June 20, 2005

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-PAPO**
	)	
(High Level Waste Repository:	)	
Pre-Application Matters)	)	

DEPARTMENT OF ENERGY'S BRIEF IN OPPOSITION TO NEVADA'S MOTION TO COMPEL PRODUCTION OF THE DRAFT YUCCA LICENSE APPLICATION, OR, IN THE ALTERNATIVE, FOR A DECLARATORY ORDER

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I. INTRODUCTION

Two issues are dispositive of the State's motion to compel production of the July 2004 Draft LA as part of DOE's initial certification. The State acknowledges that it is not entitled to relief unless (i) the license application constitutes "documentary material;" and (ii) the July 2004 Draft LA constitutes a "circulated draft." *See* State Brief at 6. This follows from 10 C.F.R. § 2.1003(a). DOE's obligation under § 2.1003(a) to make documents available on the LSN six months in advance of submitting the license application is limited to documents that qualify as "documentary material." Further, § 2.1003(a) expressly excludes "preliminary drafts" from the scope of "documentary material." The term "preliminary draft" means "***any*** non-final document that is not a circulated draft." 10 C.F.R. § 2.1001 (definition of "preliminary draft") (emphasis added).

Consequently, a two-part analysis governs the State's motion. First, the license application must qualify as "documentary material." If it does not, the question of whether the July 2004 Draft LA is a "circulated draft" does not matter, for a party's obligation to produce a "circulated draft" of a document applies only to documents that qualify as "documentary material." Second, even if the license application were "documentary material," the July 2004 Draft LA must presently satisfy all the regulatory requirements of a "circulated draft" for DOE to be required to produce it.

The State's motion fails on both issues. The license application is treated as a "basic licensing document" under the Subpart J regulations. DOE's obligation to produce "basic licensing documents" is addressed in 10 C.F.R. § 2.1003(b), and not in the provisions in § 2.1003(a) regarding the production of "documentary material." The distinction between "basic licensing documents" and "documentary material" defeats the State's characterization of the license application as "documentary material."

Likewise, the July 2004 Draft LA does not meet the specific, narrow regulatory definition of "circulated draft." As discussed below, that draft was not submitted to DOE for concurrence or signature. It was a pre-decisional, review draft, neither held out to be ready for DOE concurrence or signature nor treated as such. Nor, for that matter, was the draft the subject of a non-concurrence. DOE certainly provided comments on that draft, but there were no formal, unresolved objections. As such, the July 2004 Draft LA is not a "circulated draft."

Because the State cannot prevail on both of these antecedent issues, the Board does not need to address the question of whether the July 2004 Draft LA is privileged. DOE is not required to make that draft available in any form—whether in full-text or header-only format—as part of its initial LSN certification. The privileged status of the July 2004 Draft LA is thus a moot question under Nevada's motion.

II. ARGUMENT

A. The License Application Is Not "Documentary Material"

The State's motion fails in the first instance because the license application is not "documentary material." As a result, DOE is not obligated to make the July 2004 Draft LA available on the LSN ***even if that draft were a "circulated draft" (which it is not).***

The Commission's regulations specifically differentiate the license application from "documentary material" and treat it distinctly from "documentary material." The parties' obligations to make documents available are set forth in 10 C.F.R. § 2.1003.[1] That regulation

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[1] That regulation reads in pertinent part:

(a) Subject to the exclusions in § 2.1005 and paragraphs (b), (c), and (e) of this section, DOE shall make available, no later than six months in advance of submitting its license application for a geologic repository . . . (1) An electronic file including bibliographic header for all documentary material (including circulated drafts but excluding preliminary drafts) . . . .

(continued...)

has two separate subparts. Subpart (a) addresses the parties' obligation to make available "documentary material." Subpart (b) defines the separate and distinct obligation to produce "basic licensing documents." That subpart expressly identifies the license application as a "basic licensing document."

The State utterly ignores this distinction, but its importance cannot be overstated. If the license application were "documentary material," there would have been no need for the Commission to promulgate a separate production obligation for it. The parties' obligation to make available all "documentary material" would have been sufficient. That the Commission perceived the need to mandate a separate production obligation for the license application confirms that the license application is not "documentary material." *In the Matter of Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility)*, ALAB-944, 33 N.R.C. 81, 132-33, 1991 NRC LEXIS 18 at *118 (Feb. 28, 1991) (interpretation of Commission's regulations "must bear in mind the elementary canon of construction that the regulation should be interpreted so as not to render any part inoperative; the whole of the regulation must be given effect.") (*citing Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249-50 (1985); 2A Sutherland, Statutory Construction § 46.06 (4th ed. 1984)).

The State's attempt to obliterate that distinction and shoehorn the license application into the definition of "documentary material" is unavailing. The State makes no real effort to assert that the license application falls within the first two categories of "documentary

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(b) Basic licensing documents generated by DOE, such as the Site Characterization Plan, the Environmental Impact Statement, and the license application, or by NRC, such as the Site Characterization Analysis, and the Safety Evaluation Report, shall be made available in electronic form by the respective agency that generated the document.

