



Officer (PAPO) Board for consideration, subject to certain identified limitations.

## II. DISCUSSION

DOE styled its motion as “partially unopposed.”<sup>3</sup> Thereafter, the State of Nevada filed an answer in which it informed the Commission that DOE misstated Nevada’s position on the DOE Motion.<sup>4</sup> Specifically, Nevada stated that it authorized DOE to represent that Nevada did not object to the proposed Protective Order, subject to the following qualification:

Nevada reserves the right to argue (notwithstanding language in the draft order) that DOE, by submitting its application to the NRC, submits to NRC authority and jurisdiction, including NRC authority to order DOE to disclose classified information to cleared representatives of Nevada over the objection of DOE as the originating agency, or to determine that information DOE deems classified is not classified.<sup>5</sup>

It appears, then, that two fundamental points of contention have emerged regarding the proposed Protective Order. First, there is a potential dispute over whether the Commission has the authority to review, and potentially overturn, the classification determinations of other federal agencies – here, DOE and the Department of Defense. Second, there is a potential dispute over whether the Commission has the authority to direct DOE to disclose classified information to cleared representatives of Nevada over

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<sup>3</sup> DOE Motion at 2. Specifically, DOE stated, “DOE has already consulted and received approval on the attached proposed Protective Order’s language from the NRC Staff, Churchill County, Esmeralda County, Lander County, Mineral County, and the Nuclear Energy Institute. Lincoln County and Eureka County take no position. The State of Nevada has one concern, with Nye County and the State of California concurring.” Regarding Nevada’s concern, DOE further stated, “Nevada contends that the NRC can reverse a DOE or Navy determination that a document contains classified information.”

<sup>4</sup> *State of Nevada’s Response to DOE’s Partially Unopposed Motion for Protective Order* (June 3, 2008)(Nevada Answer).

<sup>5</sup> Nevada Answer at 2.

DOE's objection as the originating agency.<sup>6</sup> Nevada points out that these issues "should be deferred until there is an actual controversy over a specific document request . . ."<sup>7</sup>

We agree. The disputed issues raised in the DOE Motion and the Nevada Answer are not ripe for consideration at this time. The NRC Staff's acceptance review of the application is currently under way. Should the Director of the Office of Nuclear Material Safety and Safeguards reject the application, the Commission will have no application before it for consideration, and DOE's Motion will be moot.<sup>8</sup> If, however, the application is accepted for review, and a notice of hearing issues, then access to classified information (Restricted Data or National Security Information), as well as the potential introduction of classified information into the proceeding, would be governed by the procedures in 10 C.F.R. Part 2, Subpart I.<sup>9</sup> Potential disputes of the sort anticipated by Nevada appropriately would be resolved in that context following the commencement of a proceeding.

Moreover, in the absence of an actual dispute over one or more requested documents, a decision now on these anticipated disputes would amount to an "advisory opinion." As a general matter, we disfavor the issuance of advisory opinions, and, indeed,

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<sup>6</sup> See Nevada Answer at 2; see *generally* 10 C.F.R. § 2.905(h)(2).

<sup>7</sup> Nevada Answer at 2.

<sup>8</sup> See *generally* 10 C.F.R. § 2.101(e)(3).

<sup>9</sup> See, e.g., 10 C.F.R. §§ 2.905 (governing access to classified information for introduction into a proceeding, or for the preparation of a party's case); 2.907(a)(directing the NRC staff to include a notice of intent to introduce classified information in the notice of hearing, if it would be impracticable to avoid such introduction); 2.907(b)(directing a party filing a response to a notice of hearing to state in its answer its intent to introduce classified information into the proceeding, if it appears to the party that it will be impracticable to avoid such introduction).

declined to issue one in 2004, in another pre-application Yucca Mountain dispute.<sup>10</sup> We see no reason to depart from our usual policy where, as here, addressing the issues is unnecessary, given the application's current status. Taking on the questions now would constitute a "mere academic exercise."<sup>11</sup>

Given the possibility that the disputes identified above may never ripen, and in the interests of adjudicatory efficiency, there is value in developing now a Protective Order for classified information that could be used in an adjudicatory proceeding on the construction authorization application, but that would be silent as to the disputed issues.<sup>12</sup> To that end, we delegate to the PAPO Board the authority to work with DOE, Nevada, the Staff, as well as other potential parties and interested governmental participants, and, if practicable, to approve a Protective Order for use by the Presiding Officer in the Yucca Mountain proceeding, should such a proceeding be commenced.<sup>13</sup>

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<sup>10</sup> *U.S. Department of Energy* (High Level Waste Repository), CLI-04-32, 60 NRC 469, 473 (2004).

<sup>11</sup> *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 94 (1983).

<sup>12</sup> We expect, for example, that there could be circumstances in which Nevada (or another party, potential party, or interested governmental participant) requests, and DOE grants, access to requested classified information, without controversy.

<sup>13</sup> The PAPO Board has worked with the parties, potential parties and interested governmental participants to implement protective orders for several different categories of information. See *U.S. Department of Energy* (High Level Waste Repository: Pre-Application Matters), Third Case Management Order (unpublished)(Aug. 30, 2007)(approving protective orders governing the following categories of sensitive unclassified information: Naval Nuclear Propulsion Information; Official Use Only Information; Unclassified Controlled Nuclear Information); *U.S. Department of Energy* (High Level Waste Repository: Pre-Application Matters), Second Case Management Order (Pre-License Application Phase Document Discovery and Dispute Resolution) (unpublished)(July 8, 2005)(implementing a protective order for Employee Concerns Program information). Given its demonstrated experience in this area, the PAPO Board is well situated to provide guidance in this endeavor.

The Protective Order, however, should be excised of any and all provisions *that would substantively decide* the disputed questions raised above; that is, the NRC's authority to (1) review and/or overturn another federal agency's classification determinations made on information associated with the Yucca Mountain construction authorization application; and (2) direct DOE to disclose classified information to Nevada representatives (holding an appropriate security clearance) over DOE's objection as the originating agency. These issues are appropriately considered in the context of a live controversy.<sup>14</sup>

IT IS SO ORDERED.<sup>15</sup>

For the Commission

**(NRC SEAL)**

**/RA/**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland  
this 8<sup>th</sup> day of September, 2008.

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<sup>14</sup> Neither DOE nor Nevada is barred from presenting anew the arguments raised in the DOE Motion and Nevada Answer on the subject of the two disputed questions, should those disputes ripen.

<sup>15</sup> Pursuant to 10 C.F.R. § 2.101(e)(3), a docket number will be assigned to DOE's application if and when the Staff determines that the application is acceptable for docketing. As an administrative convenience, this Memorandum and Order will be served on the service lists for the PAPO-00 and PAPO-001 dockets.