

July 22,2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD

In the Matter of) Docket No. PAPO-00
)
U.S. DEPARTMENT OF ENERGY) ASLBP No. 04-829-01-PAP0
)
(High Level Waste Repository:) NEV-01
Pre-Application Matters))

**ANSWER OF THE DEPARTMENT OF ENERGY TO
THE STATE OF NEVADA'S MOTION TO STRIKE**

This is the answer of the Department of Energy (DEN) to the Motion to Strike DEN's LSN Certification and for Related Relief (Motion to Strike, or Motion), filed on behalf of the State of Nevada (NEV).'

I. PRELIMINARY STATEMENT

DEN takes very seriously its responsibility to make available its documentary material for the Yucca Mountain licensing proceeding. DEN has spent to date approximately \$45 million in that endeavor. It has had in place since the 1980s an electronic database to capture and preserve project documents. It supplemented that database with a more than year-long collection effort that canvassed the paper and electronic files of several thousand DEN and contractor employees. Current employees also reviewed nearly 6 million of their archived emails from back-up tapes to identify those that might be potentially relevant. The result of those efforts has been the production of some 2.1 million documents, half of which have been produced in full

¹ The Department of Energy joins Nevada's request to change the Department's participant code to DOE.

text format. By any real-world measure, DEN's production has been substantial, and DEN made a proper initial certification.

DEN also has gone the extra mile to make its documentary material available. It has prepared at its own expense a comprehensive index of its document collection and made its documents and index available via a website that it maintains. It operates an information center, with a toll-free help line posted on DEN's website, to advise persons how they can access DEN's documentary material.

Disputes about document production are routine in any litigation. In this proceeding, such disputes are especially likely in the pre-license application phase before the license application has been completed, before intervention petitions have been filed or contentions formulated and ruled on, and thus before the ultimate scope of the documents legitimately needed by participants has been established. Under these circumstances, no rote or formulaic process can identify documents as documentary material -- especially documents that might contain non-supporting information, in the absence of concrete contentions -- and judgment calls have to be made. Any multi-year production effort involving millions of documents, thousands of persons, and complicated information systems also will have human mistakes and system failures.

Nor will those situations be limited to DEN's production. No participant's production will attain the unreachable goal of perfection, and no participant's judgment calls will be free from good faith disagreements.

Such disputes, however, do not make a participant's certification "unlawful" or "invalid." Nor do they provide any basis to strike DEN's certification or delay the other participants' production of their documentary material. Rather, the regulations direct an alternative course. If

NEV believes DEN has not produced some document, NEV should first confer meaningfully with DEN and give DEN an opportunity to ascertain the facts because, as is the case with many of the supposedly “missing” documents identified in NEV’s motion, the documents may in fact be available on the LSN or expressly excluded by regulation. If NEV afterwards still disagrees, NEV can file a motion to compel. The Board should reject NEV’s invitation to sidestep that process and should deny NEV’s motion.

11. ARGUMENT

Shorn of its many irrelevancies, NEV’s motion distills to two main complaints. The first is that DEN’s initial certification should not be deemed effective until the LSN Administrator has completed his index of DEN’s documents. The other is that DEN had a cut-off date for processing documents. Both complaints are ill-founded, as is the relief NEV seeks.

A. DEN MADE ITS DOCUMENTARY MATERIAL ELECTRONICALLY AVAILABLE IN COMPLIANCE WITH NRC REGULATIONS?

NEV’s principal argument, that DEN’s documentary material should not be deemed electronically available until the LSN Administrator indexes it (*see* Motion at 8-14), is simply wrong. The LSN is a series of individual computer servers, each maintained by an individual participant to the proceeding and housing the electronic files constituting that participant’s documentary material. By June 30, 2004, DEN had loaded onto its participant server the electronic files containing the bibliographic headers of its documentary material and, where appropriate, the electronic images and text of those materials. Affidavit of Harry E. Leake, July 21, 2004 (Leake Aff.) ¶ 6 (Exhibit 1). Those files are compatible with the LSN

² This section also addresses the issue identified at the bottom of page 3 of the Board’s July 14, 2004 Memorandum and Order Regarding State of Nevada’s Motion (July 14 Memorandum and Order) concerning the significance of the availability of DEN’s documentary material on DEN’s website.

Administrator's indexing software and meet the technical requirements of the NRC's regulations.

Leake Aff. ¶ 6. On June 30, DEN made all those files available to the LSN Administrator.

