

July 22, 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket No. PAPO-00
	)	
DEPARTMENT OF ENERGY	)	ASLBP No. 04-829-01-PAPO
	)	
(High-Level Waste Repository: Pre-Application Matters)	)	NEV-01

NRC RESPONSE TO NEVADA MOTION TO STRIKE  
DEPARTMENT OF ENERGY LSN CERTIFICATION AND FOR RELATED RELIEF

INTRODUCTION

By letter dated June 30, 2004, the Department of Energy (DEN) submitted an initial certification that its documentary material is electronically available. Letter from W. John Arthur, DEN, to Annette Vietti-Cook, NRC, June 30, 2004 (June 30 Letter) at Appendix D. By motion dated July 12, 2004, the State of Nevada (NEV) requests (1) that the DEN certification be stricken from the docket, (2) a ruling that DEN's population of its own website<sup>1</sup> with documentary material does not satisfy Licensing Support Network (LSN) requirements, and (3) a ruling that the "certification" does not constitute an event which commences the ninety-day period specified in 10 C.F.R. § 2.1003(a) for subsequent certifications by NEV and other prospective parties in the proceeding.<sup>2</sup> Motion to Strike the Department of Energy's LSN Certification and for Related Relief, June 30, 2004 (Motion), at 1-2. NEV further maintains that the requested relief "has 'a direct relation to the LSN' and therefore falls within the jurisdiction of the Pre-License Application Presiding Officer

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<sup>1</sup> The DEN controlled site is at <http://www.ocrwm.doe.gov> or <http://www.search.lsnnext.us/search/docsearch>.

<sup>2</sup> NEV is silent on whether the 30-day period (after the DEN certification) for the NRC certification per 10 C.F.R. §§ 2.1003 and 2.1009 is triggered. See Motion at 2.

("PAPO")" and requests that, if the PAPO determines that the requested relief is not within the jurisdiction of the PAPO, the matter be referred to the Commission for decision. Motion at 2.

For the reasons stated below, the U. S. Nuclear Regulatory Commission Staff (NRC)<sup>3</sup> opposes the motion to the extent that it requests that the DEN certification be declared inadequate because of the alleged failure of DEN to make documentary material electronically available. The NRC does not take a position on the specific documents identified in the Motion or on other matters identified in the Memorandum and Order, dated July 14, 2004 (July 14 Order), of the PAPO Board.

### DISCUSSION

#### A. Limited Role of the NRC

In support of its Motion, NEV argues DEN's certification is inadequate because (1) DEN did not make "all" DEN documentary material in its possession electronically available via the central LSN website, (2) the materials were not otherwise made electronically available since documents could not be accessed via the DEN website for a number of days, and (3) specific documents were not included in the materials produced to the extent DEN materials were made available. See Motion at 8-17, 19.

The NRC is not addressing all of the matters identified in the Motion and the July 14, 2004 Order, because the NRC views its role in disputes related to procedural matters such as document

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<sup>3</sup> In its Order (Initial Pre-License Application Phase Order), dated July 9, 2004 (July 9 Order), 69 Fed. Reg. 42465 (July 15, 2004), the PAPO Board directed participants in the litigation of pre-application matters to use the three-letter LSN participant code in filings before the PAPO Board. July 9 Order at 5 n.3, 69 Fed. Reg. at 42467 n.3. Although the Nuclear Regulatory Commission Staff normally identifies itself as the "Staff" (or "NRC Staff") in an adjudicatory proceeding to distinguish between it and the "NRC" (or "Commission"), thus avoiding confusion of the separated roles in agency adjudications, we emphasize that as used herein (except for quoted passages), the acronym "NRC" refers to the staff of the NRC. References to the agency itself or to the Commission as an adjudicatory body are to "the Commission." The NRC requests that, in all future correspondence and pleadings, the staff of the Nuclear Regulatory Commission be referred to as the "NRC Staff" or "Staff", and supports NEV's request, Motion at 1 n.1, that, in the future, the Department of Energy be referred to by the acronym "DOE."

production as limited.<sup>4</sup> The NRC is of the opinion that this pre-application dispute, in large part, concerns whether a particular DEN document or group of DEN documents is, or should be, electronically available. Discussion of such matters and the relevant facts are uniquely within the purview of the entity that developed or possesses the alleged discovery items, the entity that contests the failure to produce the alleged discovery items, and, with respect to matters of availability via the central LSN website, the LSN Administrator (LSNA).<sup>5</sup> The NRC is not in a position to provide any "facts concerning the nature, extent, and completeness of the documentary material disclosed by DEN on June 30, 2004, and thereafter" as requested by the Board. See July 14 Order, at 3. NEV, DEN and the LSNA are best suited to address factual matters contested in the Motion.

