

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
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 May 16, 2005

**NEVADA’S MOTION FOR AN ORDER TO SHOW CAUSE
WHY NRC STAFF SHOULD NOT BE SANCTIONED
FOR FALSE CERTIFICATION OF LSN COMPLIANCE**

On May 4, 2005, at the hearing ordered by the PAPO Board on the use of privileges associated with participants’ Licensing Support Network (“LSN”) document collections, Nevada learned for the first time that NRC staff, in certifying on July 30, 2004 (*see* Exhibit No. 1) that it had made all of its documentary material electronically available pursuant to the requirements of 10 C.F.R. §§ 2.1003(a)(1) and 2.1009(b), apparently failed to include headers for *any* of its hundreds or even thousands of documents that it had withheld on the basis of a claimed privilege. In an exchange at that hearing (Tr. 6-7) with NRC Staff attorney Tyson Smith, Board Chairman Judge Moore and Judge Karlin each queried NRC Staff as to the status of its LSN collection:

CHAIRMAN MOORE: Staff, how many documents do you have in the LSN, and expect to have in the LSN, and what’s the breakdown of privilege claims?

MR. SMITH: Well, we expect to have in the hundreds of privilege documents rather than thousands or tens of thousands, but right now it’s very difficult for us

to estimate what those might be. It's going to depend on the content of the license application, as well as any admitted contentions.

CHAIRMAN MOORE: How many documents do you have now?

MR. SMITH: Currently we have no privilege documents on the LSN.

CHAIRMAN MOORE: Okay. But you expect hundreds, not thousands.

MR. SMITH: That's correct.

CHAIRMAN MOORE: Are we talking under 500?

MR. SMITH: I think 500 to 1,000 is probably the appropriate range.

JUDGE KARLIN: Well, may I ask; the Staff certified last year to about 25,000 if I'm correct, and none of those were claimed to have any privilege? They were header only, no header onlies?

MR. SMITH: That's correct, they [sic] were no header onlies for privilege purposes.

This exchange suggests that when NRC certified its document collection on July 30, 2004 – as it was required to do pursuant to 10 C.F.R. § 2.1003(a) within 30 days following DOE's initial certification of compliance made on June 30, 2004 – it had, either knowingly or through gross inadvertence, failed to include bibliographic headers for *any* of the documents it was withholding on the basis of privilege.¹ But Section 2.1003(a) – the basis for NRC Staff's certification – requires in subsection (a)(1) that bibliographic headers for “all documentary material” be put onto the LSN. It allows, in subsection (a)(2), only the electronic image of such documentary material to be excluded “subject to the claims of privilege in Section 2.1006.”

¹ Nevada assumes that NRC Staff's 500 to 1000 privileged documents were not all created between July 30, 2004, the date of NRC Staff certification, and May 4, 2005, the date of the PAPO hearing on privileges.

The reason for this requirement is obvious: If headers are not produced and made available for privileged documents, Nevada and the other participants to the Yucca licensing proceeding have no way to know that such documents even exist, and have no way to challenge any assertion of privilege. It is thus a vital requirement of the LSN regulations that headers for such documents be created and posted on the LSN at the time of initial certification. The proceeding must rely on the good faith of the parties in making this initial production.

Because DOE's initial certification was struck by the Board on August 31, 2004, Nevada is unclear whether NRC Staff's initial certification on July 30, 2004, became null and void. There is nothing in the regulations or in the Board's August 31, 2004 order that would suggest it did, but this matter is not specifically addressed either in the regulations or in the Board's order. Nevada believes, however, that it is not pertinent to its request here whether NRC Staff's certification remains in effect or not. The LSN was designed and implemented in Commission regulations with the assumption of good faith by the parties, and "a good faith standard must be applied to each participant's document production." Board's August 31 Order, at p. 16. Accordingly, the integrity of the process of production is as important in this proceeding as the content and status of the production itself. *Id.* at 16-18.