Leake Aff. ¶ 7.

DEN also made all those files publicly available on the Internet on June 30 through a link on its website that connects to DEN's participant server, including an index of the files. Leake Aff. ¶ 7. And while not required by the regulations, that website includes a search engine that allows searches of both headers and text in a manner similar to the LSN Administrator's website. Leake Aff. ¶ 8.

That is all that – and indeed more than – the NRC's regulations require. The NRC's regulations, in particular 10 C.F.R. § 2.1003(a), require only that DEN make available an electronic file containing a bibliographic header for its documentary material and, for certain documents, an electronic image and full text format of the documents. Other provisions, most importantly 10 C.F.R. § 2.101 1, specify various technical criteria for those electronic files. DEN satisfied those requirements by making available to the LSN Administrator on June 30 the electronic files on DEN's participant server that complied with the technical requirements of the regulations. DEN went above and beyond those requirements by simultaneously making those electronic files available through the Internet with an index.

Contrary to NEV's argument, nothing in the NRC's regulations provides that the effectiveness of DEN's certification is to be kept in abeyance until the LSN Administrator completes an index of DEN's documentary material. Similarly, no provision links the timing of NEV's or the other participants' obligation to make available documentary material to the LSN Administrator's completion of an index. The regulations, in particular 10 C.F.R. § 2.1003, provide merely that NEV and others must make their documentary material available within 90

days of the date of DEN's initial certification. They say nothing about any indexing by the LSN Administrator.

In fact, although NEV's motion makes no mention of this matter, the NRC explicitly rejected in its recent rulemaking just last month the very relief that NEV asks of this Board. In connection with other amendments that the NRC had under consideration, NEV requested the NRC to amend its regulations to add a provision that would toll its and the other participants' obligation to make available their documentary material until the LSN Administrator completed an index of DEN's documentary material. The NRC declined NEV's request, stating instead that it was "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." 69 Fed. Reg. 32836,32840 (June 14,2004) (emphasis added).

This recent history is illuminating. It confirms that the NRC's regulations do not contain the requirement that NEV advocates, because there would have been no need otherwise for NEV to have requested an amendment to add such a requirement. It additionally demonstrates that the Commission, confronted with the same plea that NEV makes here, declined to give NEV any relief. NEV presents no basis for this Board to override the Commission's decision and impose conditions on DEN that the Commission rejected and that would be fundamentally unfair to DEN, since DEN cannot control the rate at which the LSN Administrator indexes DEN's documentary material.

Nor is there any need for relief as a practical matter, because DEN has been cooperating with the LSN Administrator on a virtually daily basis to expedite his auditing and indexing of DEN's documentary material. The LSN Administrator promulgated in March 2004 a set of "Access Control Guidelines" (attached as Exhibit 13) that permit participants to provide

documents to the LSN Administrator on a confidential basis prior to certification. Following that, DEN began providing its documentary material to the LSN Administrator for indexing beginning on May 5, 2004. Leake Aff. ¶ 9. At the time, the LSN Administrator estimated that his office could index 30,000 documents a day/150,000 documents a week. At that rate, there would have been sufficient time between May 5, when DEN started providing documents, and June 30 for the LSN Administrator to index the documents that DEN produced in full text. Leake Aff. ¶ 10.

Unfortunately, the LSN Administrator experienced initial technical problems that delayed the indexing process. Leake Aff. ¶ 11. Then near the date of its certification, and as permitted by the Access Control Guidelines, DEN identified a set of privileged documents that had been indexed in full text format as part of the early crawling process but needed to be removed from the index before DEN's certification. Processing those necessary changes had the effect of further limiting the number of documents the LSN Administrator could index before DEN's initial certification. Leake Aff. ¶ 12. Nevertheless, the LSN Administrator had indexed approximately 500,000 (or about one-half) of DEN's full text documents by June 30. Leake Aff. ¶ 13.

Since June 30, DEN has worked with the LSN Administrator to verify that his index no longer contains the text of any privileged document for which the text was indexed before June 30. The LSN Administrator has verified to DEN that this is the case, and the LSN Administrator made available to the public on July 14, 2004, his index to date of the documents on DEN's participant server. Leake Aff. ¶¶ 15-16.

