

## **POLICY ISSUE NOTATION VOTE**

August 2, 2004

SECY-04-0140

FOR: The Commissioners

FROM: Luis A. Reyes  
Executive Director for Operations

SUBJECT: REQUEST OF THE STATE OF NEVADA TO BEGIN THE PROCESS  
FOR OBTAINING SECURITY CLEARANCES FOR NEVADA  
REPRESENTATIVES

PURPOSE:

To seek Commission direction regarding the State of Nevada's (Nevada) request to begin the process for obtaining security clearances for Nevada representatives. These clearances are for access to classified information in the anticipated proceeding on the U.S. Department of Energy's (DOE) application to construct a high-level waste (HLW) repository. Staff are also seeking Commission direction on applying the procedures in 10 CFR Part 25 and Management Directive 12.3 for the security clearance process.

BACKGROUND:

By letter dated May 13, 2004, Robert Loux, Executive Director of the Nevada Agency for Nuclear Projects, requested on behalf of Nevada, that the NRC begin the process for obtaining security clearances for Nevada representatives who will participate in the anticipated licensing proceeding for an HLW repository at Yucca Mountain, Nevada. See letter from Robert R. Loux to Dr. William D. Travers, dated May 13, 2004 (ML041410389). In his letter, Mr. Loux states

CONTACT: David Dancer, NMSS/HLWRS  
(301) 415-6618

that because portions of DOE's license application (LA) or supporting materials may contain Restricted Data or classified National Security Information relevant to the anticipated proceeding, it may be necessary for Nevada representatives to obtain security clearances to afford Nevada an opportunity to fully participate in the hearing process. Mr. Loux also notes that DOE intends to certify its compliance with the requirement that it provide electronic access to documentary material on the Licensing Support Network and to tender an LA for the repository in the coming months.<sup>1</sup> Given the length of time required to process requests for security clearances, Mr. Loux thinks that the NRC should immediately begin the security clearance process for Nevada representatives. Mr. Loux inquires what steps Nevada must take to initiate this process.

#### DISCUSSION:

The Commission's authority to consider Nevada's request to start the security clearance process stems from the AEA and Executive Order 12958. Section 141 of the AEA states that "[i]t shall be the policy of the Commission to control the dissemination and declassification of Restricted Data in such a manner as to assure the common defense and security."<sup>2</sup> Section 145b. of the AEA requires that the Commission investigate an individual's character, associations, and loyalty, and make a finding that granting access to that person will not endanger the common defense and security prior to granting that individual access to Restricted Data. See 42 U.S.C. § 2165.

NRC can also process Nevada's request pursuant to Executive Order 12958, as amended,<sup>3</sup> which provides that "[a] person may have access to classified information provided that: (1) a favorable determination of eligibility for access has been made by an agency head or the agency head's designee; (2) the person has signed an approved nondisclosure agreement; and (3) the person has a need-to-know the information." See Executive Order No. 12958, as amended, § 4.1(a) (68 FR 15324). Persons granted access under these standards must receive training on the safeguarding of (and penalties for failures to safeguard) classified information. *Id.* § 4.1(b) (68 FR 15324). Nevada representatives who apply for security clearances fall within the scope of "persons" covered by Executive Order 12958. *Id.*

The staff proposes to begin the process of determining the eligibility of Nevada's candidates for security clearances only. To obtain access to specific classified information, Nevada's representatives will still need to tender completed nondisclosure agreements and establish a demonstrable need-to-know regarding that specific information to aid in the preparation of

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<sup>1</sup> On June 30, 2004, DOE submitted its certification to the Secretary of the Commission.

<sup>2</sup> The AEA also provides that "[i]n performance of its functions the Commission is authorized to . . . prescribe such regulations or orders as it may deem necessary (1) to protect Restricted Data received by any person in connection with any activity authorized pursuant to this Act[.]" See AEA § 161i., 42 U.S.C. § 2201(i).

<sup>3</sup> Executive Order 12958 (60 FR 19825; April 20, 1995), was amended in 2003 by Executive Order 13292 (68 FR 15315; March 28, 2003).

Nevada's case.<sup>4</sup> See *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-04-06, 59 NRC 62, 71-72 (2004). Additionally, to the extent classified information relevant to the LA originated from DOE, the NRC must first obtain DOE's consent before granting access to DOE's information to any Nevada representative. See Executive Order No. 12958, as amended, § 4.1(c) (68 FR 15324).