The NRC, however, does have an interest in the proper interpretation and application of the Commission's regulations in this adjudicatory proceeding. Therefore, the NRC herein provides its views on the applicable requirements of 10 C.F.R. Part 2, Subpart J, and an appropriate standard by which to judge the challenged DEN certification.

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<sup>4</sup>The Commission has previously indicated that the NRC need not participate in procedural disputes related to litigation on the license application for a geologic repository. "The Commission will instruct the NRC staff to refrain from becoming involved in procedural disputes between other parties in which the staff does not have an interest, unless the Presiding Officer specifically requests the staff's views on the matter." "Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository [1991 LSS Rule]," 56 Fed. Reg. 7787, 7794 (February 26, 1991).

<sup>5</sup> The recent order directing the LSNA to answer questions related to the Motion is an indication that the PAPO Board recognizes the unique position of the LSNA with respect to the matters contested in the Motion. See Memorandum and Order (Directing the Licensing Support Network Administrator to Respond to Questions), July 19, 2004. The unique position of the LSNA is also evident under the prior Licensing Support System (LSS) rule. The LSS Administrator determined DEN's compliance with certification requirements under § 2.1003(h)(1) and that determination was subject to review (upon request) by the Pre-License Application Licensing Board under § 2.1010(a)(1) and the Commission under § 2.1015(e). See "Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for Disposal of High-Level Radioactive Waste [1989 LSS Rule]," 54 Fed. Reg. 14925, 14937, 14946, 14951.

B. Jurisdiction of the PAPO Board

In the order designating the PAPO, the Commission stated that the PAPO has “authority *solely* for the purpose of ruling on disputes over the electronic availability of documents, including disputes relating to claims of privilege and those relating to implementation of recommendations of the Advisory Review Panel under § 2.1011(d).” *U.S. Department of Energy*, CLI-04-20, 60 NRC \_\_ (July 7, 2004), slip op. at 2, 69 Fed. Reg. 42073 (July 13, 2004) (emphasis in original). The Commission further indicated that “[n]o issue lacking a direct relation to the LSN is to be entertained by the PAPO.” Slip op. at 3, 69 Fed. Reg. 42074.

Inasmuch as the matters contested are the adequacy of the DEN certification in response to NEV’s claim that NRC LSN requirements have not been satisfied and the failure to produce certain documentary material, the PAPO Board has jurisdiction to consider the Motion. Consequently, there is no need to refer this matter to the Commission.

C. Subpart J Certification Requirements and Electronic Availability

Under 10 C.F.R. § 2.1009, the responsible official for each party, potential party, and interested governmental participant, must certify to the PAPO that procedures to implement the requirements of 10 C.F.R. § 2.1003 have been implemented and that, to the best of his or her knowledge, documentary material specified in 10 C.F.R. § 2.1003 has been identified and made electronically available. 10 C.F.R. § 2.1009(b). DEN provided its certification on June 30, 2004, indicating (1) that “documentary material has been identified from those documents submitted to CACI [DEN’s contractor] by April 15, 2004 and made electronically available” and (2) that DEN would provide an updated certification when it submits its license application. DEN Certification (Appendix D to June 30 Letter). DEN also requested that the NRC withhold the LSN index of DEN’s documentary material until the LSNA verifies that accession numbers accurately correspond to publicly releasable materials. *See* June 30 Letter.

Pursuant to 10 C.F.R. § 2.1003, and subject to certain exclusions in §§ 2.1005 and 2.1003(b) and (c),<sup>6</sup> DEN is required to make documentary material<sup>7</sup> “available” no later than six months before submitting its license application. In essence, this regulation requires electronic availability of documentary material. Such information is to be “made available” by providing (1) an electronic file, including bibliographic header, in searchable text for all documentary material, (2) an electronic image and a bibliographic header for graphic-oriented material, (3) an electronic file and a bibliographic header for each item of documentary material not suitable for image or searchable full text, and (4) an electronic bibliographic header for each documentary material withheld based on claims of privilege or which constitutes confidential financial or commercial information or safeguards information. See 10 C.F.R. §§ 2.1003 and 2.1011.

