

May 25, 2005

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-Application Matters)	)	ASLBP No. 04-829-01-PAPO

NRC STAFF RESPONSE TO NEVADA'S MOTION  
FOR AN ORDER TO SHOW CAUSE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Nuclear Regulatory Commission staff ("Staff") hereby submits its response to "Nevada's Motion for an Order to Show Cause Why NRC Staff Should Not Be Sanctioned For False Certification of LSN Compliance" ("Nevada's Motion") filed on May 16, 2005. As discussed below, Nevada's motion should be denied for lacking any basis in fact and for failing to follow both NRC regulations and prior orders of the Pre-License Application Presiding Officer Board ("PAPO Board").

DISCUSSION

Nevada's arguments regarding the NRC Staff's initial certification are wholly without merit and lack any basis in fact. Based solely on an exchange between Judge Moore and Staff Counsel at the May 4, 2005 case management conference, Nevada argues that Staff's initial certification was "materially false" because it "failed to include headers for *any* of its hundreds or even thousands of documents that it had withheld on the basis of claimed privilege." Nevada's Motion, at 3, 1. Any reasonable reading of the exchange, however, must recognize that, in the clear context of the ongoing dialogue, Staff Counsel was simply providing estimates of the number of privileged documents which the Staff may generate in the future. Tr. at 6-7. When asked how

many documents it has in the LSN or expects to have in the LSN, the Staff noted that they “expect” to have in the hundreds, but that it is difficult to “estimate” the number since it depends on the content of the license application as well as any admitted contentions. *Id.* The Staff then confirmed that they currently have “no privilege documents” on the LSN. *Id.* at 7. To be perfectly clear (again), the Staff has not, at this time, identified any documentary material for which it is claiming a privilege. While Nevada argues that the Staff’s “false” certification “appear[ ] to have constituted lack of good faith and to now warrant sanctions,” they provide no basis for this serious charge other than their distortion of the exchange between Staff Counsel and the Board. Nevada’s Motion, at 3. For these reasons, Nevada’s motion should be denied.

Apart from being devoid of substantive basis, Nevada’s Motion should also be denied for failing to satisfy the requirement that motions provide “a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant’s efforts to resolve the issue(s) have been unsuccessful.” 10 C.F.R. § 2.323(b). This provision ensures that parties act with the good-faith belief that there is a genuine dispute so that they do not inundate a licensing board with unfounded, time- and resource-consuming disputes when a simple phone call may be sufficient to satisfy the movant’s needs.<sup>1</sup> Here, Nevada made no attempt to contact Staff Counsel and seek clarification about the Staff’s initial certification and made no mention of this issue in any of the communications that took place between the State and the Staff

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<sup>1</sup> The Commission encourages amicable resolution of issues raised by motions and believes that by requiring the parties to discuss their disagreements, at least some of them will be resolved without the necessity and corresponding delay of filing a motion. Because the resolution of such issues without the use of motions increases the efficiency of the adjudicatory process, the Commission included the certification requirement in the final rule. See “Responses to Comments Not Addressed in the Statement of Considerations for Changes to the Adjudicatory Process: Final Rule,” at 24, *incorporated by* “Changes to Adjudicatory Process; Final Rule,” 69 Fed. Reg. 2182, 2190 (Jan. 14, 2004).

after the May 4, 2005 case management conference.<sup>2</sup>

Finally, Nevada's Motion should be denied for failing to comply with the Board's June 9, 2004 Order (Initial Pre-License Application Phase Order) ("June 9 Order") which obligated each filer to complete service "both by email and by the adjudicatory EIE." June 9 Order, at 2 (emphasis in original); *published at* 69 Fed. Reg. 42465, 42466 (July 15, 2004). Unlike the Staff, the DOE, and other interested entities who have consistently completed service via the EIE and electronic mail in their previous filings, Nevada has repeatedly ignored the Board's June 9 Order. Thus, the Board should also deny Nevada's motion for failing to follow its specific order.<sup>3</sup>

#### CONCLUSION

For the reasons discussed above, including Nevada's continued disregard for the rules of the Commission and the orders of the PAPO Board, the Staff requests that the Board reject the Nevada's Motion with prejudice.

Respectfully submitted,

**/RA/**

Tyson R. Smith  
Counsel for the NRC Staff

Dated at Rockville, Maryland  
this 25<sup>th</sup> day of May, 2005

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<sup>2</sup> If anything, for Nevada to impugn the integrity of an agency official without making an effort to verify whether its claim was accurate and in the absence of any indication that the Staff was withholding documentary material, indicates a lack a good faith *on Nevada's part*. Certainly, Nevada's counsel is aware of the requirement since he has complied with § 2.323(b) in the past. See e.g., "Motion to Strike the Department of Energy's LSN Certification and Related Relief" (July 12, 2004), at fn 2. Thus, Nevada's disregard of the Commission's regulations should not be countenanced. In any event, in light of the Staff's and others' considerable efforts to work cooperatively to resolve a host of issues related to case management, the Staff regrets that Nevada has chosen to resort to such confrontational tactics.

<sup>3</sup> Because Nevada has failed to complete service in accordance with the Board's Order within ten days of the circumstance from which the motion arises, their motion should also be rejected as untimely. See 10 C.F.R. § 2.323(a).

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(High-Level Waste Repository:	)	
Pre-Application Matter)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF RESPONSE TO NEVADA'S MOTION FOR AN ORDER TO SHOW CAUSE" in the above captioned proceeding have been served on the following persons this 25<sup>th</sup> day of May, 2005, by electronic mail, and/or Electronic Information Exchange as denoted by an asterisk (\*).

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