

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

DOCKETED 10/05/07

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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

October 5, 2007

FOURTH CASE MANAGEMENT ORDER

(Concerning Electronic Filing, DDMS, Safeguards Information, and Other Items)

This case management order covers several matters that will facilitate use of the electronic filing system and digital data management system (DDMS), and also addresses other items such as the duty to produce redacted versions of safeguards information.

A. Electronic Filing and the 50 Megabytes Rule

On July 9, 2004, this Pre-License Application Presiding Officer (PAPO) Board issued an initial order directing that all filing and service in this proceeding be performed electronically via the NRC's adjudicatory electronic information exchange (EIE).¹ Appendix 1 to that Initial Order set forth detailed instructions for such electronic filings, including the requirement that documents exceeding 50 megabytes in size be filed in multiple transmissions of segments of 50 megabytes

¹ Licensing Board Order (Initial Pre-License Application Phase Order) (July 9, 2004) at 2 (unpublished) [PAPO Initial Order].

or less.² These are the same requirements that are found in Subpart J of 10 C.F.R. Part 2.³ In addition, the Commission has recently issued new regulations relating more generally to EIE filings. Use of Electronic Submissions in Agency Hearings, 72 Fed. Reg. 49,139 (Aug. 28, 2007). Meanwhile, in July 2007, the State of Nevada transmitted an electronic filing that was incorrectly transmitted in numerous multiple segments. In light of potential ambiguities in the Subpart J regulations and our Initial Order, the Board hereby clarifies the following points concerning the 50 megabytes rule:

1. General Rule One: Except as otherwise provided, if a filing is 50 megabytes or less in size, then it shall be transmitted to the EIE as a single individual file. It shall not be filed in segments.⁴
2. General Rule Two: Except as otherwise provided, if a filing exceeds 50 megabytes in size, then it shall be filed and transmitted to the EIE in the minimum number of segments that do not individually exceed 50 megabytes. Example: A filing that is 140 megabytes shall be transmitted and filed in 3 segments, each of which is 50 megabytes or less.
3. General Rule Three: Except as otherwise provided, if a filing consists of (a) a motion or other pleading with accompanying certificate of service, and (b) one or more documents, affidavits, or declarations as “attachments” or “exhibits” to the motion, then the filing shall be considered a single filing or “document” for purposes of the 50 megabytes rule. If the

² PAPO Initial Order, Appendix 1 at 3 (“Documents larger than 50 MB [megabytes] must be broken up and submitted in segments of 50 MB or less.”).

³ Subpart J requires that all filings be transmitted electronically via the EIE and requires that documents exceeding 50 megabytes must be transmitted in multiple segments of 50 megabytes or less. 10 C.F.R. § 2.1013(c).

⁴ The 50 megabytes rule is based on NRC’s assessment of the current upper limit for practical Internet transmission. 72 Fed. Reg. at 49,142. According to the Statement of Considerations of the EIE rule, 50 megabytes contains approximately 5,000 pages of text (without graphics). See *id.* Thus, only rarely, if ever, will there be an occasion for a potential party to transmit a filing in separate segments due to the excessive size of a filing.

total filing (a + b) exceeds 50 megabytes, then General Rule Two applies, and the filing shall be transmitted to the EIE in segments of less than 50 megabytes. If the total filing (a + b) is less than 50 megabytes, then General Rule One applies, and the filing shall not be transmitted in multiple segments and must instead be transmitted to the EIE as a single individual file or document. Example: If a potential party files a motion to compel production of documents and appends one “attachment” or “exhibit” to the motion, then the motion plus the exhibit is considered a single filing or document for purposes of the 50 megabytes rule. If the motion is 2 megabytes and the exhibit is 40 megabytes, then the total is less than 50 megabytes and thus the total package must be transmitted to the EIE as one package or document. If the motion is 6 megabytes and the exhibit is 47 megabytes, then the total package exceeds 50 megabytes and thus it must be transmitted to the EIE in 2 (but no more than 2) segments, each of which is less than 50 megabytes.

4. Evidentiary Exhibit Exception: If a filing includes (a) a motion or other pleading (including a simple cover transmittal letter) and (b) one or more proposed exhibits or sets of pre-filed written testimony that are being filed for purposes of an evidentiary hearing, then the motion and each proposed exhibit and the pre-filed testimony shall be treated as a separate (but related) filing or document and shall be transmitted to the EIE as a separate and individual electronic file.⁵ This rule only applies to pre-filed evidentiary exhibits and testimony because each such proffered exhibit or written testimony is, individually,

⁵ This comports with new 10 C.F.R. § 2.304(g), which states:

(g) Pre-filed written testimony and exhibits. In any instance in which a participant submits electronically through the E-filing system written testimony or hearing exhibits in advance of a hearing, the written testimony of each individual witness or witness panel and each individual exhibit shall be submitted as an individual electronic file.

