

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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

November 26, 2008

ORDER
(Questions for Case Management Conference)

On November 20, 2008, the Pre-License Application Presiding Officer (PAPO) Board issued an order scheduling a case management conference at 1:00 p.m. EST on December 2, 2008¹ to discuss the joint proposed sixth case management order, draft protective order, and appendices (Proposed CMO) submitted by the United States Department of Energy (DOE) on November 5, 2008.² The Proposed CMO deals with access to, and protection of, classified information. The purpose of the instant order is to set forth some of the issues and questions the parties and potential parties should be prepared to answer and discuss during the case management conference.

A. Status of Security Clearance Applications for Classified Information

1. Malsch Application: What is the current status of the security clearance application that Nevada filed on behalf of Mr. Martin Malsch? What actions, if any, remain before it can be granted?

¹ This conference will be webstreamed at the following link:
<http://www.visualwebcaster.com/event.asp?id=53642>.

² Order (Notice of Case Management Conference) (Nov. 20, 2008) (unpublished).

2. Bell Application: What is the current status of the security clearance application that Nevada filed on behalf of Dr. Jimmy Todd Bell? What actions, if any, remain before it can be granted? What are Dr. Bell's areas of expertise and technical competence?
3. Other Applications: Nevada indicates that it is not pursuing any of the other security clearance applications that it has previously filed. Please confirm. Does Nevada intend to pursue any other security clearance applications?
4. Additional Hurdles: If the security clearances are granted to Mr. Malsch and Dr. Bell, are there any additional actions or approvals that must be met before these individuals will have access to the classified information (e.g., facility clearance for storage of classified information)? What is the status of any such additional actions or approvals? How long will they take?
5. Other Potential Parties: Has any other party or potential party submitted any security clearance applications for classified information? Please summarize the status of any such applications.

B. Practical Implementation of Proposed CMO

1. General Applicability: Under the Proposed CMO any "Party . . . who wishes to apply to the NRC for a security clearance to access Classified Information in this proceeding must submit its application within 14 days of the issuance of this Order." Proposed CMO at 4. Assume that the Board issues the Proposed CMO on December 3, 2008.
 - a. Exclusion: Does this provision exclude everyone except the State of Nevada, Affected Units of Local Government, and Affected Indian Tribes from being eligible to apply for security clearances?
 - b. Applications within 14 Days: Have any persons, other than Nevada, filed any applications for security clearance or indicated that they plan to do so?

Have any of said entities indicated that they plan to file such applications within the 14 day window specified in the Proposed CMO? Please summarize and explain.

- c. 14 Day Deadline: What is the purpose of the 14 day deadline? As a practical matter, is Nevada the only entity eligible to obtain classified information under the Proposed CMO?
 - d. Post-Contention Order: Assume that the PAPO Board issues the Proposed CMO on December 23, 2008, i.e., after the initial petitions to intervene are due. Would the answers to the foregoing questions change? In what way? Would Nevada still be the only eligible entity?
2. Redaction: Under the Proposed CMO access to redacted documents is limited to a "Party whose Counsel or Representative has an application for a security clearance pending before the NRC and who wishes to formulate contentions based upon the Classified Information" Proposed CMO at 7. Such a Party must "Within 14 days of the issuance of this order, identify in writing to the PSO the specific document(s) that it wants to review in redacted form." Id. Assume that the Board issues the Proposed CMO on December 3, 2008.
- a. Only Nevada: Is Nevada the only entity eligible ("Party" that has requested a security clearance) to request a redacted document? Does this provision exclude all entities that have not requested a security clearance on or before December 3, 2008? Does this provision exclude all environmental groups, private persons, or non-governmental entities from ever requesting or receiving any redacted documents? Is this the intent of DOE, NRC and Nevada? If not, please explain how this provision will operate.
 - b. Party Status Prerequisite: Is the requirement that a person be a Party

before it can request a redacted document inconsistent with the point that access to the redacted document may be the pre-requisite to being a Party (e.g., filing a contention based on the redacted document)? Please explain how this provision will operate?

