

June 20, 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 TO
COMPEL PRODUCTION OR ISSUE A DECLARATORY ORDER

INTRODUCTION

On June 6, 2005, the State of Nevada ("State") filed a motion to compel production of the Department of Energy's ("DOE") July 2004 Draft License Application ("Draft LA"). "Nevada's Motion to Compel Production of DOE's Draft Yucca Licensing Application, or in the Alternative, for a Declaratory Order" ("Motion to Compel") and accompanying "Nevada's Initial Brief in Support of its Motion to Compel Production of DOE's Draft Yucca License Application, or in the Alternative, for Declaratory Order" ("State Brief"), June 6, 2005. The Nuclear Regulatory Commission Staff ("Staff") hereby submits its response to the Motion to Compel and State Brief. The Staff does not take a position on the factual questions of whether the Draft LA is documentary material, whether it is a circulated draft, and whether it is privileged. The Staff does, as set out below, address the areas where it disagrees with the State on issues of legal interpretation.

BACKGROUND

During a May 18, 2005, Case Management Conference, the State and DOE agreed that the issue of whether the Draft LA must be made available on the LSN should be resolved at this

time.¹ Transcript of Case Management Conference, May 18, 2005, (“May 18 Transcript”) at 379, 384. At that conference, the Pre-License Application Presiding Officer Board (“PAPO Board”) directed the State and DOE to take steps to bring the issue before it and set a schedule for briefing the issue. May 18 Transcript at 413-414. Pursuant to the PAPO Board’s direction, the State sent a letter to DOE requesting a copy of the Draft LA. See Letter from Martin G. Malsch to Donald P. Irwin, dated May 19, 2005, attached as Exhibit 1 to the State Brief. DOE denied the State’s request in a letter dated May 23, 2005. See Letter from Donald P. Irwin to Martin G. Malsch, dated May 23, 2005, (“DOE Denial”) attached as Exhibit 2 to the State Brief.

DOE asserts that the Draft LA is not required to be on the LSN because: (1) it is not a basic licensing document under 10 C.F.R. § 2.1003(b); (2) it does not constitute documentary material under 10 C.F.R. § 2.1003(a); (3) it is a preliminary draft expressly excluded under 10 C.F.R. § 2.1003(a); and (4) it is protected from disclosure by the litigation work product and deliberative process privileges. *Id.* The State Brief, filed in response to the DOE Denial, asserts that the Draft LA must be on the LSN because: (1) it is documentary material under the definition in 10 C.F.R. § 2.1001; (2) it is a circulated draft; (3) it is not subject to the deliberative process privilege because it is a circulated draft; (4) it is not subject to the litigation work product privilege because it was prepared in the ordinary course of business and pursuant to regulatory requirements; (5) DOE should have conducted a balancing test under the Freedom of Information Act (FOIA) and DOE’s own regulations; and (6) DOE should have segregated and disclosed non-privileged portions of the document, as required by FOIA. State Brief at 4-25. The State requests that the PAPO Board order DOE to disclose the Draft LA on or before the

¹ The NRC Staff did not object to this issue being dealt with sooner rather than later, but noted that it might be more appropriate to defer a decision until there was more information on the factual circumstances surrounding the Draft LA. Transcript of Case Management Conference, May 18, 2005, at 388-391.

date of its initial certification. *Id.* at 25. The Staff now responds to the State's Motion to Compel and State Brief. For the reasons set out below, the Staff asserts that the State's definition of a "circulated draft" is overly broad; that the State incorrectly identifies the time for release of a circulated draft; and that this proceeding is controlled by 10 C.F.R. Part 2, Subpart J, not FOIA or DOE regulations.

DISCUSSION

In this response, the NRC Staff does not take a position on factual issues raised by the State, including whether the Draft LA is "documentary material", a "circulated draft", or subject to a privilege. The Staff does respond to the following legal issues raised in the State Brief: (1) the definition of a circulated draft; (2) when a circulated draft must be made available on the LSN; and (3) the role of FOIA and DOE regulations in determining whether the Draft LA must be disclosed.

I. Definition of Circulated Draft

Under 10 C.F.R. Part 2, Subpart J, a draft document is classified as either a "circulated draft" or a "preliminary draft."² Subpart J explicitly disallows the deliberative process privilege with respect to circulated drafts and requires that a circulated draft be made available on the LSN unless it is otherwise privileged. 10 C.F.R. § 2.1006(c). Preliminary drafts, however, are explicitly excluded from the LSN. 10 C.F.R. § 2.1003(a)(1).