72 Fed. Reg. at 49,150. See also id. at 49,146-47.

subject to objection, admission, rejection, and handling on the DDMS as evidence in the merits hearing. It does not apply to an exhibit or declaration attached to a motion, such as a motion to compel or a motion for summary disposition. Example 1: If a potential party files a pleading consisting of a cover letter, the combined initial written testimony of a panel of 5 witnesses, and 6 attached exhibits, then the filing shall be considered 8 individual filings for purposes of EIE filing and the 50 megabytes rule. Even if the size of all 8 filings combined is less than 50 megabytes, each shall be filed separately as an individual electronic file. If, however, one of the 8 documents, by itself, exceeds 50 megabytes, then that document shall be filed in the minimum number of segments which do not exceed, individually, 50 megabytes. Example 2: If a potential party files a motion to strike a certification, which consists of the motion plus 10 attached “exhibits,” then the motion and exhibits are treated as one filing for purposes of the 50 megabytes rule, and General Rules One and Two apply.⁶

B. Motions to Compel

All motions to compel the production of licensing support network (LSN) documents filed in the pre-license application phase proceeding shall include an appendix A that lists, in a single spaced, two-column format, the alphanumeric LSN accession number of each bibliographic header and/or redacted version of the document for which production is sought and all the privileges asserted for the sought document by the privilege claimant. The first column shall contain the LSN accession numbers of the documents. The second column shall contain the claimed privileges. If the privilege claimant has asserted multiple privilege claims for the sought document, each claimed privilege shall be listed on a separate line in the second column with the

⁶ Given that the pre-license application phase of this proceeding does not involve the merits of the license application, there will be little, if any, opportunity for evidentiary/merits hearings by the PAPO Board. Accordingly, the Evidentiary Hearing Exception rule will rarely, if ever, apply during the PAPO proceeding.

LSN number repeated for each claimed privilege.⁷ There shall be no lines skipped between entries in either column. An example of the format for the appendix is set forth in the Attachment to this order.

In identifying the claimed privileges associated with each document listed on appendix A to a motion to compel, the potential party shall use the same terminology for each privilege that is set forth in the July 6, 2007, Revised Second Case Management Order (RSMCO) and in the Aug. 30, 2007, Third Case Management Order (TCMO). The following is the appropriate terminology: ECP, attorney-client communication, litigation work product, deliberative process, privacy, business proprietary, law enforcement investigative, archeological, OUO, NNPI, UCNI, and SGI. Any motion to compel the production of documents that fails to include an appendix A containing the listing of LSN accession numbers and claimed privileges will be denied.

C. Safeguards Information

During the last few months, the PAPO Board and representatives of certain of the potential parties hereto (primarily the United States Department of Energy (DOE), the NRC Staff, and the State of Nevada) have grappled with the appropriate handling and treatment of sensitive unclassified information (SUI).⁸ On August 30, 2007, the PAPO Board issued the TCMO covering three categories of SUI – Unclassified Controlled Nuclear Information (UCNI), Naval Nuclear Propulsion Information (NNPI), and Official Use Only (OUO) information, requiring, inter alia, the production of redacted versions of such documents consistent with the principles of the Freedom of Information Act and 10 C.F.R. § 9.19.⁹ However, the TCMO did not address a fourth

⁷ A motion to compel production of a document for which multiple primary privileges are claimed by the privilege claimant must challenge all claimed primary privileges. Revised Second Case Management Order (July 6, 2007) at 14 (unpublished).

⁸ See, e.g., Tr. at 1117-1197; Licensing Board Order (Questions to the NRC Staff and Other Potential Parties Regarding Access to Safeguards Information in the HLW Proceeding) (July 6, 2007) (unpublished).