10 C.F.R. § 2.1003(a) & (b).

material," *i.e.,* "information" that DOE intends to cite or rely on or that does not support the "information" on which DOE intends to cite or rely. *See* 10 C.F.R. § 2.1001. The State's only observation in this regard is the conclusory assertion that "differences between the draft and final LA, would be something that a litigant would likely use to support its position and oppose DOE's position . . . ." State Brief at 4. That statement, ungrounded in any purported difference between the July 2004 Draft LA and DOE's (yet unfinished) license application, is inconsistent with both NRC practice and applicable regulations.

The existence of a "difference" between a final and draft license application, in and of itself, is of no moment. It is the license application as filed "that is at issue in [NRC] adjudications." *In re Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3)*, CLI-99-11, 49 N.R.C. 328, 338, 1999 NRC LEXIS 52 at *20-21 (April 15, 1999) (*quoting In re Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2)*, CLI-98-25, 48 N.R.C. 325, 350, 1998 NRC LEXIS 93 (Dec. 23, 1998)).

Consistent with that settled practice, the Commission's Subpart J regulations nowhere mandate that DOE must make available drafts of the license application. To the contrary, the provision that governs the production of basic licensing documents refers only to the license application itself. It makes no mention of producing drafts of the license application. *See* 10 C.F.R. § 2.1003(b).

This silence in the Subpart J regulations carries over to the rulemaking for those regulations. There is no mention in more than 15 years of rulemaking that drafts of the license application independently qualify as documentary material or that DOE has some other obligation to make available those drafts.

That silence is deafening. Were the State correct, DOE would have to produce on the LSN every draft version of the license application (and all the edits and comments on those various drafts), for what would distinguish the July 2004 Draft LA from any other draft? Why is a "difference" between the final license application and the July 2004 Draft LA of greater intrinsic significance than a difference between it and some other draft? The Commission never so much as alluded to any such massive production obligation, much less added it to the Subpart J regulations. This Board should resist the State's request to amend the regulations without benefit of rulemaking.

This leaves the State's effort to wedge the license application into the third category of "documentary material"—the category of "reports and studies." Substitution of the phrase "license application" for "reports and studies" in the pertinent regulatory text shows just how wrong the State is. The regulation defines this category in pertinent part: "All reports and studies . . . relevant to both the license application and the issues set forth in the Topical Guidelines in Regulatory Guide 3.69 . . . ." 10 C.F.R. § 2.1001 (definition of "documentary material"). If the phrase "reports or studies" encompassed the license application, then that definition would effectively read: "All license applications . . . relevant to . . . the license application . . . ."

That construction is convoluted, circular and senseless. If the Commission intended DOE to make available drafts of the license application, it had a simple means to do so. It could have required in plain English, along with the requirement in 10 C.F.R. § 2.1003(b) for DOE to produce the license application, an additional obligation to produce all or selected draft versions of the license application. The Commission's election not to include any such

requirement in § 2.1003(b) should not be overcome by a strained and illogical interpretation of "reports and studies."

Regulatory Guide 3.69 offers the State no assistance in this regard either. The State makes much of the fact that the license application is listed in Appendix A of the guide among examples of the types of documents to be included in the LSN. Appendix A, however, does not purport to identify documents that constitute "reports and studies" within the third category of documentary material. Rather, it gives examples of documents that 10 C.F.R. § 2.1003 requires to be made available on the LSN, and as discussed above, § 2.1003(b) expressly mandates production of the license application. There is nothing remarkable, therefore, about the inclusion of the license application in Appendix A of Regulatory Guide 3.69, and its inclusion there in no way supports the State's fanciful view about "reports and studies."

If anything, Appendix A to Regulatory Guide 3.69 actually supports the determination that DOE is not required to produce drafts of the license application. The reference in Appendix A to the license application is limited to the license application itself. It makes no reference to drafts of the license application. *See* Regulatory Guide 3.69, Appendix A, ¶ 7.6. This is in stark contrast to the references to other documents that expressly mention drafts, such as draft and final environmental evaluations, *see id.* at ¶ 7.1, and draft, supplemental, and final environmental impact statements, *see id.* at ¶ 7.9. The absence of any mention of draft versions of the license application highlights that Regulatory Guide 3.69 does not purport to require production of drafts of the license application (in addition to the fact, of course, that the guide is not binding in any event).

By the same token, the State's suggestion that drafts of the license application should nevertheless be produced because drafts might have a "bearing" on the license proceeding, *see* State Brief at 6, seeks to override the Commission's regulations. The definition of "documentary material" does not define the parties' production obligation for the LSN in terms of documents that might have a "bearing" on the license application, and acceptance of the State's interpretation could radically expand the universe of documents that the parties have to produce on the LSN. For it is not just drafts of the license application that might have a "bearing" on the license proceeding under the State's formulation. The drafts of the State's and other parties' contentions, pleadings and motions might have an equal "bearing" on the license proceeding. Differences between the State's draft and final contentions is certainly of interest to DOE and theoretically might be useful to rebut the State's positions in the license proceeding. That the State is not disclosing all versions of its draft contentions exposes the infirmity of the State's assertion that a one-sided obligation exists on DOE to produce drafts of the license application.

