

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

July 22, 2004

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman

Alex S. Karlin

Alan S. Rosenthal

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
	)	

Answer to Nevada’s Motion to Strike the  
Department of Energy’s LSN Certification

On July 12, 2004, the Nuclear Energy Institute, Inc. (“NEN”) received by e-mail a copy of a “Motion to Strike the Department of Energy’s LSN Certification and for Related Relief”(“Motion”), signed by Nevada (“NEV”) counsel. This Answer is filed pursuant to the Atomic Safety and Licensing Board (“ASLB”) Memorandum and Order dated July 14, 2004. NEN opposes the Motion to the extent that it is based upon the position: (1) that the validity of the Department of Energy’s (“DEN’s”) certification is dependent upon action by the Nuclear

Regulatory Commission (“NRC” or “Commission”); (2) that certification can only be made if all documentary material in existence on the date of such certification has been made available; and (3) that not including a relatively small number of documents constitutes a material failure to comply with certification requirements.<sup>1</sup> In addition, the undersigned intends to participate on behalf of NEN in oral argument scheduled for July 27, 2004.

First, to a considerable extent, NEV’s Motion seems to be directed at DOE’s certification having been made prior to certain action by the NRC, such as indexing steps to ensure document integrity and electronic linkage to a DEN server. *See, e.g.*, Motion, pp. 14-17. Certification, however, only pertains to “identif[ying]” and making documentary material “electronically available.” 10 C.F.R. § 2.1009(b). Parties and potential parties can only certify action over which they have control. Accordingly, the “certification of compliance” required under § 2.1009(b) must pertain to action of the certifying entity and not that of others, including the NRC.

Furthermore, the principle that certification can only pertain to action of the certifying entity was implicitly affirmed in the NRC’s recent revision to 10 C.F.R. Part 2. In commenting on the proposed revision, NEV had raised exactly the same point that is the basis for the Motion. *See* 69 Fed. Reg. 32,836, 32,840. In this

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<sup>1</sup> NEN did not receive proof of service of the Motion as required by 10 C.F.R. § 2.1013(c), but does not oppose it on that basis.

comment, NEV asked for the LSN administrator certification to “become the tolling event for the certification by all other LSN participants.” *Id.* In the final rulemaking, NRC responded to NEV’s comment not by agreeing with NEV but, rather, by stating “The NRC is pursuing an approach with DOE to ensure that the DOE collection has been indexed and audited by the LSN Administrator in approximately the same time frame as the DOE certification.” Although the NRC may not have succeeded in closing the time gap between DOE and LSN Administrator action to NEV’s satisfaction, the fact remains that the Commission specifically considered as part of a formal rulemaking, but chose not to grant, NEV’s request to include that gap in the determination of 10 C.F.R. § 2.1003 advance certification timelines.

Second, the Motion appears to at least imply that sufficient certification can only be made if all documentary material in existence up to and including the precise moment of certification, itself, has been made available. However, common sense alone compels a different conclusion. It obviously takes time to process documents in accordance with NRC regulations and guidance in order to identify them as documentary material; make them available to the LSN; and provide the proper certification. Even new documentary material, produced after initial certification, need only be made available at some time “*reasonably* contemporaneous with its creation . . . .” *See* 66 Fed. Reg. 29,453, 29,460

(emphasis added). Accordingly, to the extent the Motion rests on the proposition that certification must cover all documentary material in existence up to and including the moment certification occurs, it should be denied.

Moreover, the possibility that certain documents might not be included at the time of initial certification was specifically addressed in NRC's recent revision to 10 C.F.R. Part 2, wherein the NRC determined that such concerns probably could not be properly resolved at the time of certification. The NRC considered the possibility that "an LSN participant identifies a document which the creator of that document has not included on its LSN document collection server" and concluded that "in such circumstances, it is not apparent what purpose would be served by raising the issue before the PAPO unless the documentary material has some readily apparent significance as a Class 2 document." 69 Fed. Reg. 32,842. NRC further noted that "[A]n LSN participant would not be expected to identify specifically documents that fall within either Class 1 or Class 2 documentary material in the pre-license application phase." *Id.* at 32,843. With respect to the Department of Energy, the NRC stated that "DOE would be required to supplement its Class 1 and Class 2 documents to the degree the application makes it apparent the scope of the DOE documentary material in those classes had changed, a process that might well be repeated by all parties following the admission of contentions." *Id.* The NRC concluded that "[D]isputes over Class 1

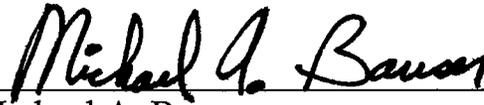
and Class 2 documentary material generally would be of a type that would be more appropriately raised before the Presiding Officer designated during the time following the admission of contentions when the NRC staff is working to complete the Safety Evaluation Report in its entirety.” *Id.* at 32,843-44. Accordingly, since the determinant of whether or not a document is missing is ultimately its relevance to the license application and contentions filed thereto, NEV’s concerns about allegedly missing documents are premature.

Third – and related to the point discussed above – the Motion alleges that “countless relevant documents (likely many millions of pages) were *not* and are *not* now available, on LSN or anywhere else they could be deemed accessible to the public.” Motion, p. 12 (emphasis in original). The precise number of documents alleged to be missing is not specified. However, the supporting Affidavit of Robert R. Loux, Exhibit 7, identifies only seven documents. This, of course, is only a tiny fraction of the more than one million documents certified by DEN. To the extent that the Motion is premised on the proposition that failure to certify a proportionally small number of documents constitutes a material failure to comply with 10 C.F.R. § 2.1009, it should be rejected.

In sum, for the forgoing reasons, the Motion should be denied. In addition, the undersigned, upon whom service of future filings in this proceeding should be made, intends to participate in oral argument currently scheduled for July 27, 2004.

Respectfully submitted,

Dated: July 22, 2004

A handwritten signature in black ink that reads "Michael A. Bauser". The signature is written in a cursive style and is positioned above a horizontal line.

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