

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	Docket No. PAPO-0001
)	
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 08-861-01-PAPO-BD01
)	
(High Level Waste Repository: Pre-Application Matters))	June 3, 2008

**STATE OF NEVADA'S RESPONSE TO
DOE'S PARTIALLY UNOPPOSED MOTION FOR PROTECTIVE ORDER**

The Department of Energy's ("DOE's") "Partially Unopposed Motion" is opposed by the State of Nevada ("Nevada" or "State"), as the motion indicates. The "Partially Unopposed Motion" also blatantly misstates Nevada's position, seeks an unfair advantage, and minimizes the importance of issues that strike at the heart of NRC's licensing authority over DOE. If this motion is any indication of the accuracy or completeness of the forthcoming LA, then multiple rounds of information requests and determined intervention by multiple parties will be needed before the full truth about the safety of Yucca Mountain can be known.

A. Misstatement of Nevada's Position

In the two weeks before DOE filed its motion, Nevada and various other potential parties offered oral and written (e-mail) comments on DOE drafts of the protective order and DOE offered some changes in its draft order in response. In its initial comments, and in subsequent comments and oral discussions, Nevada's consistent position was that the Commission's authority over DOE included authority both to order disclosure of classified information to cleared representatives of other parties over DOE's objection as the originating agency, and to review DOE's classification decisions. However, Nevada also recognized that, in taking this position, it was raising a significant legal issue that might never ripen into a live controversy

because DOE might give Nevada access to all of the classified documents it requested. Accordingly, from the outset, Nevada merely urged DOE to modify its protective order in specified, limited respects so that the issues raised by Nevada would not be prejudged, one way of the other. DOE refused to do so, even though a similar approach had been agreed to with respect to sensitive unclassified information, including unclassified naval nuclear propulsion information ("NNPI").¹ Ultimately, on May 30, 2008, before DOE filed its motion, Nevada (Mr. Malsch) sent DOE (and other potential parties) an e-mail stating in relevant part as follows:

In the interest of moving forward on this, I would be willing to have you submit your redraft (which included lots of my stuff and some helpful new stuff from you) to the Board, but with the cover filing stating that Nevada does not object to the draft order with the understanding that 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. Nevada will argue, if necessary, that 10 CFR 2.905(h)(2) does not or should not apply to this proceeding because of the special circumstance of DOE's submission to NRC authority and jurisdiction.

A copy of this e-mail is attached. The motion DOE subsequently filed does not include this statement of position. Instead, DOE misstates Nevada's position as pertaining only to the Commission's authority over classification decisions, ignoring Nevada's position that in some circumstances the Commission also may order disclosure of information that is properly classified. Moreover, the motion also ignores Nevada's position that this matter need not be

¹ See August 30, 2007 Third Case Management Order at ¶ VII A.

resolved now because it is not ripe, given the possibility that ultimately Nevada will be given access to the classified documents it requests.

Finally, Nevada argued at the outset that the draft protective order needed to be accompanied by a case management order that addressed important ancillary matters such as privilege logs. This still needs to be done.

B. Unfair Advantage

DOE's motion includes a substantive legal discussion of why DOE's position on classification decisions is correct, while Nevada's position is wrong, including a citation to a U.S. Supreme Court case claimed to be controlling. But DOE failed to include Nevada's stated reason for its position, that by submitting its license application DOE submits to NRC authority, including NRC authority over the matters in dispute. DOE makes it appear that Nevada had given no reason at all for its position. This is untrue and also unfair, as it portrays Nevada in an unfair light before it gets an opportunity to answer.

C. Minimizing the Importance of an Issue

In arguing that the Commission could order DOE to disclose classified information and review DOE classification decisions, Nevada merely sought to have the Commission treat DOE no different from any other applicant claiming a document privilege. Moreover, while Nevada recognized that 10 C.F.R. § 2.905 (h) allows the originating agency to deny access to classified information, it also believed that this provision was never intended to apply to applicants for Commission licenses.