B. The July 2004 Draft LA Is Not A "Circulated Draft"

The State's motion fails for the additional, independent reason that the July 2004 Draft LA is not a "circulated draft." DOE, therefore, is not required to make that draft available on the LSN ***even if the license application qualified as "documentary material" (which it does not).***

The definition of "circulated draft," set forth in 10 C.F.R. § 2.1001, is very particular. It defines "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 (definition of "circulated draft"). That a draft was sent to, reviewed by, and commented upon by DOE personnel is insufficient to create a "circulated

draft" under that definition. More is required. In particular, the draft must have been distributed for a special purpose—for supervisory concurrence or signature. In addition, a special event must have occurred—the original author or "others in the concurrence process" must have "non-concurred" on that version of the draft.

These are very exacting requirements. Distribution of a draft for comments, even to a supervisor, is not sufficient. The document must have reached the point where the document is distributed for approval in the form of concurrence or signature. Further, comments on a draft are not sufficient, even where the draft was distributed for supervisory concurrence or signature. An actual "non-concurrence" must exist. And this non-concurrence cannot be from just anyone. It must be from the author or "others in the concurrence process." The views, comments and even objections of others do not matter under the regulatory definition. *See also* NRC Regulatory Guide 3.69, Appendix A, ¶ 1 (noting that "predecisional" and "other internal review drafts" of documentary material are excluded from the LSN).

The rulemaking behind § 2.1001 corroborates the narrow scope of "circulated draft." The Commission made clear when promulgating its Subpart J regulations that the requirements to submit documentary material on the Licensing Support System, now LSN, "generally apply only to final documents, *e.g.,* a document bearing the signature of an employee of an [LSN] participant or its contractors." 53 F.R. 44411, 44415 (Nov. 3, 1988). The exception for "circulated drafts," the Commission further explained, applies to a special situation: "The intent of this exception to the general rule on final documents 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 (the concurrence process) of an [LSN] participant or its contractor . . . . ***The objection or non-concurrence must be unresolved.***" *Id.*

(emphasis added). The Commission further reiterated that it is only draft documentary material with a *"**formal, unresolved objection**"* that must be submitted as a "circulated draft." *Id.* (emphasis added).

While the State makes no mention of this rulemaking, it is critical to a proper application of "circulated draft." Mere distribution of a draft for review and comment does not give rise to a "circulated draft." Rather, the distribution must be for the internal management review and approval process. Furthermore, comments, edits and other suggestions on a draft do not constitute "non-concurrences," even if made in the course of an internal management review process. Only "formal" objections matter, and even then a formal objection is not sufficient for a non-concurrence. The formal objection must be unresolved. If the formal objection is resolved to the satisfaction of the person who made it—for instance, by further edits to the document—the draft that elicited the objection does not qualify as a "circulated draft."

The July 2004 Draft LA plainly does ***not*** qualify as a "circulated draft" under those standards. The contract between DOE and BSC did not contemplate that the deliverable BSC was to submit to DOE by July 2004 was a license application ready for DOE's concurrence or approval. The contract contemplated instead that the July 2004 deliverable would be a draft and that subsequent iterations would be generated before a final license application was submitted to DOE for management approval. Indeed, the contract expressly and repeatedly called the July 2004 deliverable a draft and distinguished that document from the "final LA" that BSC was to submit later for DOE concurrence or approval. *See, e.g.,* DOE-BSC Contract, Modification No. A057, page B-6 (Attachment A).

The July 2004 Draft LA that BSC actually delivered was very much a draft. Many of its sections were in an active state of revision. Many of the underlying technical documents to be cited and relied on in the license application—such as analysis model reports, system description documents, facility description documents and the pre-closure safety analysis—were incomplete or in active revision. Further significant work remained to be done on issues of facility design and analysis. Declaration of Joseph D. Ziegler (Ziegler Declaration) at ¶ 3 (Attachment B).

Moreover, the July 2004 Draft LA was ***not*** circulated to DOE management for its signature or concurrence. Ziegler Declaration at ¶¶ 2 & 4. The July 2004 Draft LA underwent instead a multidisciplinary working-level review, referred to as "chapter review," by technical review teams. The DOE personnel on these teams were technical staff in the Office of Repository Development. DOE's counsel also participated in the review. Ziegler Declaration at ¶ 4. These teams made comments on various sections of the July 2004 Draft LA, which comments were provided to BSC in August 2004 for use in generating the next draft of the license application. The July 2004 Draft LA was not distributed to DOE management for concurrence or signature as part of that process. Ziegler Declaration at ¶ 5.

To be sure, DOE's Deputy Director, Office of Repository Development, and DOE's Director, Office of License Application and Strategy, Office of Repository Development, read various parts of the July 2004 Draft LA, just as they had read from time to time drafts of the individual sections as they were being drafted before July, 2004. They did not read the July 2004 Draft LA, however, as part of the "chapter review" process or because that draft had been submitted to them for their signature or approval. They read portions of the draft to apprise themselves of the license application's general state of preparation, as one would

expect such managers to do. Ziegler Declaration at ¶ 6. And in any event, § 2.1001 is clear that the reading of a draft by management personnel does not transform the draft into a "circulated draft." The draft must have been submitted for the purpose of their concurrence or signature, and there must have been a non-concurrence.