The Licensing Support Network is “the combined system that makes documentary material available electronically to parties, potential parties and interested governmental participants to the proceeding” on a license application for a geologic repository under 10 C.F.R. Parts 60 and 63, as part of “electronic access to documentary material, beginning in the prelicense application phase.” 10 C.F.R. § 2.1001. Design standards for computer systems necessary for compliance with Commission requirements for electronic production of documentary materials include, *inter alia*, (1) making textual or image versions (as appropriate) of documents, as well as data and log files “available on a web accessible server which is able to be canvassed by indexing software

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<sup>6</sup> The cited regulations identify the categories of documentary material (such as junk mail, classified and budgetary information) that are excluded from the requirement to provide electronic access and categories that need be identified by bibliographic header only (such as safeguards or privileged information).

<sup>7</sup> Documentary material is defined as (1) any information upon which a party, potential party, or interested governmental participant intends to rely upon and/or cite in support of its position in the proceeding on a license application; (2) any information that is known to and in the possession of, or developed by the party that is relevant to, but does not support its position, and (3) all reports and studies, prepared by or on behalf of the potential party, including all related “circulated drafts,” relevant to both the license application and the issues set forth in the Topical Guidelines in Regulatory Guide 3.69, regardless of whether they will be relied upon and/or cited by a party. 10 C.F.R. § 2.1001. “The scope of documentary material shall be guided by the topical guidelines in the applicable NRC Regulatory Guide.” *Id.*

(i.e., "robot", "spider", "crawler")," (2) making "bibliographic header data *available*" in certain formats, and (3) programmatically linking, "preferably via a hyperlink or some other automated process, the bibliographic header record with the text or image file it represents," affording the LSN software enough information to identify a text or image file and the bibliographic data that describes it. 10 C.F.R. § 2.1011(b)(2)(i), (ii), (v) (emphasis added).<sup>8</sup>

Notably absent from the regulations in 10 C.F.R. Part 2, Subpart J, however, is an explicit requirement that for certification purposes, documentary material must be made electronically available via the LSN. See 10 C.F.R. §§ 2.1001, 2.1003, 2.1011. Rather, certification requires that procedures have been implemented to meet requirements to provide electronic files including bibliographic headers, for text and image materials and a bibliographic header for material not suitable for electronic files or material being withheld from disclosure on privilege or other grounds. See 10 C.F.R. §§ 2.1003, 2.1006. That the regulations do not contain an obligation expressly linking certification to the LSN does not, however, undermine the importance of the LSN in providing access to documentary material. As the Commission explained in issuing the LSN design standards rule in 2001, "the Commission intends to implement a design for the 'central LSN site' that will ensure that the totality of the individual websites operate in an "efficient and effective" manner." "Licensing Proceedings for the Receipt of High-Level Waste at a Geologic Repository; Licensing Support Network, Design Standards for Participating Websites," 66 Fed. Reg. 29453, 29461 (May 31, 2001).

The recommended design is an LSN home page/website based on portal technology. Web portals include hardware and software capable of: Indexing all bibliographic data and text documents on a web server; establishing a baseline; and then routinely revisiting those servers to compare new findings against the previous baselines. The single LSN web page standardizes search and retrieval across all collections providing a common user search interface, rather than requiring users to learn the search and retrieval commands from each different site.

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<sup>8</sup> The spidering software is a "custom auditing program that interacts with participant documentary material in a way that allows the LSN staff to identify any subsequent changes to a document" or in an LSN participant collection. See LSN Guidelines at 12-1.

The Commission believes . . . the recommended design will provide a document discovery system that will facilitate the NRC's ability to comply with the schedule of decision on the repository construction authorization; provide an electronic environment that facilitates a thorough technical review of relevant documentary material; ensure equitable access to the information for the parties to the HLW licensing proceeding; ensure that document integrity has been maintained for the duration of the licensing proceeding; most consistently provide the information tools needed to organize and access large participant collections; feature adequately scaled hardware and software; and include comprehensive security, backup, and recovery capabilities.

66 Fed. Reg. 29453, 29461. The primary focus of the regulations is that a party, potential party, or interested governmental participant make its documentary material electronically available as evidenced by the 10 C.F.R. § 2.1009 certification. Consequently, the relevant inquiry is whether DEN took steps to make its materials "electronically available."