⁹ TCMO (Aug. 30, 2007) at 7-8 (unpublished).

category of SUI – Safeguards Information (SGI). This is because of several complicating factors, including that the Commission has proposed certain major changes to its regulations concerning SGI¹⁰ and the PAPO Board has recently submitted a memorandum to the Commission alerting it to significant SGI-related delays likely to be caused by the methods the NRC Staff uses in investigating and evaluating individuals seeking access to SGI.¹¹

In these circumstances, and in light of the fact that the potential parties currently have identified only 21 SGI documents (all of them belonging to DOE), Tr. at 1200, and the fact that DOE, the NRC Staff, and the State of Nevada have all indicated that they have no objection to producing redacted versions of SGI documents on the LSN, Tr. at 814, 934, the Board has decided to proceed with SGI documentary materials as follows. First, potential parties shall provide (and duly supplement) bibliographic headers and redacted versions of documentary material containing SGI to the same extent, in the same manner, and at the same time as prescribed for SUI under Section III of the TCMO.¹² Second, for the time being, any dispute concerning SGI will be handled by the Board on a case-by-case basis.

D. Concurrent Filing of Electronic File for Privilege Logs for SUI and Secondary Privileges

Section III of the RSCMO addresses the submission of privilege logs for documents withheld on the grounds of a primary privilege, and mandates the concurrent submission, to the

¹⁰ See 71 Fed. Reg. 64,004, 64,056 (Oct. 31, 2006); 70 Fed. Reg. 7,196 (Feb. 11, 2005). See also NRC Regulatory Agenda, NUREG-0936, at 9-10 (July 2007) (showing NRC planned that the final SGI rule be issued in August 2007).

¹¹ Licensing Board Memorandum (Aug. 31, 2007) (unpublished).

¹² If DOE submits its certification pursuant to 10 C.F.R. § 2.1009(b) within 20 days of the date of this order, then it will be satisfactory if DOE produces the initial redacted versions of its SGI documentary material on or before October 30, 2007.

LSN Administrator (LSNA), of the electronic file used to generate the privilege log. RSCMO at

12-13. More specifically, the RSCMO states:

The privilege log shall be filed via NRC's EIE process in PDF format as specified in the EIE Guidance Document. The privilege log submitted by a privilege claimant will be available to potential parties via the NRC's Electronic Hearing Docket (EHD) (http://hlwehd.nrc.gov/Public_HLW-EHD/home.asp). Potential parties, such as DOE, the NRC Staff, and the State, may request access to privilege logs on the Atomic Safety and Licensing Board Panel's Digital Data Management System from the LSNA and by scheduling DDMS training (LSNWebmaster@nrc.gov). The LSNA will make the initial determination of access to privilege logs on the DDMS.

Concurrent with any such filing, parties shall submit the electronic file used to generate the above noted privilege log to the LSNA in the data format and via transfer media as mutually agreed upon by the party and the LSNA. The proposed file format and transfer media specifications should be provided to the LSNA, at the earliest possible opportunity and, without exception, prior to the file creation and submission to the LSNA. The LSNA will review and make the sole determination of the technical acceptability of any such proposal.

RSCMO at 12-13 (footnotes omitted) (emphasis added).

The Board hereby clarifies and confirms that, if a potential party files a privilege log for documents claimed to qualify for a secondary privilege, pursuant to the RSCMO IV.D.2 at 16, or for documents claimed to qualify for a SUI privilege, pursuant to the TCMO V.C.2.b at 11, then the potential party shall, concurrently with any such filing, submit the electronic file used to generate the privilege log to the LSNA in the data format and via the transfer media mutually agreed upon by the party and the LSNA. Stated differently, the form and format provisions of RSCMO III.E (other than the specific elements in Appendices A - C), apply equally to privilege

logs submitted under RSCMO IV.D.2 and TCMO V.C.2.b. This will allow the secondary and SUI privilege logs to be incorporated into the DDMS.

It is so ORDERED.

The Pre-license Application
Presiding Officer Board

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

/RA/

Alex S. Karlin
ADMINISTRATIVE JUDGE

/RA/

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 5, 2007

ATTACHMENT

Example of Motion to Compel Appendix A

The State of Nevada's April 1, 2008 motion to compel seeks the production of the following documents:

LSN Accession Number

DEN001564402

DN2002205522

DN2002205522

DN2002205522

DN2002411190

DN2002333721

Claimed Privilege

OUO

Business Proprietary

Copyrighted Material

Privacy

NNPI

Attorney-Client Communications

Note: DN2002205522 is repeated three times, because there are three claimed privileges for the document.

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(High-Level Waste Repository:)	
Pre-Application Matters))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing PAPO BOARD FOURTH CASE MANAGEMENT ORDER (CONCERNING ELECTRONIC FILING, DDMS, SAFEGUARDS INFORMATION, AND OTHER ITEMS) have been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (*)).

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