The State argues that the Draft LA is a circulated draft, which is not subject to any privilege, and asserts that the "PAPO Board should order DOE to disclose the Draft LA on or before the date of its initial LSN certification." State Brief at 3, 25. In concluding that the Draft LA is a circulated draft, the State focused on the following three questions:

- (1) Was the draft LA...reviewed by DOE?

² See 10 C.F.R. § 2.1001, which defines a preliminary draft as "any nonfinal document that is not a circulated draft."

- (2) Did DOE management make comments, including comments which did not *agree*, or which *disagreed*, with any material aspect of what had been delivered?
- (3) Were changes made in the document in recognition of those *non-agreements* or *disagreements*?

State Brief at 8. The State asserts that for the Draft LA, each of these questions is answered in the affirmative, and further submits that the fact that the Draft LA was modified in accordance with changes ordered by DOE proves that it is a circulated draft. *Id.* at 8, 13.

The Staff believes that the State's definition of circulated draft is overly broad. Subpart J defines a "circulated draft" as "a nonfinal document circulated for supervisory concurrence or signature in which the original author or others in the concurrence process have non-concurred." 10 C.F.R. § 2.1001. What constitutes a non-concurrence is further discussed in the Statement of Considerations published when Subpart J was originally promulgated (Subpart J SOC's). See *Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste*, 54 Fed. Reg. 14925 (April 14, 1989).³ The Subpart J SOC's indicate that the intent of requiring circulated drafts to be made available on the LSN is to "capture those documents to which there has been an unresolved objection by the author or other person in the internal management review process." *Id.* at 14934. The Subpart J SOC's make clear that "the objection or non-concurrence must be unresolved," and indicate that "Any draft documents to which such a *formal, unresolved objection* exists must be submitted for entry into the [LSN]."⁴ *Id.* (emphasis added). Thus, the Staff believes that a mere disagreeing comment is insufficient to make a draft

³ This rule set out requirements for the LSS - Licensing Support System - which was the predecessor to the current, web-based document management system now referred to as the LSN. While the LSS regulations were revised in 1998, there is no indication that the Commission intended to change the meaning of "circulated draft" at that time. See *Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository*, 63 Fed. Reg. 71729 (Dec. 30, 1998).

⁴ The use of the word "signature" in the definition of circulated draft in § 2.1001 also suggests the expectation of a more formal process than sending around a working draft for comment.

a circulated draft where it does not rise to the level of a formal objection that is not resolved in the course of the decision-making process.⁵

II. Release of a Circulated Draft

The Staff believes that the State's position on when the Draft LA should be made available if it is a circulated draft is inconsistent with 10 C.F.R. § 2.1001 and the Commission's intent as indicated in the Subpart J SOCs. The State asserts that the Draft LA should be disclosed on or before the date of DOE's initial LSN certification. State Brief at 25. However, Subpart J and the Subpart J SOCs indicate that a circulated draft is not required to be submitted to the LSN until the decision-making process on the document has been completed, either because it is a draft of a document that has become final or because it is a draft of a document that does not become final due to either a decision not to finalize it or due to the passage of a substantial period of time in which no action has been taken on the document.⁶ See 10 C.F.R. § 2.1001; 54 Fed. Reg. at 14934. In fact, the Subpart J SOCs explicitly state that "the requirements of § 2.1003 do not require a [LSN] participant to submit a circulated draft to the [LSN] while the internal decision-making process is ongoing." 54 Fed. Reg. at 14394. In addition, as discussed above, to have a circulated draft, there must be an unresolved objection or nonconcurrence. Thus, a final determination that a document is a circulated draft cannot be made, and the circulated draft made available on the LSN, until the end of the decision-making process when it is clear whether any objections remain unresolved.

⁵ The State points to statements by Mr. Graser, currently the LSN Administrator, in DEN 001005468, (Exhibit 3 to the State Brief) as supporting its position. See State Brief at 8, fn 3. However, comments by Mr. Graser in his previous capacity with DOE are not dispositive of the current issue.

⁶ The question of whether a substantial period has elapsed without action to finalize a document is a factual determination. Neither DOE nor the State has addressed this issue with respect to the Draft LA and the Staff does not take a position on this question.

