

RAS 8140

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

DOCKETED
USNRC

July 14, 2004 (1:14PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

SERVED July 14, 2004

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
NEV-01

July 14, 2004

MEMORANDUM AND ORDER

(Regarding State of Nevada's July 12, 2004 Motion)

On July 12, 2004 the State of Nevada (NEV) electronically filed a motion with the pre-license application presiding officer (PAPO) Board challenging, inter alia, the availability of the Department of Energy's (DEN's) documentary material pursuant to 10 C.F.R. § 2.1003(a) and seeking to strike DEN's June 30, 2004 certification regarding same. Pursuant to 10 C.F.R. § 2.323(c), DEN shall, and any other participant or person may, file an answer to NEV's motion no later than July 22, 2004. See Order (Initial Pre-License Application Phase Order) July 9, 2004. As stated in Section 2.323(c), such answers may be in support of or in opposition to NEV's motion and accompanied by affidavits or other evidence.

The PAPO Board will hold oral argument on NEV's motion at 9:00 a.m. EST on July 27, 2004, in the Atomic Safety and Licensing Board Panel third floor hearing room at the Two White Flint North building at NRC Headquarters, 11545 Rockville Pike, Rockville, Maryland. Time

allocation for argument, sign in procedures for participants and members of the public, and other terms regarding the hearing will be set forth in a subsequent order.

In addition to any other matters DEN wishes to raise in response to NEV's motion, DEN shall address the following matters:

1. How many documents did DEN make available¹ on June 30, 2004? Have all of those documents been continuously available since that date? If not, identify and explain each time period when some or all of the documents have not been so available.

2. On June 30, 2004 did DEN make available all extant documentary material generated by or in the possession of DEN or its agents or contractors?

3. If the answer to question #2 is no, identify and briefly describe any extant documentary material that DEN did not make available on June 30, 2004, and provide a precise, current estimate of the number of documents not yet made available.

4. Identify and describe any known limitations to DEN's search and disclosure of documentary material, include any persons (e.g., former DEN contractors or law firms) who might reasonably possess relevant DEN documentary material but who were either not contacted or did not respond fully to DEN's request for such documents.

5. Identify and describe any classes or categories of documents (e.g., e-mails or documents collected after April 15, 2004) that DEN did not make available on June 30, 2004. Provide DEN's precise, current estimate of the number of documents in each such class or category and the reasons why they were not made available.

¹ For purposes of this and the following questions, the phrase "make available" means in relevant part (a) providing an electronic file and an electronic bibliographic header (EBH) for documents, (b) providing an electronic image format and EBH for graphic oriented documentary material, (c) providing an EBH for each item of documentary material that is not suitable for image or searchable full text, and (d) providing an EBH for documents specified in 10 C.F.R. § 2.1003(a)(4).

6. On June 30, 2004, did DEN provide the public and the Licensing Support Network (LSN) with an EBH for each extant document subject to any DEN claim under 10 C.F.R. § 2.1003(a)(4)? If not, provide an estimate of the number of such documents for which DEN did not provide an EBH.

7. State whether the documents listed in Exhibit 7 to the Affidavit of Robert R. Loux, the Executive Director of the Nevada Agency for Nuclear Projects, were available to the public as of July 12, 2004 and if not, state why not.

8. State whether, in making documents available, DEN has made textual (or where non-text, image) versions of its documents available on a web server that is able to be canvassed by NRC's LSN web indexing software and DEN complied with the standards specified in 10 C.F.R. § 2.1011(b)(2).

9. State whether there is any agreement between DEN and NRC establishing the moment at which documentary material is deemed "available" as specified in 10 C.F.R. § 2.1003(a).

DEN's answers to the above specified matters shall be signed by at least one attorney of record for DEN, whose signature shall constitute a certification that, to the best of the signor's knowledge, information, and belief, formed after a reasonable and thorough inquiry of persons with direct knowledge of the pertinent facts, the answers are complete and correct as of the time they are made.

Similarly, any person filing an answer to the motion of NEV, is encouraged to focus on the facts concerning the nature, extent and completeness of the documentary material disclosed by DEN on June 30, 2004, and thereafter. Any such answer shall be signed as specified in the preceding paragraph. Additionally, DEN shall address, and any person filing an answer to NEV's motion may address, NEV's argument that "it is not sufficient for DEN simply to make documents available on its own web site. Compliance with Subpart J requires that the

documents be available and indexed on NRC's web site." State of Nevada Motion, page 15 (emphasis added).

In addition to the motion by NEV, we have been contacted by two other persons raising concerns about the availability of DEN's documentary material. First, on July 9, 2004, the NRC LSN Administrator sent us an e-mail asking for approval to implement a request from DEN to delete, as privileged, certain documents from the LSN web site. On July 9, 2004, we issued a ruling declining to respond to that request.

Next, on July 12, 2004, Ms. Judy Treichel, Executive Director of the Nevada Nuclear Waste Task Force, Incorporated, sent us an e-mail concerning the alleged lack of availability of DEN's documentary material. The e-mail attached a copy of Ms. Treichel's July 7, 2004 letter to the NRC's Office of the General Counsel alleging difficulties experienced in accessing such documentary material and asking for "help in getting the NRC to assume direction and control of the process now and to require that the [DEN] meet the intent of the rule before 'the clock begins ticking' toward a deadline for the rest of us." Treichel Letter, page 2.

With regard to such requests, all persons interested in the HLW pre-license application proceeding must note that the jurisdiction of this Board is limited to disputes and does not include generalized advice, advisory opinions, or approvals as to the mechanics of additions or deletions to the LSN. Furthermore, as stated in the Commission's July 7, 2004 Order (CLI-04-20, 60 NRC __, __ (2004) (slip op. at 4) "[t]he ex parte and separation of function rules (10 C.F.R. § 2.347 and § 2.348, respectively) shall apply" to those matters falling within our jurisdiction. Therefore, we will not entertain any requests or motions that do not comply with

these requirements and which are not served on all participants in accordance with 10 C.F.R. § 2.323(c) and our Order of July 9, 2004.

It is so ORDERED

For the Pre-license Application
Presiding Officer Board

A handwritten signature in cursive script, reading "Thomas S. Moore", is written over a solid horizontal line.

Thomas S. Moore, Chairman
Administrative Judge

Rockville, Maryland

July 14, 2004

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (REGARDING STATE OF NEVADA'S JULY 12, 2004 MOTION) have been served upon the following persons by electronic mail.

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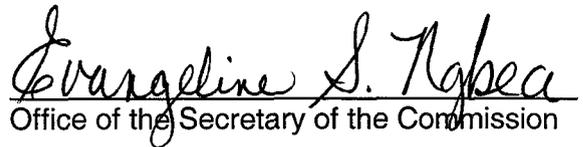
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Dated at Rockville, Maryland,
this 14th day of July 2004