Ordinarily, the staff would process such requests using the procedures of 10 CFR Part 25 and Management Directive 12.3, "NRC Personnel Security Program" (April 27, 2004).<sup>5</sup> Part 25 establishes the procedures for authorizing access to classified information. Section 25.3 states that Part 25 applies "to licensees and others who may require access to classified information related to a license or an application for a license." See 10 CFR § 25.3. The term "license" for the purposes of Part 25 is defined to mean "a license issued pursuant to 10 CFR Parts 50, 70, or 72."<sup>6</sup> See 10 CFR § 25.5. However, the NRC would issue any license for the proposed repository, pursuant to 10 CFR Part 63. See 10 CFR § 63.1. Part 25 does not include within its scope persons who require access to classified information related to licenses or LAs under Part 63.<sup>7</sup> Thus, Part 25 does not apply to Nevada's request. Management Directive 12.3 establishes and implements the Commission's Personnel Security Program consistent with applicable laws, regulations, and executive orders. While Management Directive 12.3 does apply to persons other than NRC employees or contractors, see Management Directive 12.3 at 7, it is unclear which parts of the process would apply to Nevada's request. See "NRC Personnel Security Program," Handbook 12.3, at 5.

The NRC could respond to Nevada's request in several ways. These options are outlined below, along with the policy implications.

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<sup>4</sup> If Nevada has a need to use, process, store, reproduce, transmit, transport, or handle NRC classified information in connection with the anticipated licensing proceeding at any location, the State would also be required to request a facility security clearance under 10 CFR Part 95 to possess classified information at that location. See 10 CFR § 95.15.

<sup>5</sup> Additionally, regulations in 10 CFR Part 2, Subpart I, establish procedures for parties in NRC adjudicatory proceedings to obtain access to Restricted Data or classified National Security Information when required for the adequate preparation or presentation of that party's case. See 10 CFR §§ 2.900, 2.901, and 2.905(a)–(b). The regulations in Part 2, Subpart I, do not apply to Nevada's request because no proceeding in which the State might be a party has yet commenced.

<sup>6</sup> Similarly, the regulations provide that security clearances for access to classified information "must be requested for licensee employees or other persons (e.g., 10 CFR Part 2, Subpart I) who need access to classified information in connection with activities under 10 CFR Parts 50, 52, 54, 70, 72, or 76." See 10 CFR § 25.17(a).

<sup>7</sup> Nor does Part 25 include licenses or license applications for HLW geologic repositories under 10 CFR Part 60 within its scope.

(1) Act Now on Nevada's Request

The Commission could direct the NRC staff to initiate the clearance process for Nevada representatives now, using the procedures contained in 10 CFR Part 25 and Management Directive 12.3. The staff would propose meeting with Nevada officials to discuss the process for obtaining security clearances, including how to properly complete the required security packet, the standards for clearance eligibility, and the fees for starting the clearance process.

This option would support the timely completion of the anticipated HLW proceeding. Pursuant to the Nuclear Waste Policy Act (NWPA), Congress will look to the Commission to issue a final decision on the LA within 3 years of its submission. See NWPA § 114(d), 42 U.S.C. § 10134(d). If the security clearance process is not started until Nevada is granted party status in the anticipated proceeding, delay may result if a Presiding Officer or Licensing Board later determines that Nevada needs access to classified information. The length of time required to process security clearance requests presently can extend up to 12 months or more. While the staff recognizes that there is currently no "licensing proceeding," the staff notes that this approach would otherwise be consistent with the rationale endorsed in *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), No. 070-03098-ML, 2002 WL 31887873, at \*1 (December 18, 2002) (unpublished order) ("because of the substantial time necessary to process security clearance applications, it is prudent to initiate the security clearance process so as to avoid delaying the proceeding in the event it becomes certain that [the party] will need access to Restricted Data or National Security Information to prepare its case"). There is, of course, a possibility that similar requests from a possibly significant number of other potential participants in the anticipated HLW proceeding may be submitted if the NRC begins the security clearance process for Nevada. The staff believes that it will be able to deal with these requests on a case-by-case basis, balancing the benefits from initiating the clearance process at the present time for other persons against the risk of delay from not acting on such requests until the licensing proceeding starts.

(2) Deny Nevada's Request and Inform Nevada That It Should Refer Its Request to the Presiding Officer or Licensing Board

The Commission could direct the staff to deny Nevada's request, and inform Nevada that it should await the commencement of the proceeding on DOE's LA for the proposed repository and submit its request to the Presiding Officer or Licensing Board using the procedures of 10 CFR Part 2, Subpart I. This option will defer the expenditure of NRC resources until Nevada identifies and requests access to specific classified information for which Nevada demonstrates a need-to-know. However, it could delay the timely completion of the proceeding, given the time required to process security clearance requests.

(3) Deny Nevada's Request and Inform Nevada That It Should Petition DOE for Clearances

The Commission could direct the staff to deny Nevada's request, and inform Nevada that it should petition DOE for security clearances for classified information generated by DOE relevant to the LA. This option has the potential to preserve NRC resources, assuming that DOE agrees to grant Nevada's request. If DOE denies Nevada's request, it is reasonable to expect that Nevada will either resubmit its request to the NRC before the proceeding on the LA commences or await commencement of the anticipated HLW proceeding. If this situation were

to unfold, any resources initially saved will have to be spent, and additionally, the prospect of delay in the completion of the proceeding would become more probable.