DEN also stands ready to provide the LSN Administrator each day with as many files as his office can index when the LSN Administrator notifies DEN that he is ready to resume the

indexing of DEN's collection. Leake Aff. ¶ 17. (It has come to DEN's attention that the LSN Administrator has temporarily ceased indexing because of technical difficulties. These difficulties, DEN believes, are not due to problems with DEN's electronic files. Leake Aff. ¶ 18.) Meanwhile, DEN has offered, and will continue to offer, public access to the electronic files on its participant server and the associated index through its website. Leake Aff. ¶ 19. So not only has DEN made its documentary material available, NEV has suffered no prejudice.³

B. DEN MADE A GOOD FAITH PRODUCTION.

NEV's other principal argument, that DEN's certification is allegedly insufficient because DEN cannot guarantee that it produced all documentary materials (see Motion at 10-11), seeks to impart an absurd literalism to the NRC's regulations that would be impossible to satisfy. In an ongoing project of the size and scope of the Yucca Mountain project, where documents are still being generated and identified on a regular basis, no initial certification can be 100% complete as of the moment of production, simply because of the lead time needed to collect documents and process them for production.

³ As NEV notes, DEN's website was taken off-line for four and a half days over the July 4 holiday. This was done to safeguard the content of certain documents that contain privacy protected information and that had been inadvertently made available in full text format through DEN's website. Leake Aff. ¶ 14; *see also* July 2, 2004 Letter from John Arthur to Daniel Graser (Exhibit 16). The problem was fixed as expeditiously as possible, and the website was turned back on the morning of Tuesday, July 6, 2004. Leake Aff. ¶ 14.

DEN also does not credit the hearsay assertion in NEV's motion that an unidentified person spoke with unnamed personnel at DEN's information center who allegedly claimed ignorance of the LSN. Personnel at the information center were advised in advance of June 30 that they would be designated as the point of contact for public queries regarding the LSN. Procedures were developed in advance of June 30 to assist information center personnel in answering public queries. Information center personnel were trained regarding those procedures before June 30. Affidavit of Beatrice E. Reilly ¶¶ 4- 11 (Exhibit 2).

To ready a document for production on the LSN, a legible electronic file has to be created of the document's image and text. A bibliographic header has to be created for the document. The document has to be screened to ensure that sensitive unclassified, Privacy Act, or privileged information is not released to the public. The electronic file of the document needs to be shipped to the location of DEN's participant server where additional processing steps must be performed, including validating the transmittal, loading the content manager, updating the search engine index, and exporting to the web server. Leake Aff. ¶ 3. That all takes time, and by necessity some cutoff date is required for initial processing. Also by necessity, some documents will be caught in the gap and must be made available through supplemental productions.

That is all the NRC can reasonably expect. The NRC, in fact, has pointedly stated that it "expects all participants to make a *good faith effort* to include on their LSN document collection servers all of the Class 1 and Class 2 documentary material that *reasonably can be identified* by the date specified for initial compliance in § 2.1003(a) of the Commission's regulations." 68 Fed. Reg. 66372,66376 (Nov. 26,2003) (emphasis added). *See also Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 2)*, LBP-75-30, 1 N.R.C. 579, 582 (1975) ("discovery, like all matters of procedure, has ultimate and necessary boundaries.").

DEN indisputably made a good faith production that was reasonable under the circumstances. After all, DEN identified 2.1 million documents for its LSN collection, which is a massive number of documents. By way of comparison, the NRC has estimated that its collection will have about 35,000 documents. Most of the participant counties have estimated that the documents in their productions will number in the hundreds. NEV told the LSN Administrator that it expects to produce zero documents. *See June 23, 2004 LSN ARP Transcript at 53-54 (Exhibit 8)*.

To identify its 2.1 million documents, DEN assembled with the assistance of its litigation support contractor CACI, Inc. (CACI) a collection of approximately 2.9 million documents. Affidavit of Colleen M. Lurwick (CACI Aff.) ¶ 3 (Exhibit 3). This compilation encompassed the documents in DEN's Record Management System from its inception in 1987 through mid-May 2004, which consisted of approximately 1.3 million documents. It also encompassed approximately 850,000 paper and 50,000 electronic documents submitted in response to the May 5, 2003 memorandum from the Office of the General Counsel to affected DOE and contractor offices seeking potentially relevant documents (Call Memo). And, it included nearly 700,000 emails and attachments that project personnel identified as potentially relevant. CACI Aff. ¶ 4.