These issues go to the very heart of the Commission's authority and jurisdiction as an independent regulatory agency, because they bear on whether the Commission has ultimate authority to control its own licensing proceedings. Nevada is questioning whether the

Commission must stand impotent in the face of a calculated DOE refusal to disclose the full license application to cleared persons so that they may participate meaningfully in the NRC licensing proceeding. Moreover, it is not as though DOE is without options. If DOE is not willing to accede to Commission jurisdiction over matters of document privilege just like any other applicant, then it may file an unclassified application with naval reactor fuel excluded from Yucca Mountain.

These issues are far too important to be decided on the basis of a brief motion and a brief answer, and by suggesting otherwise DOE tries to minimize their significance. These issues should be deferred until there is an actual controversy over a specific document request, as Nevada requested. If, however, the Commission believes these matters must be addressed and resolved in advance of a concrete dispute over specific documents, then the Commission should establish an appropriate briefing schedule so that the issues may be thoroughly researched and briefed by all potential parties.

If DOE is unwilling to submit its application before these matters are resolved, but is nevertheless determined to submit its license application this month, then it may exclude naval reactor fuel from Yucca Mountain, as suggested above. Alternatively, DOE may delay filing its application until the issues are fully briefed and decided. After all, DOE has known for years that its license application would include classified information, but it waited until the very last minute to bring these matters to the Commission's attention.

Respectfully submitted,
(signed electronically)

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June 3, 2008

Exhibit 1

Exhibit 1

Charles Fitzpatrick

From: martin malsch [mmalsch@nuclearlawyer.com]
Sent: Friday, May 30, 2008 10:43 AM
To: 'Alex S. Polonsky'
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Subject: RE: Draft Protective Order for Classified Information - Yucca Mountain Licensing Proceeding

Alex: In the interest of moving forward on this, I would be willing to have you submit your redraft (which included lots of my stuff and some helpful new stuff from you) to the Board, but with the cover filing stating that Nevada does not object to the draft order with the understanding that 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. Nevada will argue, if necessary, that 10 CFR 2.905(h)(2) does not or should not apply to this proceeding because of the special circumstance of DOE's submission to NRC authority and jurisdiction.

I appreciate your effort to preserve our LSN compliance issue, and what you propose is satisfactory to Nevada, although I would note that our argument here is logically applicable to other mandatory parties like Nye County, and you did not preserve the argument for them.

From: Alex S. Polonsky [mailto:apolonsky@morganlewis.com]
Sent: Tuesday, May 27, 2008 6:01 PM
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Subject: Draft Protective Order for Classified Information - Yucca Mountain Licensing Proceeding

Fellow counsel,

We only received comments from Nevada on the proposed Protective Order, with Nye County concurring with those comments. DOE has considered those comments, and provides the attached responses for your review and comment.

To make the editing process transparent, we "accepted" all of Nevada's track changes to create a clean document, with Nevada's comments preserved in the margin. We then inserted DOE's edits in track changes. Accordingly, the changes you see in the document are DOE's and not Nevada's.

DOE understands that it may not reach agreement with all the parties on all of the issues presented in this Protective Order. However, DOE would like to file this with as many parties concurring as possible. Please let me know by c.o.b. Thursday if you would join a motion to enter this protective order (with or without additional changes).

Many thanks for your cooperation to date.

Alex S. Polonsky
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6/2/2008

Washington, D.C. 20004
202-739-5830

(See attached file: Draft Protective Order for Classified Information (addressing comments from potential parties).DOC)

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of) Docket No. PAPO-0001
)
U.S. DEPARTMENT OF ENERGY) ASLBP NO. 08-861-01-PAPO-BD01
)
(High-Level Waste Repository:)
Pre-Application Matters) June 3, 2008

CERTIFICATE OF SERVICE

I hereby certify that the foregoing State of Nevada's Response to DOE's Partially Unopposed Motion for Protective Order has been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (*)).

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