Also very importantly, the chapter review process did not generate "non-concurrences." The July 2004 Draft LA was not submitted to the technical review teams for their concurrence or signature. The technical review teams instead reviewed the draft for the purpose of providing comments to the authors of the license application. Ziegler Declaration at ¶ 7. Some of those comments were "mandatory." Others were not. For mandatory comments, the author of the license application section in question was required to respond to the technical review team. Generally speaking, the response was either acceptance of the comment, a justification for the original text, or an alternative proposal. If the technical review team was not satisfied with the response, further consultation occurred among the author and the review team until agreement was reached on how to proceed. Ziegler Declaration at ¶ 8. The agreed resolutions of mandatory comments were incorporated into the next draft of the license application. The non-mandatory comments were incorporated at the author's option. Ziegler Declaration at ¶ 9.

The "chapter review" process thus did not generate formal, unresolved objections to the July 2004 Draft LA. The technical review teams provided comments. If mandatory, the comments were satisfactorily resolved. If non-mandatory, the author had the discretion to reject the comment, in which case the comment could not be viewed as a formal, unresolved objection even if not acted on by the author. As a result, the July 2004 Draft LA is not a "circulated draft."

And, it is worth noting that it would be premature to conclude that the July 2004 Draft is a "circulated draft." It cannot be adjudged that comments are unresolved before the license application is finalized. The Commission recognized as much when it promulgated the definition of "circulated draft." The Commission made clear as part of that rulemaking 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." 53 F.R. 44411, 44415 (Nov. 3, 1988). Until that decision-making process is complete, the ultimate disposition of any "objection" is uncertain.

The State attempts to shift the focus from these facts to various factors that are not germane to the narrow regulatory definition of "circulated draft." The State points out that previous drafts of license application sections existed before July 2004, that considerable work went into those drafts, and that various reviews had been made of those draft sections. State Brief at 9-11. All true, but beside the point. A draft does not become a "circulated draft" under the regulation because it is an advanced draft, because it was worked on for a long time, or because prior versions were reviewed. If the draft in question was not submitted for supervisory concurrence or signature and did not receive a non-concurrence, that is, a formal, unresolved objection, it is not a circulated draft regardless of how much work preceded the draft.

Equally irrelevant is the fact that review of the July 2004 Draft LA was, to use the State's characterization, "intense" and "detailed." State Brief at 11. Nor is it pertinent that the review teams generated a "substantial" number of comments. State Brief at 12. Status as a "circulated draft" does not depend on the duration or thoroughness of a review, concepts that are mentioned nowhere in the definition of "circulated draft." Again, the critical determinants

are whether the review was for the purpose of supervisory concurrence or signature and whether that review gave rise to a non-concurrence. A draft that was reviewed for another purpose or that did not yield a non-concurrence is not a "circulated draft" no matter how extensive or thorough the review and no matter how many comments the review generated.

Other red herrings are the State's observations that the July 2004 Draft LA was the first time all of the topics set forth in the NRC's Yucca Mountain License Application Review Plan "had ever been brought together in a single document," State Brief at 12-13, and that the July 2004 Draft LA will form the "substantial basis" for the final version of the license application. State Brief at 13. Those factors have no relevance whatsoever under the regulatory definition of "circulated draft," as evidenced by the fact that the State does not even attempt to ground its argument on this score on the regulation's text.

The State's reference to the incentive provisions in the DOE-BSC contract is similarly diversionary. In the first place, the State is wrong about the alleged payment of a performance-based incentive (PBI) for the July 2004 Draft LA. DOE did not pay that PBI. Declaration of Kenneth W. Powers at ¶ 2 (Attachment C). DOE, in consultation with BSC, agreed in late 2004 to suspend that and all the other PBIs and negotiate new PBIs. *Id.* at ¶ 3.[2]

In any event, the fee arrangement between an LSN participant and its contractors has no bearing on a document's status as a circulated draft. The regulatory definition of "circulated draft" makes no mention of fee arrangements. The rulemaking makes no reference

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[2] The news article attached as Exhibit 11 to the State's brief is not to the contrary. That article quotes a DOE spokesman on August 4, 2004 as stating that BSC "qualified" for payment of the PBI by delivering the July 2004 Draft LA. The same article also explains, however, that the DOE spokesman further said that DOE had to examine the product before the payment could be certified. DOE subsequently suspended all the PBIs without making the payment.

to fee arrangements either. A draft submitted for supervisory concurrence or approval that receives a non-concurrence qualifies as a "circulated draft" regardless of whether the author is paid any bonus or incentive for the draft. By the same token, the payment of a bonus or incentive, or more properly, the prospect of a possible fee incentive, does not transform a draft document into a "circulated draft" if the draft does not otherwise meet the regulatory requirements for a "circulated draft."

Then there is the following assertion by the State: "The fact that the July 2004 Draft LA submitted by [BSC] was modified in accordance with changes ordered by DOE does not *detract* from its status as a circulated draft, but rather *defines* it as such." State Brief at 13 (emphasis in original). The State has it exactly backwards. Apart from the fact the State mischaracterizes the "chapter review" process, the fact that the July 2004 Draft was modified to conform to DOE's comments indicates that the draft is ***not*** a circulated draft. As the Commission has explained, "formal, ***unresolved*** objections" are the hallmark of a "circulated draft." The modification of a draft to satisfy the views of persons reviewing the draft is the antithesis of an unresolved objection.

Indeed, essentially every draft would qualify as a "circulated draft" if the State's argument were accepted. It is the nature of drafts to be reviewed and edited, often multiple times. If a draft became a "circulated draft" merely because it was distributed for comments and was edited in response, each draft of virtually every substantive document the parties create would be a "circulated draft."