NEV challenges the completeness of the materials underlying the DEN certification and suggests that DEN's certification must include "all documentary material that is known to, in the possession of, or developed by or at the direction of DEN at the time of certification" and that "certification can only occur following the *completed* task of document identification." See Motion at 9, *citing* 10 C.F.R. §§ 2.1003 (emphasis in original). NEV also argues that the objectives of discovery are not satisfied if DEN discloses some relevant information with the remaining identified at a later date, *id.* at 9-10, and that a recent rule change provides for supplementation of documentary material "only to the extent such materials are 'created after the time of its initial certification,'" *id.* at 10 *citing* 10 C.F.R. § 2.1003(e). This interpretation of the rule change fails to appropriately consider contemporaneous NRC statements accompanying the rule. Those statements addressed the scope of documentary material and disclosure obligations of LSN participants prior to admission of contentions in the licensing proceeding. See "Licensing Proceeding for a High-Level Radioactive Waste Geologic Repository; Licensing Support Network, Submissions to the Electronic Docket," 69 Fed. Reg. 32836, 32840, 32842-44 (June 14, 2004).

The scope of documentary material made available prior to an initial certification is not as expansive as NEV suggests. See Motion at 9-14. For example, reports or studies must have a

nexus both to the license application and the topical guidelines, thus ensuring that “LSN participants do not have to identify, and include as documentary material, reports or studies that have no bearing on the DOE license application for a geologic repository at the Yucca Mountain site, such as reports or studies on issues on other potential repository sites or on issues outside of the NRC licensing criteria.” 69 Fed. Reg. 32836, 32843.

In addition, the Commission also indicated that information that a party would rely upon to support its position in the proceeding and information that does not support that position need not be made electronically available until after admission of contested issues -- so-called “reliance” materials related to a “position a party in the HLW proceeding will take in regard to compliance with Commission regulations on the issuance of a construction authorization for the repository” -- could change after the initial DEN certification. *Id.* at 32843. The Commission noted that given that the full scope of “reliance” materials will not become apparent until after proffered contentions are admitted by the Presiding Officer in the licensing proceeding, “an LSN participant would not be expected to identify specifically documents that fall within either Class 1 or Class 2 [reliance] documentary material in the prelicense application phase.” *Id.* The Commission stated that it “still expects all participants to make a good faith effort to have made available all of the documentary material that may be eventually designated as [reliance] documentary material by the date specified for initial compliance in section 2.1003(a) of the Commission’s regulations.” *Id.* The scope of such reliance documentary material for DEN and other LSN participants could change based on events subsequent to the initial DEN certification, including the admission of contentions. *See id.*<sup>9</sup>

Given that the scope of “reliance” documentary material can be affected by events subsequent to an initial certification, a certification pursuant to 10 C.F.R. § 2.1009 is not necessarily inadequate if an LSN participant does not identify or make available electronically all “reliance”

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<sup>9</sup> The Commission further opined that, absent special circumstances, a dispute on a particular document in the reliance category “would be more appropriately raised before the Presiding Officer designated during the time following admission of contentions.” 69 Fed. Reg. 32843-44.

materials that predate the initial certification (or if reliance materials predating the initial certification are identified or made available subsequent to the initial certification) if the LSN participant engaged in good faith efforts to identify documentary material within the scope of § 2.1003. A “rule of reason must be applied to an LSS [or LSN] participant’s obligation to identify all documentary material within the scope of the topical guidelines.” 1989 LSS Rule, 54 Fed. Reg. 14925, 14934.

NEV asserts that the DEN certification should be stricken because it covers only documentary material provided to the DEN contractor by April 15, 2004. See Motion at 9-12 & n.5. Given that crawling and indexing activities take time, it is not unreasonable to expect that there would be a gap between the last date of document processing and the date of a certification. Before materials can be made electronically available, potential participants in the licensing proceeding must undertake the time-consuming task of identifying, screening, and processing (in electronic format) documentary material, and placing the electronic files on a computerized system that is capable of being “spidered” or “crawled” by the central LSN website software. Thus, it is also reasonable to expect that documentary material identified less than two months prior to the date of the certification would not be included in certified materials.

