

October 13, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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-03
)	

MOTION OF THE NUCLEAR ENERGY INSTITUTE FOR LEAVE TO FILE BRIEF IN
SUPPORT OF THE APPEAL OF THE DEPARTMENT OF ENERGY FROM THE PAPO
BOARD'S SEPTEMBER 22, 2005 MEMORANDUM AND ORDER

The Nuclear Energy Institute (“NEI”) hereby seeks leave to file the simultaneously-submitted brief with the Nuclear Regulatory Commission (“Commission”) in the above-captioned proceeding. On October 3, 2005 the Department of Energy (“DOE” or “Department”) filed an appeal from the PAPO Board’s Memorandum and Order of September 22, 2005¹. In that Memorandum and Order, the Board ordered DOE to produce two draft versions of its license application on the Licensing Support Network (“LSN”) as a condition of the Department’s initial certification of document availability. NRC regulations provide for the filing of a brief in *opposition* to an appeal within 10 days after service of the appeal by a potential party². For the reasons stated below, NEI seeks leave to file a brief in *support* of the DOE and NRC appeals.

NEI offers a unique perspective concerning the instant appeal. NEI is the organization responsible for establishing unified policy on issues that affect the U.S. nuclear industry,

¹The Nuclear Regulating Commission Staff (“NRC Staff”) also filed an appeal on October 3, 2005.

²10 C.F. R § 2.1015(b).

including the regulatory aspects of generic operational and technical issues. NEI's members include all entities licensed to operate the 103 commercial nuclear plants in the United States³. Used nuclear fuel from those plants will be disposed of at Yucca Mountain if the site is licensed by the Commission.

NEI is a member of the LSN Advisory Review Panel. In addition, NEI has participated as a potential party in the instant proceeding since its inception, and filed a brief opposing the motion which was ultimately granted by the PAPO Board in its September 22 Memorandum and Order⁴.

The PAPO Board's expansive interpretation of what constitutes "documentary material" under the Commission's regulations will have a direct impact on NEI. If allowed to stand, it will require the production of considerably more material than would otherwise be required under a proper application of the definition.⁵

Acceptance of NEI's brief in this proceeding will not prejudice or unduly burden any other party. NEI necessarily takes this matter "as it finds it." NEI does not propose to inject new issues into the proceeding or seek to alter the record developed by the parties.

NEI has been authorized by legal counsel for DOE, the Nuclear Regulatory Commission Staff and the State of Nevada to represent that they do not oppose this motion.

For the foregoing reasons, NEI requests that the Commission accept its brief in the instant appeal.

³ NEI's membership also includes, for example, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry

⁴ Brief of the Nuclear Energy Institute Opposing the State of Nevada's Motion to Compel Production of the July 2004 Draft Yucca Mountain License Application (June 20, 2005).

⁵ See 10 C.F.R. § 2.1001.

Respectfully submitted,

A handwritten signature in black ink that reads "Michael A. Bauser". The signature is written in a cursive style with a horizontal line underneath it.

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Dated: October 13, 2005

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BRIEF OF THE NUCLEAR ENERGY INSTITUTE IN SUPPORT OF THE
APPEAL OF THE DEPARTMENT OF ENERGY FROM THE PAPO BOARD'S
SEPTEMBER 22, 2005 MEMORANDUM AND ORDER

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Final Rule, Licensing Proceeding for the Receipt of High-Level Radioactive Waste at a Geologic Repository; Licensing Support Network, Submissions to the Electronic Docket, 69 Fed. Reg. 32,836 (June 14, 2004) 4

BRIEF OF THE NUCLEAR ENERGY INSTITUTE IN SUPPORT OF THE
APPEAL OF THE DEPARTMENT OF ENERGY FROM THE PAPO BOARD'S
SEPTEMBER 22, 2005 MEMORANDUM AND ORDER

