three could discuss and comment. Whether or not  
17 they actually do may be less likely, but between  
18 sending it out in two weeks to the other potential  
19 parties and sending it to us several weeks later,  
20 there would need to be presumably a mechanism for  
21 discussion and opportunity for all potential parties  
22 to comment the way Mr. Shebelskie's firm did with the  
23 case management orders in the past.

24 So I think we really are talking about two  
25 weeks to get it out to the other parties, potential

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1 parties and two weeks minimum for the potential  
2 parties to submit something to us.

3 Would that work, Mr. Malsch?

4 MR. MALSCH: I think that works for us.

5 CHAIRMAN MOORE: Mr. Polonsky?

6 MR. POLONSKY: I would hope that would  
7 work. I hope we could do it in a shorter time frame,  
8 but we appreciate being given the extra time.

9 CHAIRMAN MOORE: Well, we are happy to  
10 make it shorter.

11 MR. POLONSKY: Well, it's nice to have the  
12 outer bounds to use if I need it, but --

13 MR. MALSCH: All right, we'll remember  
14 that when you ask for an extension.

15 (Laughter.)

16 CHAIRMAN MOORE: Then we will expect a  
17 joint proposed draft case management order and  
18 protective order to be filed Wednesday, November 5th.

19 ADMIN. JUDGE KARLIN: And that would  
20 include the nondisclosure agreement because that's the  
21 basic mechanism of all of our prior orders, a case  
22 management order, a protective order, and a  
23 nondisclosure agreement.

24 CHAIRMAN MOORE: Do any of you have any  
25 questions?

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1 MS. BUPP: The staff has none, Your Honor.

2 MR. MALSCH: And Nevada has done.

3 CHAIRMAN MOORE: Then if no one has any  
4 further questions, we will conclude this and we thank  
5 you and look forward your joint proposed protective  
6 order, case management order, and nondisclosure  
7 agreement.

8 Mr. Polonsky, the Board fully intends  
9 before you circulate it to have fully consulted with  
10 the other parties to try to have as much agreement so  
11 that your initial effort is essentially the outlines  
12 of where you're going to take it, not just to spring  
13 something on them that you know they will not accept.

14 MR. POLONSKY: This is Mr. Polonsky.  
15 Understood. I mean we all, at least Nevada and the  
16 staff and DOE have agreement on the protective order  
17 itself. And so I think the focus will be on the case  
18 management order.

19 CHAIRMAN MOORE: Okay, now be sure that  
20 you scrutinize closely PAPO's third case management  
21 order and protective order so that you see the form  
22 and format and the theme and scheme that underlies  
23 those.

24 Judge Karlin?

25 ADMIN. JUDGE KARLIN: One other thing that

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1. we've done in the past here and I'm not sure whether  
2. it's appropriate or necessary is that you know we have  
3. a date now set for proposed -- a joint proposed or  
4. whatever as best as you can come up with, protective  
5. order, a case management order. Should we have -- if  
6. there are parties who have some objection or other  
7. concern about that, should we set a date five days  
8. later for them to file whatever comment or objection  
9. or concurrence that they might have?

10. CHAIRMAN MOORE: That would be filed on  
11. the same date?

12. ADMIN. JUDGE KARLIN: Well, it might be  
13. able to if they have seen it ahead of time, but if  
14. they're working up until the deadline to come up with  
15. this, there may not be opportunity to review it and to  
16. provide their comment. I would suggest we consider a  
17. five-day later -- five calendar days if that works out  
18. for any other potential party to submit comments,  
19. objections or concerns about the proposed order.

20. CHAIRMAN MOORE: All right, then Monday,  
21. November 10th -- that's probably a federal holiday.  
22. Tuesday, November 11th. Any parties that can't join,  
23. they must set forth in a filing with the Board their  
24. objections to the otherwise draft order.

25. MS. BUPP: Your Honor, Veterans Day is

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1 always on November 11th. It doesn't move to be  
2 observed.

3 CHAIRMAN MOORE: Then it will be due on  
4 Monday, the 10th.

5 (Laughter.)

6 So that we're clear on the dates, the  
7 proposed draft, protective order, case management  
8 order and nondisclosure agreement will be due November  
9 5th and anyone that cannot join that will have their  
10 objections in writing to the Board on Monday, November  
11 10th.

12 If there's nothing else, then we will  
13 stand adjourned. Thank you very much.

14 (Whereupon, at 12:30 p.m., the  
15 teleconference was concluded.)  
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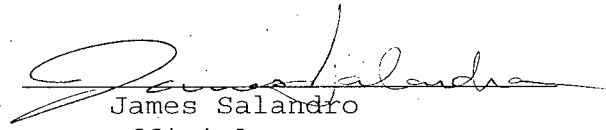
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in the matter of: PAPO

Name of Proceeding: Teleconference

Docket Number: PAPO-00

Location: (n/a)

were held as herein appears, and that this is the  
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James Salandro  
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