As explained in DEN's Initial Certification Plan (Exhibit 4), DEN identified from this collection of 2.9 million documents those that might qualify as documentary material. DEN identified for production, based on procedures, those documents from this collection that DEN had identified as those that it intends to cite and rely on in support of its license application. It identified for production reports and studies of the kind required to be produced. And, it identified large categories of documents for production to capture what might contain non-supporting information. The result of those steps, set forth more particularly in the Initial Certification Plan, resulted in the 2.1 million document LSN collection. CACI Aff. ¶ 5.

Contrary to NEV's contention, DEN did *not* withhold identified documentary material from production. NEV puts much stock in an estimated document count that DEN provided to the LSN Administrator more than a year ago, but that number was nothing more than an estimate. It was made to help the LSN Administrator ensure that the LSN had adequate capacity. *See* Exhibits 5 and 6. It was made *before* DEN had begun systematically processing its documents for the LSN, and it was, as the person who provided it acknowledged at the time, a

determination made without the benefit of an actual count of documents. Leake Aff. ¶ 2. DEN also made clear along the way that the number might change, *including going down*. See December 9, 2003 LSN ARP Transcript at 129 (Exhibit 9). The simple truth is that DEN turned out to have fewer documents to produce than it preliminarily estimated last year.

Nor did the April 15 cutoff date referenced in the Initial Certification Plan artificially limit the scope of DEN's production efforts. The April 15 cutoff was not a rigid deadline. It provided time for the record originators in OCRWM to submit records and time for processing these records into the Records Management System. It also provided time for CACI to process documents, pursuant to procedures, into the required electronic format to support the initial certification. Nothing prevented CACI from processing additional documents received after April 15 if it could appropriately process them in time for the initial certification. Leake Aff. ¶ 4.

And CACI did just that. CACI processed and included as part of the initial certification a number of documents that it received after April 15, 2004. In particular, CACI received feeds from DEN's Records Management System on a monthly (and at times more frequent) basis. CACI processed in time for the initial certification all the Records Management System feeds it received through May 22, 2004. CACI also processed all the paper documents that it received in response to the Call Memo through June 11, 2004. CACI Aff. ¶ 6.

As a consequence, the number of documents that CACI received after April 15 but did not process for the initial certification was only approximately 81,000 documents -- approximately 62,000 of which CACI received before June 30 and the remaining 19,000 of which CACI received afterwards. CACI Aff. ¶ 7. Not all of these documents will qualify as documentary material. For example, this group contains approximately 4,500 documents coded as "package" in the Records Management System that are merely tables of contents that do not

qualify as documentary material. CACI has begun processing these documents, so those that might qualify as documentary material will be identified and made available in supplemental productions. CACI Aff. ¶ 8. But even if all 81,000 documents were produced, that would constitute only a 3.7% addition to DEN's LSN collection.

As these facts show, DEN's initial certification is both reasonable and proper. Through the processes it undertook to identify and collect the 2.1 million documents, DEN has more than fulfilled the purpose of the LSN regulations regarding initial certification.⁴

C. THE NRC'S REGULATIONS DO NOT AUTHORIZE NEV'S REQUESTED RELIEF.

In addition to its lack of substantive merit, NEV's motion fails because NEV seeks relief that the NRC regulations do not contemplate. The members of this Board, like all ASLB panels, are "delegates of the Commission and exercise only those powers which the Commission has given them." *In re Public Service Company of Indiana*, 3 NRC 167, 170 (1976). As such, the Board can award only that relief allowed under the Commission's regulations. *Safety Light Corp (Bloomsburg Site Decontamination)*, CLI-92-13, 36 NRC 79, 86 (1992).

No provision of the NRC's regulations governing the LSN, found in subpart J of 10 C.F.R. Part 2, authorizes this Board to strike DEN's initial certification. Similarly, no provision of those regulations authorizes this Board to suspend the deadline for NEV's certification.

To the contrary, the NRC's regulations specify the determinations that the PAPO, and by extension this Board, is allowed to make in response to a claim of improperly withheld documents. Those regulations allow the following six holdings only: (1) whether the withheld

⁴ The numbers of documents provided in this Answer involve large quantities and complex processes. Not all of them may remain accurate to the last digit. However, they represent current best estimates and are, DEN believes, substantially accurate.

documents meet the definition of documentary material; (2) whether the documents are excludable under § 2.1005; (3) whether the documents are privileged under § 2.1006; (4) whether, if privileged, the privilege is absolute or qualified; (5) whether, if qualified, the documents should nonetheless be disclosed; and (6) whether the documents should be disclosed under a protective order. 10 C.F.R. §§ 2.1010(b)(1)-(6). Nothing in that grant of authority contemplates the invalidation of a party's initial certification or a delay in the production of another participant's documentary material.