That is inconsistent with the regulatory definition of "circulated draft" and not what the Commission intended. The State's interpretation would effectively write out of existence the exclusion for preliminary drafts in 10 C.F.R. § 2.1003(a) and transform the narrow definition

of "circulated draft" into a wide-ranging production obligation that would swamp the LSN. Such an irrational result contravenes all accepted norms of regulatory interpretation. *In the Matter of U.S. Enrichment Corp. (Paducah, Kentucky Gaseous Diffusion Plant)*, DD-01-3, 54 N.R.C. 305, 321, 2001 NRC LEXIS 261 at *37 (June 14, 2001) (rejecting interpretation of a regulation that would lead to absurd, unjust or unintended results, and holding that Commission's regulations should be construed to avoid such results); *In the Matter of Texas Utilities Electric Company, et al. (Comanche Peak Steam Electric Station, Unit 1)*, ALAB-868, 25 N.R.C. 912, 937, 1987 NRC LEXIS 43 *58 (June 30, 1987) (stating that it is "elementary that the Commission may not interpret its regulations 'as meaning something other than what those words . . . may rationally convey.'").

C. The Privileged Status Of The Draft LA Is Not Germane To The State's Motion

Although there was some general discussion at the case management conferences regarding the privileged status of the draft license application, that issue is unnecessary to resolution of the State's motion. While the State does not challenge that the draft license application is a deliberative process document, *see* State Brief at 16, the question of whether the July 2004 Draft LA is a "circulated draft" trumps any need to consider application of this privilege. If the July 2004 Draft LA is not a "circulated draft," then DOE is not required to produce it even if not privileged. If it is a "circulated draft"—which it is not—any deliberative process privilege would be overridden by regulation. *See* 10 C.F.R. § 2.1006(c).

Application of the litigation work product privilege is similarly irrelevant or at least premature. Again, if the July 2004 Draft LA is not a "circulated draft," then DOE is not required to produce it even if it is not protected by the litigation work product privilege or any other privilege. And as discussed above, any determination that the draft is a "circulated draft" must await finalization of the license application, for only then would one know that

any formal objection remains unresolved. Therefore, whether or not the July 2004 Draft LA is protected by the litigation work product privilege, no determination can be made now that the July 2004 Draft LA must be included as part of DOE's initial LSN certification as a "circulated draft."

The Commission has made "clear" its "disinclination to render advisory opinions absent the most compelling cause to do so." *In the Matter of Texas Utilities Generating Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2)*, ALAB-714, 17 N.R.C. 86, 93, 1983 N.R.C. LEXIS 188 at *16 (1983). So where resolution of the "bedrock" legal issues presented by a motion resolves the matter, there is no need to render an advisory opinion on other issues presented by the motion. *E.g., In the Matter of Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), et al.*, LBP-92-32, 36 N.R.C. 269, 279, 308-09, 1992 N.R.C. LEXIS 52 (Nov. 18, 1992).

D. The Board Should Not Rewrite The Commission's Regulations To Order Production Of The July 2004 Draft LA

The State's various arguments that the July 2004 Draft LA is subject to production under the "public interest" exceptions in FOIA are not germane. Needless to say, this Board does not adjudicate or otherwise have jurisdiction over FOIA requests that may or may not be submitted to DOE and that are governed by DOE's internal regulations. If the State believes that the July 2004 Draft LA can be obtained through FOIA, it has a simple expedient. It can make such a FOIA request on DOE.

As it happens, the State did make such a request. The State made that request by letter dated August 24, 2004. *See* Attachment D. A DOE FOIA officer denied the request on November 22, 2004. *See* Attachment E. The State elected not to appeal that denial, and the time to file such an appeal (30 days after DOE's determination) has long expired. This Board

is not the tribunal to correct the State's refusal or failure to pursue the administrative and judicial remedies under FOIA.

Nor would it be appropriate for the Board to take up the State's plea to compel the July 2004 Draft LA based on some general notion that it might be helpful for the State to have it. The "starting point in interpreting any regulation is not . . . the consideration of 'over-arching,' albeit unwritten, principles. . . . [It is] the language and structure of the provision itself." *In the Matter of Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility)*, ALAB-944, 33 N.R.C. 81, 132, 1991 NRC LEXIS 18 at *117-18 (Feb. 28, 1991). And the language and structure of Subpart J does not authorize the State's request.

The Commission has promulgated detailed regulations that address the materials that DOE and the other parties must produce and when. Those regulations were developed as a result of extensive rulemaking over 15 years, giving due consideration to the competing interests and concerns of the relevant parties. The Commission additionally advised in its most recent rulemaking for the Subpart J regulations that it did not intend to make any further changes in the parties' production obligations. 69 F.R. 32836, 32838 (June 14, 2004). What the State seeks to do is alter the balance the Commission struck in its regulations and to add production requirements notwithstanding the Commission's intent that those requirements remain settled.

Nor is the actual value of making available the July 2004 Draft LA beyond question, even if the State's request were legally authorized. It is not clear, given that drafts are just that—*i.e.*, not final documents, subject to change—just how informative any given draft would be, other than to stimulate premature questions about differences between it and the final document. Even for that purpose, the ultimate value of a draft could not be realized

unless the Board were also to require the producing party to produce a blackline comparison between the draft and the final version. This, DOE submits, is not the purpose of the LSN. If it were, the Commission would not have adopted the exclusion for preliminary drafts.