NRS Staff's certification that it had made "all" of its documentary material available, at the very same time it knew it was withholding 500 to 1000 privileged documents without making headers available for such documentary material, appears to have constituted a serious breach of the regulations rendering NRC Staff's initial certification materially false as a matter of fact and law. Regardless of whether NRC Staff now has a chance to re-certify, and to do so correctly, its conduct in making a false certification to the Board on July 30, 2004, appears to have constituted lack of good faith and to now warrant sanctions. The Board clearly has the power to impose

sanctions under 10 C.F.R. §§ 2.1010, 2.319, and 2.321(c). *See also*, the Board's August 31 Order at pp. 10-11.

Nevada notes that the sanction *it* and any other prospective participant faces in this proceeding for failing to demonstrate "substantial and timely compliance with the requirements of § 2.1003 at the time it requests participation" in the licensing proceeding is to have its party status denied. 10 C.F.R. § 2.102(b)(1). Thus, as the Board's order striking DOE's initial certification vividly illustrated, the regulations apply considerable gravity to certifications of compliance made with respect to LSN document collections.

At the hearing on May 4, 2005, in connection with its Question 11, the Board grappled with the issue of what sanctions should be imposed for "an untimely, incomplete, or insufficient privilege log." Tr. 210. Mr. Smith responded to that question as follows:

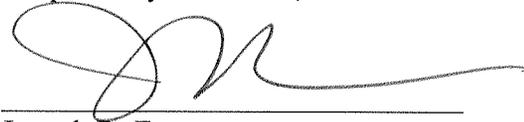
MR. SMITH: ...any sanction should be proportional to the inadequacy of the privilege log. For example, for a modest violation, the Board could order a party to supplement its privilege log or for a more serious violation, you could waive the privilege or disqualify an attorney or a firm or even strip a potential party of its potential party status.

Though we are dealing here with the inadequacy of an initial certification due to its lack of privilege headers and not with a privilege "log," the same principles would appear to apply, if not with more gravity, since the conduct here effectively concealed the very existence of documents the NRC Staff claims to be privileged.

In any event, Nevada does not presently seek sanctions against NRC Staff, because it does not presume to know all of the facts on which Staff apparently failed to comply with Commission regulations in certifying its LSN document collection last summer. In addition,

Nevada does not know what impact the Board's striking of DOE's certification would or should have with respect to Staff's noncompliance, if it cannot be justified. For those reasons, Nevada respectfully requests that the Board issue an Order to Show Cause why NRC Staff should not be sanctioned, so that Staff, DOE, and other interested participants can be afforded the opportunity to express their views.

Respectfully submitted,



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May 16, 2005

EXHIBIT

No. 1

July 30, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD

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

NRC CERTIFICATION OF COMPLIANCE

On June 30, 2004, the Department of Energy (DEN) filed its certification of compliance under 10 C.F.R. § 2.1009(b) with the Secretary of the Commission. See Letter from W. John Arthur, III, Deputy Director, DEN Office of Civilian Radioactive Waste Management, to Annette L. Vietti-Cook, Secretary, U.S. Nuclear Regulatory Commission, at Appendix D (June 30, 2004) (ML041830699).

Not later than 30 days after certification by DEN, viz., by July 30, 2004, the NRC Staff (NRC), as a party to the potential license application proceeding, must certify to the Pre-Application Presiding Officer that it has made its documentary material electronically available. 10 C.F.R. §§ 2.1003(a) and 2.1009(a), (b). Specifically, the NRC official responsible for administering the agency's obligation to make its documentary material electronically available must certify that procedures concerning electronic availability of documentary material have been implemented, and that, to the best of his or her knowledge, documentary material has been identified and made electronically available. 10 C.F.R. § 2.1009(b).

Accordingly, appended to this filing is the certification of Jack R. Strosnider, Director of the Office of Nuclear Material Safety and Safeguards (NMSS), the responsible official for the NRC's efforts to identify and make its documentary material available. See Certification of Availability of Documentary Material (July 30, 2004) (NRC Certification).