Indeed, the only place where the regulations permit delay as a type of sanction appears in 10 C.F.R. § 2.1012(a). That provision states that if DEN fails to make its initial certification at least six months prior to tendering its license application, "the Director of the NRC's Office of Nuclear Material Safety and Safeguards will not docket the application until at least six months have elapsed from the time of the certification." 10 C.F.R. § 2.1012(a). Any determination under § 2.1012(a) is, of course, premature at this time and cannot even be potentially ripe for consideration before DEN's application is ready for docketing. And even then, § 2.1012(a) makes clear that the decision to extend the docketing of DEN's application rests with Director of the Office of Nuclear Material Safety and Safeguards, and not the PAPO.

But what § 2.1012(a) demonstrates with respect to the issue at hand is that the NRC did not contemplate determinations at this preliminary stage as to whether participants legitimately need more time to prepare contentions, or to put it another way, whether their "head start" was adequate in light of DEN's initial certification. Indeed, the NRC said as much in its recent LSN rulemaking, when the Commission stated that disputes over the adequacy or completeness of the production of documents at initial certification should not be raised during the pre-license application phases, but instead "would be of a type that would be more appropriately raised

before the Presiding Officer designated in the Notice of Hearing during the fifteen months following the admission of contentions that are allotted to the NRC staff to complete the Safety Evaluation Report in its entirety.” 68 Fed. Reg. 66373, 66376 (Nov. 26, 2003). *See also* 69 Fed. Reg. 32843-44 (June 14, 2004) (commentary by Commission that disputes over the classification of documentary material ought to be deferred until the post-docketing period).

Also instructive in this regard is the NRC’s earlier rulemaking in which the Commission purposefully omitted from the PAPO’s jurisdiction any review over the validity of DEN’s initial certification. In particular, 10 C.F.R. § 2.1010(a)(1) as originally enacted provided that a “Pre-License Application Licensing Board” had jurisdiction over, among other things, “disputes over the entry of documents during the pre-license application phase, including disputes relating to relevance and privilege” as well as “disputes relating to the LSS Administrator’s decision on substantial compliance pursuant to § 2.1003(h) of this subpart.” 54 Fed. Reg. 14925, 14948 (April 14, 1989).

Under the former § 2.1003(h), the LSS Administrator was to evaluate DEN’s compliance with the requirements of § 2.1003 -- submission of documentary material to the LSS -- and if DEN’s submission did not substantially comply, the LSS Administrator would not certify DEN’s compliance. *See id.* at 14946. If the LSS Administrator certified that DEN had substantially complied with its production obligation and NEV disagreed, NEV could challenge the determination before the Pre-License Application Licensing Board. Thus, by virtue of former §§ 2.1003 and 2.1010, the Pre-License Application Licensing Board essentially possessed the authority to do what NEV seeks today -- determine the sufficiency of DEN’s initial certification.

The NRC, however, revised these rules in 1998. Specifically, the NRC eliminated the “paragraphs relating to evaluations and certifications by the LSS Administrator ... because the

LSS (and LSSA) concept is removed.’? 69 Fed. Reg. 71729, 71734 (Dec. 30, 1998). The NRC also eliminated from the ambit of § 2.1010 the resolution of disputes regarding the sufficiency of DEN’s initial certification, thereby limiting the PAPO’s jurisdiction to the resolution of “disputes relating to electronic access to documents in the pre-license application phase.” *Id.* The consequence of these amendments was to remove from the PAPO’s jurisdiction any dispute regarding the validity of DEN’s initial certification of the kind NEV makes here.

In short, NEV’s motion improperly asks this Board to undo these amendments and to act in a manner contrary to what the Commission provided. The Board should reject NEV’s request since it has no basis under the regulations applicable to the Board and since an alternative remedy exists elsewhere under the NRC regulations.

D. DEN RESPONSES TO QUESTIONS POSED BY PAPO BOARD IN JULY 14, 2004 MEMORANDUM AND ORDER.

The July 14, 2004 Memorandum and Order asked DEN to answer nine enumerated questions. DEN’s answers to those questions follow.