Further, notwithstanding this Board's powers, DOE respectfully suggests that the Board should think long and skeptically before engrafting wholly new document production requirements onto those established by rulemaking in the LSN regulations, so as to impose additional, one-sided obligations on DOE. By the same logic that would obligate DOE to produce draft versions of its license application in conjunction with its initial LSN certification, the State and others should be required to share their draft contentions with DOE at this time. It is just as credible that the "public interest" in the advancement of this proceeding would benefit from the sharing of draft contentions at this time, so as to enable DOE to take into account those contentions as it finalizes the license application, as it is to argue that providing a draft of the license application would further the State's or any other potential party's ability to formulate valid contentions in timely fashion. The public interest would benefit from having the license application be the most sound it can be, and the licensing proceeding could be facilitated if DOE could address contentions in the pre-license application phase.

The point is, each party can articulate changes it might wish to make to the Commission's regulations. The proper forum to raise those issues, however, is through rulemaking before the Commission, and the State's proposal is not only beyond the regulations, it raises at least many issues as it appears to resolve.

III. CONCLUSION

The Board should deny the State's motion to compel. The Commission's regulations do not require DOE to make the July 2004 Draft LA available on the LSN. The license application is not "documentary material," and the requested draft is not a "circulated draft" in any event.

Respectfully submitted,

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Dated: June 20, 2005

ATTACHMENT A

The PBIs and Award Fee Incentive for the final performance period are set forth below with the distribution of the balance of the available fee:

	PBI	Completion Date	Fee Amount
1.	Submission of a Complete Draft LA	Jul 26, 2004	$11,043,476
2.	Final LA Document Ready for DOE Tender to NRC	Nov 30, 2004	$15,290,967
3.	LA Docketed by the NRC	Mar 2005	$22,086,954
4.	Development of Engineering, Procurement, and Construction (EPC) Performance Specifications	Apr 15, 2005	$ 6,795,985
5.	Development and Support of CD-2	Sep 30, 2005	$ 1,698,996
6.	Closure of NRC Requests for Additional Information	Apr 1, 2005 thru Mar 31, 2006	$ 6,795,985
	Award Fee Incentive – Program Management of Worldclass Quality for a Regulated Entity	Apr 1, 2004 thru Mar 31, 2006	$21,237,455

The following describes the PBIs and the Award Fee Incentive:

- PBI 1. Submission of a Complete Draft LA: To obtain a license, the Department must demonstrate that a repository can be constructed, operated, monitored, and eventually closed without unreasonable risk to the health and safety of workers and the public. The content of the LA must be adequate to support NRC docketing of the LA within 91 days of the date DOE tendered the LA to the NRC, timely technical review by the NRC, and to facilitate completion of the NRC's licensing process within the three-year time frame required by the Nuclear Waste Policy Act. The contractor will have to develop the safety case for the demonstration of compliance with the Commission's performance objectives for preclosure radiological safety. The contractor will also present discussions of potential hazards, analyses of events that might disrupt operations and affect safety, and identify structures, systems, and components of the repository that would assure safety before and after repository closure. The contractor will also develop a Total System

Performance Assessment conducted to support licensing, including a discussion of the models, inputs, and assumptions used to demonstrate compliance with postclosure safety objectives; discussions of features, events, and processes that affect postclosure performance; and summaries of the contribution of engineered barriers to performance. To meet the current Program milestone schedule for submission of the *LA Document Ready for DOE to Tender to NRC* on November 30, 2004, a complete draft of all sections of the LA must be provided to DOE by July 26, 2004.

Performance Measure: The draft LA must satisfy the following attributes: the draft must address all applicable requirements of 10 CFR 63 and the NUREG 1804 revision 2; it must have all technical team reviews, as defined in the DOE License Application Management Plan, completed; and all DOE Mandatory comments and applicable Technical Direction Letters must be resolved.

Assumptions and Conditions: The following conditions are assumed: the Preclosure Safety Analysis (PCSA) and the Total System Performance Assessment (TSPA) have been completed; all AMR's consistency reviews mandatory comments have been resolved; quality assurance Corrective Action Report (CAR) numbers 1 and 2 have been closed; level-A or level-B Condition Reports (CRs) relevant to the draft LA have been dispositioned; and disposition of all Key Technical Issues (KTIs) has been confirmed.

The following parameters are key drivers to the information contained in the Draft LA.

- The major nuclear facilities addressed in the LA and in the Preclosure Safety Analysis (PCSA) for the LA are:
  - Dry Transfer Facility #1 and #2
  - Remediation Facility #1
  - Canister Handling Facility
  - Aging System
  - Transportation Cask Receipt/Return Facility
  - Underground Facility, including emplacement drifts and shafts
- The preclosure period analyzed in the LA is 100 years and the postclosure period is 10,000 years.
- The PCSA analyzes repository preclosure performance based on the maximum throughput capability of 3,000 MTHM per year.
- The aging system capability is 20,000 MTHM.
- The waste inventory used for commercial spent nuclear fuel and high-level waste used in the TSPA cannot be changed. (Shall be per Initial Radionuclide Inventories ANL-WIS-MD-000020 Rev 00)

An update has been made to several of the parameters in the previous paragraph. Those parameters and implementation conditions are contained in Authorization Letter, Subject: *Authorization for Bechtel SAIC Company, LLC (BSC) to Include a Bare Fuel Handling Facility and Increased Aging Capacity In The License Application*, dated January 27, 2004.