- c. Security Clearance Application Prerequisite: Redaction eliminates classified information from a document and allows non-cleared individuals to read a document. Why should a person be required to file an application for a security clearance before he or she can obtain access to non-classified redacted documents? Isn't the idea of redaction to dispense with the security clearance application process?
- d. Precursor Assumption: Why should the Board accept the proposition that "The Board views requests for non-classified redacted versions of classified documents as a precursor to . . . ultimately reviewing the classified documents." Isn't the prime purpose of redaction to avoid the need to review the classified document?
- e. Security Clearance as a Bar: The Proposed CMO specifies that a "Party that has a Representative or Counsel that holds an 'L' or higher security clearance and has a 'need to know' may not request redaction of classified information." Id. at 8. Isn't Nevada the only entity that meets these criteria? Is Nevada simultaneously (i) eligible to request a redacted version (see 2.A above) and (ii) prohibited from requesting a redacted version per section III.G of the Proposed CMO? Please explain.

- 3. Availability of Redacted Documents: Redacted documents, by definition, are non-classified documents that have had all of their sensitive information excised. Under our prior case management orders, redacted documents are made available automatically. Please explain why the same principle should not apply

here. Can special provisions be made for offline access, as we did with regard to Employee Concerns File documents?

4. Privilege Logs: Under our prior case management orders, potential parties are required to provide a privilege log that identifies (without revealing any sensitive information) the existence of documents claimed to be privileged and exempt from disclosure. Please explain why the same principle should not apply here.
5. Identification of Specific Document: The Proposed CMO states that redacted documents will only be provided if the party identifies the “specific document(s) it wants to review in redacted form” within 14 days of the issuance of the order.
 - a. Unknown Documents: How will a Party know of the existence of, and thus identify and request, such a “specific document”?
 - b. Expiration in 14 Days: How will this provision operate with regard to classified documents that arise after the 14th day? Does the opportunity to request redacted documents expire on the 14th day? How will a Party know that a classified document containing new and materially different information (see 10 C.F.R. § 2.309(f)(2)(I) and (ii)) has arisen? How can a Party request a non-classified redacted version of such a document?. What time-deadlines apply to any such request?
 - c. Privilege Log: Doesn’t the foregoing requirement emphasize the need for a regularly supplemented privilege log or some other listing of documents claimed to be classified? Please explain.
6. Deadlines for Production of Document: What is the time frame within which DOE must make the redacted version of a document available? Why does section III.5 of the Proposed CMO place the burden on the requestor, when it is DOE that is late?
7. Need to Know/Competence: Under the Proposed CMO, who decides whether a

Requestor has a “need to know” the classified information? The originating agency? See Proposed CMO at 11. Who decides whether the Requestor has the “technical or legal competency necessary to evaluate the Classified Information”? Id. at 9. What is the authority of the Presiding Officer Board and/or Commission in such matters?

8. Presiding Officer Role: What is the time frame within which DOE must respond to a request and provide access to classified information under section V of the Proposed CMO? What is the authority of the Presiding Officer Board (whether PAPO or subsequent Boards) in such matters?

C. Limit Proposed CMO to Nevada?

It appears that the State of Nevada is the only entity pursuing or requesting access to classified information at this time. Although Nevada has agreed to the Proposed CMO, it appears that no other potential requester has actively participated in its development. Yet the Proposed CMO sets some universal rules and criteria that may be confusing, difficult, and perhaps impossible for other parties and potential parties to meet. Given this situation, would it be sufficient and more appropriate to clarify that the Proposed CMO only addresses and resolves Nevada’s requests for access, i.e., the actual matter before us. Wouldn’t this better accord with the Commission’s advice to defer non-ripe matters unless and until there is a “live controversy”? CLI-08-21 at 3 and 5. Rather than attempting a global solution, isn’t it more prudent for the Board to issue a case management order that simply resolves the specific and concrete issues related to Nevada’s access to classified information, and let all other matters be

reserved until a specific request and/or controversy arises? The Board is especially interested in input from potential parties other than Nevada, DOE, and the NRC Staff on this question.

It is so ORDERED.

For the Pre-license Application
Presiding Officer Board

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 26, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (QUESTIONS FOR CASE MANAGEMENT CONFERENCE), issued November 26, 2008, have been served upon the following persons by Electronic Information Exchange.

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