1. How many documents did DEN make available⁵ 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.

DEN RESPONSE: DEN made 2,090,474 documents electronically available on June 30, 2004. The documents have been continuously available since that date with the following exceptions:

a. DEN’s documents were not available from July 1, 2004 at approximately 4:00 p.m. (E.D.T.) until July 6, 2004 at approximately 8:30 a.m. (E.D.T). DEN took its participant server off-line during that time in order to correct technical errors that inadvertently made available the text of certain documents with protected privacy information, such as Social Security numbers.

⁵ 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).

b. DEN took its participant server off-line on July 7 from 2:50 a.m. (E.D.T.) to 3:00 a.m. (E.D.T.) because a technical problem with the server's firewall prevented electronic access to the documents.

c. For less than one minute on July 15, DEN's documents were not electronically available while DEN updated its document index.

All active web sites require brief maintenance periods from time to time, and DEN expects that neither its web site nor the LSN site will be an exception. These brief periods for maintenance and updates should ultimately enhance and not detract from the utility of the site.

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?

DEN RESPONSE: DEN did not knowingly fail to make available on June 30, 2004 any document known to the certifying official that qualifies as documentary material. As stated in its Initial Certification Plan (Exhibit 4), DEN implemented procedures as required by 10 C.F.R. § 2.1009(a)(2) and to the best of the certifying official's knowledge, the documentary material specified in 10 C.F.R. § 2.1003 had been identified from those documents submitted to CACI by April 15, 2004, and made electronically available. Nevertheless, there are a few groups of documents that *might* contain documentary material but were not processed. These groups are described in response to question # 3.

DEN's ability to identify and make available "all extant documentary material" is necessarily subject to DEN's judgment regarding what qualifies as documentary material. Thus, in addition to those groups described in response to question #3, DEN expects that future events, such as the finalization of the license application and the acceptance of contentions, may have some affect on its assessment of what documents qualify as documentary material and may require supplementation of the documents made electronically available. Moreover, as DEN discovers any inadvertently omitted documents, it will make such documents electronically available.

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.

DEN RESPONSE: The groups of documents that *might* contain "documentary material" are (i) documents from DEN offices and contractors that failed to certify to DEN that they provided DEN with all their respective potentially relevant documents; (ii) archival emails authored by inactive or external users; (iii) documents provided to CACI after April 15, 2004 that CACI did not process for the initial certification; (iv) documents created after April 15, 2004 that have not yet been provided to CACI; and (v) a limited number of emails where the active users were not available or able to complete their reviews or where technical difficulties impeded the conversion of the emails.

With respect to category (i), DEN cannot estimate the number of documents that these entities did not produce. DEN also cannot estimate how many, if any, of these documents would qualify

as documentary material, but the number, if any, should be *de minimis*. See also answer to question # 4.

With respect to category (ii), there are approximately 4,000,000 archival emails in this group. Inactive users are persons no longer associated with the project -- typically, former employees. External users are persons outside the project. As stated in its Initial Certification Plan, DEN does not intend to cite or rely on these emails in support of its license application. These emails also would not seem to qualify as reports and studies. Given OCRWM's record-keeping procedures, the number of documents including emails produced from the other document collections, and the experience of the current user review, only an extremely small number, if any, of archival emails in this group might contain non-supporting information not reflected in the other documents already in DEN's LSN collection.

With respect to category (iii), CACI received a total of approximately 55,104 documents that were not processed as part of DEN's initial certification from the following sources: the Record Management System (19,354), paper (1,000),⁶ and efiles (34,750) submitted in response to the to the Call Memo. At the time of initial certification, these documents had not been subject to the identification process described in section 4.3 of the Initial Certification Plan and thus were not made electronically available on June 30, 2004. At that time, and at the time of filing this response, DEN did not know how many of these documents might qualify as potential documentary material. Based on historic ratios that result from comparing documents collected to documents produced to date, DEN expects that after application of its identification protocol described in the Initial Certification Plan, some 12,000 of the RIS documents and 580 of the paper documents that may be identified as potential documentary material; those documents will be made available in a supplemental production. Because DEN has not completed the process of eliminating duplicate documents from the 34,750 post-April 15 efile documents, DEN is not able to determine how many of the efile documents it might expect to make available under the identification protocol described in the Initial Certification Plan.