Fee Payment: Fee for this PBI may be earned. Should the contractor meet the *Performance Measures* and *Assumptions and Conditions* for this PBI and the draft LA is received on July 26, 2004, or earlier, the contractor shall receive $11,043,476. Following July 26, 2004, the fee is reduced by 2.5% (of the amount available for this PBI) for every workday thereafter. For receipt on August 7, 2004, and thereafter, the contractor shall receive no fee and the available fee will be lost and unearnable.

- PBI 2. Final LA Document Ready for DOE Tender to NRC: This activity includes those actions associated with supporting DOE in getting ready for tendering the LA to the NRC. The Contractor must support the actions necessary to complete the final agency review and demonstrate that the LA was prepared in compliance with 10 CFR 63 and NRC's Yucca Mountain Review Plan (NUREG 1804, revision 2). The schedule for final agency review is summarized in the LA Management Plan. Actions to support the final agency review include: the contractor swiftly addressing changes to the LA during final Departmental review; contractor's responsiveness to DOE directions including General Counsel (GC) and GC's legal support contractor on any revision to the LA; contractor assisting in timely resolution of internal and external comments and requests for information; contractor's providing of the LA in print ready format for printing; contractor using lessons learned from the production and issuance of the SR to assure quality LA; contractor certifying that the LA is complete, its content is in compliance with 10 CFR 63 and with the review methods and acceptance criteria under NUREG 1804, and recommending submission to NRC; contractor assembles a team of subject matter experts to defend each LA section; and contractor documents and appropriately dispositions any related Condition Report (CR) related to the LA.

  Performance Measure: The final LA must satisfy the following attributes: The final LA is received by November 30, 2004; the contractor certifies that the final LA document meets all of the applicable requirements of 10 CFR 63 and NUREG 1804 revision 2; all DOE Mandatory comments and applicable Technical Direction Letters from Departmental reviews of the final LA, including all technical mandatory and legal, are resolved; all quality conditions related to the material supporting the final LA must be dispositioned; the contractor shall have assembled a license defense team; the final LA has been signed by DOE and is in print ready and electronic format, acceptable for tendering to the NRC.

ATTACHMENT B

June 20, 2005

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-PAPO**
	)	
(High Level Waste Repository: Pre-Application Matters)	)	

DECLARATION OF JOSEPH D. ZIEGLER

I am Joseph D. Ziegler. I make this declaration under oath and under penalty of perjury:

1. I am the Director, Office of License Application and Strategy, Office of Repository Development, U.S. Department of Energy (DOE). I have personal knowledge of the facts set forth in this declaration.

2. The draft license application that Bechtel-SAIC LLC (BSC) delivered to DOE in July, 2004 (July 2004 Draft LA) was not submitted to DOE for concurrence or signature.

3. As of the end of July 2004, many sections of the July 2004 Draft LA were still in an active state of revision. Many of the underlying technical documents to be cited and relied on in the license application—including analysis model reports, system description documents, facility description documents and the pre-closure safety analysis—were incomplete or in active revision. Further significant work remained to be done on issues of facility design and analysis.

4. The July 2004 Draft LA was not circulated to DOE management for its signature or concurrence. The July 2004 Draft LA underwent instead a multidisciplinary working-level review, referred to as "chapter review," by technical review teams. The DOE personnel on these teams were technical staff in the Office of Repository Development. DOE's counsel also participated in the review.

5. The technical review teams made comments on various sections of the July 2004 Draft LA and provided those comments to BSC in August 2004 for use in generating the next draft of the license application. The July 2004 Draft LA was not distributed to DOE management for concurrence or signature as part of that process.

6. DOE's Deputy Director, Office of Repository Development, and I read various parts of the July 2004 Draft LA, just as we had read drafts of individual sections as they were being drafted before July, 2004. We read portions of the July 2004 Draft LA to learn of the license application's general state of preparation.

7. The July 2004 Draft LA was submitted to the technical review teams for the purpose of providing comments to the authors of the license application sections.

8. The comments of the technical review team were either mandatory or non-mandatory. For mandatory comments, the author of the license application section in question was required to respond to the technical review team. Generally speaking, the response was either acceptance of the comment, a justification for the original text, or an alternative proposal. If the technical review team was not satisfied with the response, further consultation occurred among the author and the review team until agreement was reached on how to proceed.

9. The agreed resolutions of mandatory comments were incorporated into the next draft of the license application. The non-mandatory comments were incorporated at the author's option.

Joseph D. Ziegler

ATTACHMENT C

June 20, 2005

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-PAPO**
	)	
(High Level Waste Repository: Pre-Application Matters)	)	

DECLARATION OF KENNETH W. POWERS

I am Kenneth W. Powers. I make this declaration under oath and penalty of perjury:

1. I am the Associate Deputy Director, Office of Repository Development, U.S. Department of Energy (DOE). I have personal knowledge of the facts set forth in this declaration.