### RESOURCES

Current NRC policy on security clearances is to charge a fee which reimburses the agency for the cost imposed by the organization conducting the security investigation (e.g., Office of Personnel Management), plus an amount for NRC administrative costs in processing the security clearances. Mr. Loux's letter did not specify the number of individuals for which the State of Nevada would seek security clearances. The letter simply stated that "Nevada would propose to limit clearances to key people, some of whom have had clearances in the past" and committed "to provide the names of experts and legal counsel who will participate in the proceeding...." The staff spoke with Mr. Loux by phone on July 15, 2004, and he indicated that there would be no more than 3 individuals seeking clearances. Assuming clearance difficulties are not encountered, staff estimates that additional NRC resources would not be required for any of the options discussed in this paper.

### RECOMMENDATIONS:

The staff considers that the potential savings of NRC resources of Options 2 and 3 are outweighed by the need to initiate the security clearance process now so as to avoid delay in the anticipated proceeding. The staff thus recommends that the Commission choose Option 1 to grant the request of Nevada to start the security clearance process for representatives of Nevada, and direct the staff to use the procedures in 10 CFR Part 25 and Management Directive 12.3.

### COORDINATION:

This paper has been coordinated with the Office of the General Counsel, which has no legal objection. The Office of the Chief Financial Officer has reviewed this paper for resource implications and has no objections.

**/RA Ellis W. Merschoff Acting For/**

Luis A. Reyes  
Executive Director  
for Operations

Attachment:

Ltr frm R. Loux to W. Travers dated May 13, 2004



OFFICE OF THE GOVERNOR  
AGENCY FOR NUCLEAR PROJECTS

1761 E. College Parkway, Suite 118

Carson City, Nevada 89706

Telephone: (775) 687-3744 • Fax: (775) 687-5277

E-mail: [nwpo@nuc.state.nv.us](mailto:nwpo@nuc.state.nv.us)

May 13, 2004

Dr. William D. Travers  
Executive Director of Operations  
U.S. Nuclear Regulatory Commission  
Mail Stop O16 E15  
One White Flint North  
11555 Rockville Pike  
Rockville, MD 20852-2738

RE: Security Clearances

Dear Dr. Travers:

As you know, the State of Nevada ("Nevada") is by law given full-party status in the anticipated Yucca Mountain repository licensing proceeding. Nevada intends to fully participate in every aspect of that proceeding.

To that end, it will be essential that appropriate persons involved in Nevada's participation have access to all documentary materials and discussions relating in any way to licensing issues. By way of example, Nevada must be privy to the Department of Energy ("DOE") License Application ("LA") and all supporting or referenced materials, as well as to all documents on the Licensing Support Network ("LSN") of DOE, NRC, or other parties.

On February 25, 2004, during the course of an open meeting between DOE and NRC Staff on Yucca Mountain safeguards matters, DOE informed a representative of Nevada that some portions of the LA or supporting materials may contain classified Restricted Data or National Security Information, access to which would require a security clearance, but that no final decision on classification had been made. The NRC also informed the Nevada representative at the time that no classification determination had been made. Since February 25, neither NRC nor DOE has informed Nevada about any classification decision. Nevertheless, since it is at least possible some documents and discussions relevant to the licensing proceeding

Dr. William D. Travers  
May 13, 2004  
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may be classified, the Yucca Mountain repository licensing proceeding may implicate section 181 of the Atomic Energy Act and 10 C.F.R Part 2, Subpart I, which provide for granting security clearances for access to classified information to parties' representatives so that parties' procedural rights will not be impaired unnecessarily.

Given both the time required to process security clearances and DOE's current plans to provide LSN certification and then tender an LA later this year, it is clearly prudent to begin the process of obtaining security clearances immediately. Nevada would propose to limit clearances to key people, some of whom have had clearances in the past.

We will be happy to provide the names of experts and legal counsel who will participate in the proceeding (and supplement that list as necessary) to include whatever background information is prerequisite to securing the necessary clearances. Please advise with respect to what steps we must take and with whom we should communicate in order to immediately initiate the security clearance process, to ensure complete access of Nevada's representatives in the licensing proceeding to any and all relevant but classified information.

We, of course, are aware that 10 C.F.R. § 2.907 could be read to suggest that the process could be delayed until issuance of the Notice of Hearing or possibly later, but we believe that such a delay would not be in anyone's interest because, if classified information is involved, this would force a delay in filing contentions, the conduct of discovery, and holding of evidentiary hearings on all matters involving such information.

Sincerely,



Robert R. Loux  
Executive Director

cc: Joseph Egan  
Marta Adams