DEN also has collected and is processing approximately 26,000 emails authored and identified as potentially relevant by project personnel. Because emails may contain attached documents, DEN cannot calculate at this time how many documents it might produce from this sub-set of emails. DEN will promptly make these documents available in accordance with its Initial Certification Plan.

With respect to category (iv), DEN cannot estimate the number of documents in this group, but reasonably believes in light of its collection efforts that only a *de minimis* number of documents in this group exist and that even fewer would qualify as documentary material. BSC advises that it may approximately 12,000 documents in various stages of processing for entry onto the Record Management System.

⁶ This is an estimate based on the number of pages. DEN will have no precise document count until the documents are coded.

With respect to group (v), only a handful of persons -- approximately 20 out of the more than 2,300 reviewers -- could not complete their review. Based on the experience of the active email users who did complete their review, only a *de minimis* number of emails are likely to be identified as documentary material from this group. DEN does not have a good present estimate of the emails that are subject to technical problems. A previous estimate of emails with encryption problems was approximately 18,000; however, this was a gross number that did not reflect any determination whether any of the emails were documentary material (which could not be ascertained because the technical problems prevent review of the emails' content).

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.

DEN RESPONSE: DEN contacted the offices and contractors listed in Exhibit 10 to collect potentially relevant documents. Only five of those 94 entities failed to certify to DEN that they had provided CACI with potentially relevant documents. Exhibit 11 lists those entities and the reasons for their not certifying. Of these five, one entity no longer existed. Two are participants to this proceeding with their own obligations to make documentary material available. One was the National Academy of Sciences, which is not an agent of DEN and which in any event provided a letter stating that it had no responsive documents. The remaining one was a former contractor. There is no provision in NRC's applicable regulations that requires DEN to canvass former agents or contractors to collect documents. Also, DEN has no ability to require former agents or contractors or subcontractors to provide documents now.

In addition, although the University and Community College System of Nevada produced two boxes of potentially relevant documents, it noted in its certification the exception that not all of its sub-contractors had provided it with their respective final certifications. DEN has no current knowledge that these entities possess any additional documents that qualify as "documentary material." See also DEN's response to questions ## 2 and 3 above for additional limitations.

In connection with this answer, DEN notes that it had processes and procedures in place that required TRW to transfer project documents to its successor as DEN's M&O contractor. See Exhibit 12. These documents have been retained by DEN's current M&O contractor and were submitted and processed in accordance with the procedures for the Certification Plan. Documents provided to DEN by its former outside counsel, Winston & Strawn, are retained by DEN's Office of General Counsel and were submitted and processed in accordance with the procedures for the Certification Plan.

DEN did not collect documents for production to the LSN from its current outside litigation counsel hired in March 2004.

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.

DEN RESPONSE: DEN refers to its responses to questions ## 2-4 above for documents that DEN did not make available on June 30, 2004 and an estimate of documents in the categories described.

In addition, in section 5.3 of its Initial Certification Plan, DEN explains how it identified classes or categories of documents within each of its collections -- that is, RMS, the paper collection, the efile collection, the legacy paper collection, the electronic databases, OCRWM emails and archival emails -- to make electronically available. Conversely, the same section identifies those classes and categories of documents within each respective collection that DEN did not make available on June 30, 2004. These classes and categories of documents were not made available because those categories of documents are not believed to contain information that would qualify the documents as documentary material or that are otherwise excluded from production by regulation.

The number of documents made available on June 30, and the number of documents not made available on June 30, for each collection is shown on Exhibit 17. Exhibits 18 and 19 list by "document type" the documents made available from the RIS and paper collections respectively. Because documents may have been assigned more than one document type, DEN could not reasonably identify by document type the number of documents for each document type not made available.

As further described in section 5 of its Certification Plan, DEN did not undertake to review or produce for its initial certification the collection of archival emails that were authored by persons other than active users (*i.e.*, persons who had accounts on OCRWM's email system at the time of the email review process). There are approximately 4 million such archival emails.

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.

DEN RESPONSE: To the best of its knowledge, DEN provided the public and the LSN on June 30, 2004, with electronic access to an EBH for all documents DEN made available on that day, including those documents subject to a claim under 10 C.F.R. § 2.1003(a)(4). DEN did not knowingly withhold an EBH for any document that DEN had identified for which DEN intends to assert a claim under 10 C.F.R. § 2.1003(a)(4), with two qualifications.