2. DOE did not pay the Performance Based Incentive (PBI) provided in its contract with Bechtel-SAIC Company LLC (BSC) for the draft license application that BSC delivered in July, 2004.

3. DOE and BSC instead agreed in late 2004 to suspend all the PBIs under the contract and to negotiate new PBIs. To the best of my knowledge, no fee has been paid under the new PBIs.

Kenneth W. Powers

Kenneth W. Powers

ATTACHMENT D

04-79

EGAN, FITZPATRICK, MALSCH & CYNKAR, PLLC

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August 24, 2004

VIA FACSIMILE

ORD/FOIA 04-79
Due Date 9/22/04

RECEIVED
AUG 24 2004
DOE/ORD/FOIA

FOIA Officer
United States Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Ms. Diane Quenell
United States Department of Energy
Office of Repository Development
1551 Hillshire Drive
Las Vegas, Nevada 89134-6321

Re: Freedom of Information Act — Request for Documents

To Whom It May Concern:

Pursuant to the Freedom of Information Act ("FOIA"), 55 U.S.C. 552, we hereby request the following document, either in hard copy or electronic form:

> The draft License Application (for Yucca Mountain project) which Margaret Chu discussed at the August 19, 2004 DOE/NRC Management and QA meeting as having been submitted for its review by Bechtel SAIC to DOE.

This request is made on behalf of the State of Nevada.

The requesting party is willing to pay up to a total amount of $1,000 for search time[1] and document copying costs without the necessity for further approval. The requesting party has specifically made this request as narrow as possible in order to facilitate expeditious and timely response by DOE.

Thank you for your prompt attention to this request. If you have any questions, please contact me at 210-820-2667.

Sincerely,

Charles J. Fitzpatrick

CJF:sm
cc: Joseph R. Egan, Esq. (via fax)
Mr. Robert R. Loux (via fax)

---

1. This request is intended to cover DOE's headquarters office, as well as its field offices, including, but not limited to, DOE's Nevada field office.

ATTACHMENT E

Department of Energy
Office of Civilian Radioactive Waste Management
Office of Repository Development
1551 Hillshire Drive
Las Vegas, NV 89134-6321

QA: N/A

NOV 22 2004

CERTIFIED MAIL – 7000 1670 0005 4673 2624

Charles J. Fitzpatrick, Esquire
Egan, Fitzpatrick, Malsch & Cynkar, PLLC
1777 N.E. Loop 410, Suite 600
San Antonio, TX 78217

Dear Mr. Fitzpatrick:

This is in response to your August 24, 2004, Freedom of Information Act (FOIA) letter requesting a copy of the "draft License Application (for Yucca Mountain project) which Margaret Chu discussed at the August 19, 2004 DOE/NRC Management and QA meeting as having been submitted for its review by Bechtel SAIC to DOE." Please reference ORD-FOIA 04-79 in any future correspondence regarding this matter.

Under the provisions of the FOIA, documents held in government files will be disclosed to the public upon request with nine specific exemptions. One of those, Exemption 5 of 5 U.S.C. § 552(b), protects from disclosure inter-agency and intra-agency memoranda or letters which would not be available to a party other than an agency in litigation with the agency. We have determined that the draft License Application is exempt from disclosure under Exemption 5 of 5 U.S.C. § 552(b), because of the deliberative process privilege. The general purpose of this exemption is to prevent injury to the quality of agency decisions. It serves to encourage open, frank discussions on matters of policy between subordinates and superiors. Exemption 5 also protects against the premature disclosure of proposed documents before they are finally adopted and against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's decision. We have determined that releasing this document could chill the deliberative process in the future.

I am the individual responsible for the determination to withhold the draft License Application.

This decision may be appealed, in writing, within 30 days after your receipt of this letter, to the Director, Office of Hearings and Appeals, HG-1, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585. The written appeal must contain all other elements required by 5 C.F.R. § 1004.8. Judicial review will thereafter be available to you in the district where you reside, where you have your principal place of business, where the Department's records are situated, or in the District of Columbia.

In your August 24, 2004, letter you stated your willingness to pay fees in an amount not to exceed $1,000; however, in this instance no fees are assessed. This completes our response to your FOIA request. If we can be of further assistance, please contact Diane Quenell at (702) 794-5004.

Sincerely,

Kenneth W. Powers
Associate Deputy Director

June 20, 2005

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-PAPO
	)	
(High Level Waste Repository:	)	
Pre-Application Matters)	)	

DEPARTMENT OF ENERGY'S BRIEF IN OPPOSITION TO NEVADA'S MOTION TO COMPEL PRODUCTION OF DOE'S DRAFT YUCCA LICENSE APPLICATION, OR, IN THE ALTERNATIVE, FOR A DECLARATORY ORDER

CERTIFICATE OF SERVICE

I certify that copies of the foregoing **DEPARTMENT OF ENERGY'S BRIEF IN OPPOSITION TO NEVADA'S MOTION TO COMPEL PRODUCTION OF DOE'S DRAFT YUCCA LICENSE APPLICATION, OR, IN THE ALTERNATIVE, FOR A DECLARATORY ORDER** has been served upon the following persons by electronic mail and/or Electronic Information Exchange as denoted by an asterisk (*).

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By Michael D. Shebelskie

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