An LSN participant who completes reasonable efforts to make its documentary material available in accordance with 10 C.F.R. §§ 2.1003, 2.1009, and 2.1011, prior to submitting its certification cannot be said to have failed to comply with the rule. For example, 10 C.F.R. § 2.1009 does not require a participant to certify that “spidering” of the participant’s collection has been completed and the documentary available via the LSN.<sup>10</sup>

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<sup>10</sup> In response to comments that (1) the DEN document collection may not be indexed and audited by the LSNA by the time of a DEN certification (and therefore not “available” to the public) and (2) that added certification by the LSNA of DEN’s collection should be required and become the trigger for subsequent certifications, the Commission indicated that the revision was outside the scope of the rulemaking. 69 Fed. Reg. 32840. The Commission indicated that it was pursuing an approach “to ensure that the DOE collection has been indexed and audited by the LSN Administrator approximately the same time frame as the DOE certification” and potentially ensuring that the indexed and baseline collection would be available well in advance of potential docketing of an acceptable application. 69 Fed. Reg. 32840.

Accordingly, whether a participant's documentary material has been "made available" electronically should be determined based on whether there has been a good faith effort to identify and make documentary material available in accordance with the standards in § 2.1003 and § 2.1011, with the recognition that the scope of reliance documentary material may be affected by subsequent events (such as the admission of contentions in the potential Yucca Mountain licensing proceeding).

D. Criteria for Evaluating the DEN Certification

NEV proffers information that indicates that, after the DEN certification on June 30, 2004, the DEN controlled-collection was taken off-line on July 1, 2004, due to the discovery of the inadvertent release of privacy information, see Motion at Exhibit 6, and that the collection of DEN documentary material was not otherwise available via the central LSN website as of July 8, 2004, see *id.* at Exhibit 5. NEV acknowledges that, by the date of its filing, the separate DEN LSN collection was accessible via the DEN website, but notes that there are headers that "have no link to actual documents." See Motion at 19.

Because the regulations do not provide criteria by which to judge the adequacy of the DEN certification, the PAPO Board should apply the standard applicable to petitioners for leave to intervene and persons seeking to participate as interested governmental participants in the HLW proceeding in 10 C.F.R. § 2.1012(b)(1). Each petitioner must demonstrate "substantial and timely compliance with § 2.1003 requirements at the time it requests to participate in the proceeding." 10 C.F.R. § 2.1012(b)(1). "Substantial and timely compliance" with the regulations was the standard under the former LSS (centralized data base) rule, that would have been applicable to disputes regarding the DEN certification.

The industry argues the LSS will create new procedural issues over which litigation is likely --for example, the LSS Administrator's certification that DOE is in substantial and timely compliance with the document submission requirements in the rule. In response, the Commission notes that although the LSS rule does establish some new procedural requirements, these requirements are necessary to ensure that the parties subject to the rule are in substantial and timely compliance with its provisions, and thereby facilitate compliance with the NWPA's three-year time

frame. In particular, the certification of DOE compliance is necessary to assure that relevant documents are in the LSS as soon as possible, so as to allow for early, pre-license application discovery. Any disputes over compliance with the rule will be resolved by the Pre-License Application Licensing Board established in 2.1010 *before* the license application is submitted. [Emphasis in original]

Final LSS Rule, 54 FR 14925, 14927 (April 14, 1989). Although this standard is not applicable to DEN under the current rule, there does not appear to be any reason to judge DEN's compliance by a standard different from that applicable to other potential parties in the licensing proceeding. Thus, good faith efforts that result in timely and substantial compliance should satisfy the requirements of § 2.1009.<sup>11</sup>

The Commission has stated its "expectation" that "DOE will comply with . . . the Commission's requirements on initial certification" 66 Fed. Reg. 29453, 29460 n.2, and has urged potential LSN participants to make their documents electronically available in the prelicense application phase.<sup>12</sup> Arguably and ideally, DEN should have made its collection available to the central LSN website in time to allow for resolution of problems similar to those identified

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<sup>11</sup> The mere failure to accurately predict the amount of documentary material to be made available electronically should not provide a basis to render a certification inadequate.

<sup>12</sup> See 63 Fed. Reg. 71729, 17134 ("the NRC would encourage the earliest feasible availability of document material in order to enhance future smooth operation of the licensing proceeding"); 66 Fed. Reg. 29453, 29461 n.4 (May 30, 2001) ("the Commission strongly recommends that all those who are parties or potential parties to the HLW adjudicatory proceeding make every possible effort to provide access to as much of their existing section 2.1003 documentary material as soon as possible after the central LSN site is operational"). Since April 2002, the LSN guidelines have indicated that participants should make a significant portion of their documentary material electronically available in advance of the certification deadline so as to permit testing and other activities to evaluate system performance. LSN Guideline 8.2 at 8-1.