First, as explained in section 4.1 of its Initial Certification Plan, DEN identified potential documentary material in the files of the employee concerns programs of OCRWM and Bechtel SAIC Company, LLC (BSC). All such documents were received, generated, or collected in connection with concerns raised with the OCRWM Concerns Program (and its predecessors) or the BSC Concerns Programs. These files are protected under the Privacy Act of 1974. Because of the confidential nature of these files, they were not made available to CACI for processing. Rather, DEN provided CACI with information sufficient for CACI to create an EBH for each employee concerns file containing potential documentary material and directed CACI to make

the EBH electronically available. The EBH was created on a “per file” and not a “per document” basis. The employee concerns files will be preserved and retained by the respective OCRWM and BSC concerns programs.

Second, as explained in response to question # 4 above, DEN did not collect documents for production to the LSN from its current outside litigation counsel hired in March 2004. Nor did it make an EBH available for any documents in possession of its current outside litigation counsel.

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.

DEN RESPONSE: As of July 12, 2004, six of the documents were present in bibliographic header format in DEN’s LSN collection. Of these six, one (# 4) was properly excluded because it is readily available and may be subject to copyright. The remaining five (## 1, 6, 9, 11, and 12) were in header-only format because they were identified as containing privacy-protected information or as legally privileged. DEN would have reviewed these as part of its ongoing processes and procedures. In light of NEV’s motion, DEN expedited its review of these documents and determined that the privacy and privilege concerns flagged by the screening software did not require DEN to continue withholding the full text and image of these particular documents. Thus, in addition to the documents’ header, they are now also available in full text and image format on DEN’s participant server.

Of the six not present even in header-only format, one (# 3) had been excluded inadvertently through human error. Two (## 7 and 8) were excluded because they were not identified as potentially relevant by the active users who authored them. One (#2) was properly excluded because it was readily available through the on-line computer library center. One (# 5) was a proceeding, and its related materials were subsumed in a database for which DEN provided a bibliographic header. One (# 10) was authored by an inactive user. As DEN explained in its Initial Certification Plan, the archival emails of inactive users were neither reviewed nor made electronically available.

See Exhibit 20 which provides additional detail regarding these documents.

In light of NEV’s interest in the documents listed in Exhibit 7, DEN has made them, or will make them, electronically available in full text and image format on DEN’s participant server except to the extent that they are subject to copyright or publicly available. DEN’s decision to make these documents available does not reflect DEN’s judgment about whether these documents contain documentary material. DEN exercised its judgment in determining what documents are likely to contain documentary material in conjunction with its initial certification. In addressing this and future inquiries about the availability of documents, DEN expects that there will be reasonable differences of opinion about the status of documents as documentary material. To minimize and focus any future disputes and in response to external inquiries, DEN generally intends to focus on whether a document is subject to privilege or otherwise excludable rather than its status as documentary material.

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).

DEN RESPONSE: Yes. In making its documentary material available on June 30, DEN made available electronic files compatible with the NRC's LSN web indexing software and compliant with the standards specified in 10 C.F.R. § 2.1011(b)(2), as evidenced by the fact that the LSN Administrator has thus far successfully indexed approximately 500,000 of DEN's documents.

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 RESPONSE: DEN never had an occasion to make any such agreement with the Commission. DEN did have discussions on this issue with the LSN Administrator and the LSN Advisory Review Panel, but no agreement was ever reached. It was, and remains, DEN's position in those discussions that the NRC's regulations do not condition DEN's certification, or the availability of DEN's documentary material, on the completion of an index by the LSN Administrator. It was, and also remains, DEN's position that it would be unfair to impose a condition on DEN that it could not control.

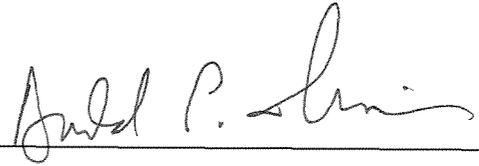
DEN and the LSN Administrator did have an agreement with respect to DEN's right under the Access Control Guidelines. *See Exhibits 14& 15.*

11L. CONCLUSION

For the foregoing reasons, DEN believes that its initial certification on June 30, 2004 was consistent with the requirements of the LSN regulations, and respectfully urges the Board:

1. to deny NEV's July 12 motion to strike DEN's initial certification;
2. to deny NEV's request to toll the commencement of the time for other parties to make their LSN submissions: and
3. to deny NEV's unsupported request to certify this matter to the Commission.

U.S. DEPARTMENT OF ENERGY

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