III. Nevada's Reliance on the Freedom of Information Act and DOE Regulations

The State also argues that even if the Draft LA is found to be privileged, DOE must release at least some parts of the document under the FOIA and DOE's own regulations. The Staff disagrees with the State's assertion that FOIA and DOE regulations are controlling here. The State first argues that under DOE's own regulations, a privileged document would not be withheld without a determination of whether disclosure is in the public interest. State Brief at 21. This proceeding is conducted under the Commission's regulations in 10 C.F.R. Part 2, Subpart J, and it is those regulations that determine which documents must be on the LSN.⁷ While DOE's regulations would be relevant to a FOIA request filed directly with DOE, they are not controlling in this proceeding, and neither the PAPO Board nor the Commission has the jurisdiction to enforce those regulations. It is true that 10 C.F.R. § 2.1006 does, with respect to this proceeding, adopt the traditional discovery privileges and the exemptions found in 10 C.F.R. § 2.390 (which are modeled after the FOIA exemptions). However, although decisions under FOIA may serve as guidance for interpreting these privileges and exemptions, neither § 2.1006 nor § 2.390 incorporates all of the requirements of the FOIA into this proceeding.

With respect to its assertion that a balancing test is required, the State appears to misapprehend both Commission and judicial precedent. The State asserts that a government agency must weigh the public interest against the possible harm to the agency before deciding to withhold privileged documents. State Brief at 21-23. While it is true that both privileges at issue here, the work product privilege and the deliberative process privilege are qualified privileges, and thus may be subject to a balancing test, both Commission and judicial precedent require only that an agency show that the privilege is properly invoked and then require the

⁷ The Staff recognizes that there may be some question as to the applicability of Subpart J prior to DOE's certification under 10 C.F.R. § 2.1009. However, given that the State agreed that early resolution of this question was desirable, it should not now be allowed to argue that the question should be answered under something other than the Commission's regulations.

person requesting production to show that sufficient justification exists to overcome the privilege.⁸ Thus, in this proceeding, if the PAPO Board determines that the Draft LA is privileged, then the PAPO Board should determine whether the State has made a showing sufficient to overcome the privilege.

The State also asserts, again with misplaced reliance on FOIA, that even if the Draft LA is privileged, DOE is required to segregate out and disclose the non-privileged information (*i.e.* factual information and details of the analyses and tests). State Brief at 24. The Staff notes that if the Draft LA is determined to be a preliminary draft, it is excluded from the LSN in its entirety under 10 C.F.R. § 2.1003(a)(1), and thus segregation of factual information should not be required. For a document required to be on the LSN that is not a preliminary draft, whether the contents of the document must be segregated depends on the privilege asserted and is governed by Subpart J.⁹

⁸ Overcoming a valid claim of deliberative process privilege requires some overriding need or special circumstances. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1343 (1984). Fact work product is discoverable upon a showing of substantial need and inability to obtain equivalent materials by other means without undue hardship, and opinion work product may be discoverable only upon extraordinary justification. *Houston Lighting and Power Company et al.* (South Texas Project, Units 1 and 2), CLI-87-8, 26 NRC 6, 10 (1987) *citing* *Hickman v. Taylor*, 329 U.S. 495, 510-513 (1947); *In re Murphy*, 560 F.2d 326, 334-336 (8th Cir. 1977).

⁹ For example, as the Staff has previously noted, there is no automatic duty to segregate factual work product from deliberative work product when claiming the work product privilege; instead, the factual material in a work product document is only available upon a showing of substantial need and undue hardship. See NRC Staff Response to Issues Raised at the First Case Management Conference, May 12, 2005, at 3-4; see *also* footnote 8, *infra*.

CONCLUSION

For the foregoing reasons, the Staff requests that the PAPO Board not adopt the State's overly broad interpretation of the meaning of "circulated draft;" that the PAPO Board clarify that a circulated draft need not be made available until the decision-making process on that document is completed; and that the PAPO Board look to 10 C.F.R. Part 2, Subpart J, not DOE regulations and FOIA, in determining what documents must be produced on the LSN.

Respectfully submitted,

/RA/

Shelly D. Cole
Counsel for NRC Staff

Dated at Rockville, Maryland
this 20th day of June, 2005

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Pre-Application Matter))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF RESPONSE TO NEVADA'S MOTION TO COMPEL PRODUCTION OR ISSUE A DECLARATORY ORDER" in the above captioned proceeding have been served on the following persons this 20th day of June, 2005, by electronic mail, and/or Electronic Information Exchange as denoted by an asterisk (*).

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