LSN guidance documents, like other NRC guidance documents, do not impose binding requirements. See, e.g., *Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 398 (1995) (methods or solutions other than those set forth in NRC NUREGs or regulatory guides are sufficient if they provide a basis to meet regulatory requirements). Section 1 of the LSN Guidelines, dated June 2004, indicates that the guidelines do not supercede Commission regulations and merely document decisions of the LSN Advisory Review Panel (LSNARP) and the 2001 rule changes that "contributed to the design basis of the LSN." LSN Guideline at 1-1. The guidelines describe LSNA duties as including establishing "target dates by which participant LSN website document collections should be ready to connect to the central LSN site." *Id.* at 2-2. NRC counsel has no knowledge as to whether a target date was established for DEN.

subsequent to the DEN certification. Perfection, however, should not be the standard by which an LSN participant is judged. It is not unreasonable to expect that despite best efforts, parties and potential parties will experience problems in satisfying the electronic availability requirements. In the future, NEV and other LSN participants also may have to address matters such as the inadvertent release of protected or sensitive information by rendering their collections inaccessible for limited periods of time.<sup>13</sup>

NEV suggests that the periods when the DEN website was off-line or the DEN collection was not available via the central LSN website renders the DEN certification inadequate. *See, e.g.*, Motion at 11-12, 14-17, 19. Neither the regulations nor the Guidelines contain any standard for the availability of websites vis a vis certification.<sup>14</sup> The application of a “timely and substantial compliance” standard is reasonable because it recognizes both the occasional unavailability of Internet websites and that collections may be taken off line to address problems identified by the LSN participant or others. Inadvertent disclosure of sensitive or other information that may be withheld from disclosure must be addressed without causing unnecessary delays in the pre-application or post-application phase of the proceeding. The Commission has previously indicated that “substantial and timely compliance” with the LSS rule “facilitates compliance with the NWPA three-year time frame.” 54 Fed. Reg. 14927. The statutory period for a decision on any application for a construction authorization was the impetus for the LSS/LSN as well as the Commission’s desire to provide, among other things, opportunities for discovery and to become

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<sup>13</sup> Pursuant to 10 C.F.R. § 2.1011(c)(4), the LSNA is required to assist potential parties with identifying any problems regarding the integrity of documentary material and recommending solutions. In commenting on the proposed LSN rule, DEN agreed that the purpose of that provision is to ensure that information provided to the LSN is not removed or modified and that the LSN should have the authority to ensure document integrity. *See* 66 Fed. Reg. 29453, 29457.

<sup>14</sup> Although, the Guidelines recommend that participant websites be available for search and retrieval of documents between the hours of 6 a.m. to midnight eastern time, *see* LSN Guidelines at 4-1, the LSN guidelines also recognize that there may be periods when participant LSN collections are unavailable, *see* LSN Guideline 4.1 at 4-1. They do not indicate appropriate durations for such outages or down times.

knowledgeable about information relevant to the license application in advance of the inception of the proceeding. See 54 Fed. Reg. 14926. Thus timely and substantial compliance should be based in part, on whether the required documentary material was available for the six-month periods (prior to submission of a license application or docketing) provided in the regulations. See 10 C.F.R. §§ 2.1003 and 2.1012(a).

In short, if DEN can demonstrate substantial and timely compliance with the requirements of § 2.1003 and the design standards prior to making its certification and good faith efforts to identify documentary material, there would be no basis to conclude that its certification was inadequate. Brief and intermittent interruptions in the availability of documentary material do not undermine the Commission's objective of providing an opportunity for meaningful discovery and to frame focused contentions in the pre-license application phase.

The NRC does not have information to enable it to take a position on whether DEN engaged in good faith efforts to identify and make available documentary material or whether DEN is in timely or substantial compliance with the applicable electronic availability requirements for certification. It does not appear, however, that NEV has met its burden to proffer information that shows the NEV is entitled to the relief request.<sup>15</sup> NEV, in its Motion, neither demonstrates that the purposes or objectives of the regulations have been thwarted nor that DEN is not in timely and substantial compliance with the electronic availability requirements. To the extent that NEV now complains about information not being electronically available for six-months prior to submission of a potential license application, a determination on that point would be premature until DEN submits its application.<sup>16</sup>

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<sup>15</sup> The movant or proponent of an order has the burden of proof to show the requested relief should be granted. 10 C.F.R. § 2.325.