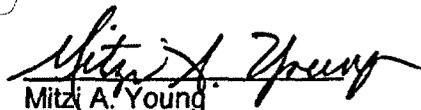
This certification is being submitted with due regard for the recent testimony of the Licensing Support Network Administrator (LSNA) during the July 27, 2004 oral argument, that the Licensing Support Network (LSN) indexing software was having difficulty crawling and indexing a small number of NRC documents that had been made electronically available. See Transcript at 106. Subsequently, in response to requests by the NRC, the LSNA provided the NRC with a list of the documents previously made available by the NRC but not yet accessible via the central LSN website. Attachment A to the certification lists these documents, which are available via the NRC's Agencywide Documents Access and Management System (ADAMS). See NRC Certification at 2.

The NRC remains ready to work with the LSNA, if requested, to address technical issues. See NRC Certification at 2. The NRC has not been able to ascertain, however, what technical problems exist or when such problems may be resolved so that all NRC documents are accessible via the central LSN website. *Id.*

Respectfully submitted,



Michael A. Woods
Counsel for NRC Staff



Mitzel A. Young
Counsel for NRC Staff

Dated at Rockville, Maryland
this 30th day of July, 2004.

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NUCLEAR REGULATORY COMMISSION

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)	

CERTIFICATION OF AVAILABILITY OF DOCUMENTARY MATERIAL

As the official responsible for the administration of the U.S. Nuclear Regulatory Commission Staff (NRC) responsibility to provide electronic files of documentary material, I hereby certify, pursuant to 10 C.F.R. § 2.1009(b), that the procedures specified in 10 C.F.R. § 2.1009(a)(2) have been implemented and that, to the best of my knowledge, documentary material specified in 10 C.F.R. § 2.1003 has been identified and made electronically available in accordance with the requirements of 10 C.F.R. § 2.1011(b)(2).

I am informed: (1) that the Licensing Support Network Administrator (LSNA) recently indicated that there is a small number of NRC documents not indexed by the Licensing Support Network (LSN) indexing software due to technical problems; (2) that those documents cannot currently be accessed through the LSN central website (<http://www.lsnnet.gov>); and (3) that it is not clear when the associated technical problems may be resolved, and the documents will be accessible via the central LSN website.

Therefore, I have directed my staff to continue to be available to work with the LSNA, if requested, to resolve issues within the NRC's control that the LSNA may identify. In the interim, the unindexed documentary material is otherwise publicly available via the U.S. Nuclear

Regulatory Commission's Agencywide Documents Access and Management System (ADAMS)

(<http://www.nrc.gov/reading-rm/adams.html>). A list of these documents as of yesterday

morning is appended hereto as Attachment A.


Jack R. Strosnider, Director
Office of Nuclear Material Safety
and Safeguards

Dated at Rockville, Maryland
this 30th day of July 2004

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

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U.S. DEPARTMENT OF ENERGY)	ASLBP No. 04-829-01 PAPO
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(High Level Waste Repository: Pre-Application Matters))	NEV-01 May 16, 2005

CERTIFICATE OF SERVICE

I certify that copies of the foregoing NEVADA'S MOTION FOR AN ORDER TO SHOW CAUSE WHY NRC STAFF SHOULD NOT BE SANCTIONED FOR FALSE CERTIFICATION OF LSN COMPLIANCE has been served upon the following persons by electronic mail:

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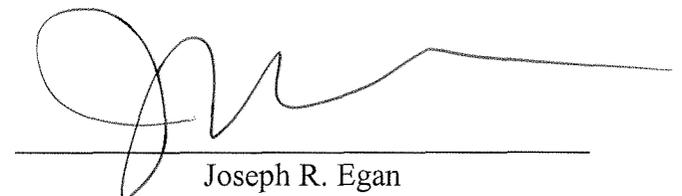
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