<sup>16</sup> Moreover, the rule specifically addresses the appropriate remedy for the failure of DEN certify its document availability six months in advance of the submission of any license application. That remedy is that the application may not be docketed until at least six months after DEN's certification. See 10 C.F.R. § 2.1012(a). Any determination by the PAPO Board regarding the  
(continued...)

If, however, the PAPO Board determines that DOE was not in timely and substantial compliance with § 2.1009 until a later date, the Staff is of the view that the time line for certification by the Staff and other LSN participants should be postponed accordingly.

CONCLUSION

For the reasons stated above, electronic availability of documentary material via the LSN is not required prior to certification. The adequacy of the DEN certification must be judged by application of the requirements of 10 C.F.R. §§ 2.1003, 2.1009 and 2.1011 that pertain to electronic availability. The PAPO Board should determine whether DEN engaged in good faith efforts to identify documentary material and whether DEN substantially and timely complied with the certification requirements. Intermittent interruptions in access to electronic materials made available at participant websites should not prevent a finding of substantial and timely compliance. The NRC, however, takes no position on other matters raised by the Motion and the July 14 Order.

Respectfully submitted,



Mitzi A. Young  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 22nd day of July 2004

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<sup>16</sup>(...continued)

validity of the DEN certification would affect this potential docketing date. The Commission, however, has specifically noted that the pendency of a dispute contesting some aspect of the certification would not be a reason to delay the NRC acceptance of a potential DEN license application for docketing. See 66 Fed. Reg. 29460.

July 22, 2004

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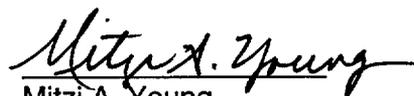
In the Matter of	)	Docket No. PAPO-00
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	)	
(High-Level Waste Repository: Pre-Application Matters)	)	NEV-01
	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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Name of Party:	NRC Staff

Respectfully submitted,

  
Mitzi A. Young  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 22nd day of July 2004

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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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Name of Party:	NRC Staff

Respectfully submitted,



Janice E. Moore  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 22nd day of July 2004

July 22, 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

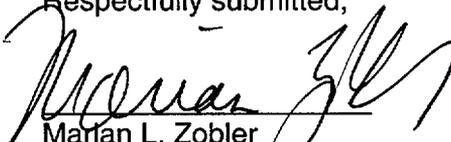
In the Matter of	)	Docket No. PAPO-00
	)	
U.S. DEPARTMENT OF ENERGY	)	ASLBP No. 04-829-01-PAPO
	)	
(High-Level Waste Repository: Pre-Application Matters)	)	NEV-01
	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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July 22, 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket No. PAPO-00
	)	
U.S. DEPARTMENT OF ENERGY	)	ASLBP No. 04-829-01-PAPO
	)	
(High-Level Waste Repository: Pre-Application Matters)	)	NEV-01
	)	

NOTICE OF APPEARANCE

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

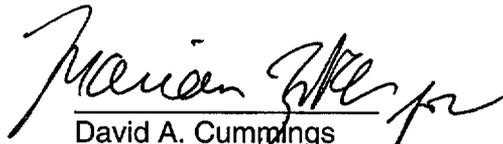
In the Matter of	)	Docket No. PAPO-00
	)	
U.S. DEPARTMENT OF ENERGY	)	ASLBP No. 04-829-01-PAPO
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(High-Level Waste Repository: Pre-Application Matters)	)	NEV-01
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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	)	
(High-Level Waste Repository: Pre-Application Matters)	)	NEV-01
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC RESPONSE TO NEVADA MOTION TO STRIKE THE DEPARTMENT OF ENERGY LSN CERTIFICATION AND FOR RELATED RELIEF", "NOTICE OF APPEARANCE" for Mitzi A. Young, "NOTICE OF APPEARANCE" for Janice E. Moore, "NOTICE OF APPEARANCE" for Marian L. Zobler, "NOTICE OF APPEARANCE" for David Cummings, and "NOTICE OF APPEARANCE" for Michael A. Woods in the above captioned proceeding have been served on the following persons by electronic mail and/or Electronic Information Exchange this 22nd day of July, 2004.

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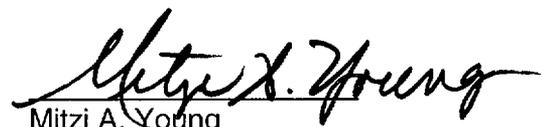
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