On September 22, 2005, the Pre-License Application Presiding Officer (“PAPO”) Board issued an order that would require the Department of Energy (“DOE” or “Department”) to make available the July 2004 and September 2004 draft versions of the Yucca Mountain high level waste repository license application (“Draft LA”) on the licensing support network (“LSN”) no later than the time it makes its 10 CFR 2.1009(b) certification.¹ DOE has appealed LBP-05-27 to the Commission, and the NRC Staff has both appealed and applied for a stay of LBP-05-27 pending review of its appeal.²

The Nuclear Energy Institute (“NEI”) is a potential party in the proceedings before the PAPO Board, and also filed a brief opposing the motion which was ultimately granted by the PAPO Board in its September, 22 2005 Memorandum and Order.³ NEI has moved for leave to file this brief this same date.⁴

I. NEI SUPPORTS THE DOE APPEAL OF LBP-05-27

NEI supports the DOE Appeal and adopts the legal positions and arguments of the Department seeking reversal of LBP-05-27 in its entirety. NEI also supports

¹ *U.S. Department of Energy* (High Level Waste Repository: Pre-Application Matters), 62 N.R.C. ____, LBP-05-27, slip op. at 1 n.1, 52-53 (2005).

² The Department of Energy’s Brief on Appeal From the PAPO Board’s September 22, 2005 Order (Oct. 3, 2005) (“DOE Appeal”); NRC Staff Appeal of LBP-05-27 and Application for a Stay (Oct. 3, 2005) (“NRC Staff Appeal”).

³ See Brief of the Nuclear Energy Institute Opposing the State of Nevada’s Motion to Compel Production of the July 2004 Draft Yucca Mountain License Application (June 20, 2005).

⁴ Motion of the Nuclear Energy Institute for Leave to File Brief in Support of the Appeal of the Department of Energy From the PAPO Board’s September 22, 2005 Memorandum and Order (Oct. 13, 2005).

and adopts the legal arguments advanced in the NRC Staff Appeal with respect to the PAPO Board's erroneous definition of "circulated draft," and does not oppose the NRC Staff's request for a stay. This brief provides additional grounds to those asserted by DOE and the NRC Staff for Commission reversal of LBP-05-27.

II. THE COMMISSION SHOULD REVERSE LBP-05-27

As the representative for the nuclear power industry, NEI has a strong interest in ensuring the Yucca Mountain proceeding is conducted in fair, efficient, and effective manner. NEI files this brief because LBP-05-27 falls far short of the mark of a practical interpretation of the Commission's regulations and imposes unnecessary burdens on proceeding participants. Hence, LBP-05-27, if not reversed, will detrimentally impact the conduct of the Yucca Mountain licensing proceeding and could have adverse precedential impact on that and other future proceedings.

In addition to the arguments made by DOE and the NRC Staff in their appeals, there are several other reasons requiring reversal of LBP-05-27. *First*, the Draft LA does not meet the Commission's understanding of what constitutes documentary material and, thus, need not be made available on the LSN upon DOE's certification. *Second*, LBP-05-27, in effect, requires proceeding participants to make available draft contentions on the LSN – a requirement that has no basis in Commission regulations. *Third*, in an attempt to justify its conclusions, the PAPO Board has impermissibly challenged the Commission's regulations. *Lastly*, the PAPO Board negated the well-established attorney work product privilege

protecting license application drafts from discovery. Because of these serious errors, NEI urges the Commission to reverse LBP-05-27.

A. The Draft LA Is Not Documentary Material As Meant By The Commission

The PAPO Board's ruling amounts to a rewrite of the Commission's regulations governing what information must be made available on the LSN during the pre-application phase of the high level waste repository proceeding. This rewrite dramatically transforms what the Commission intended when it promulgated regulations governing this proceeding and with subsequent amendments, beginning fifteen years ago. Specifically, the PAPO Board's view of what constitutes "documentary material" is contrary to the Commission's explicit statements of its intent. The Commission has repeatedly described "documentary material" as those materials supporting or underlying the Yucca Mountain license application. For example, the Commission stated that the LSN would

mak[e] the *information and data supporting* a DOE application available simultaneously in a centralized database to all interested parties before the application is submitted....⁵

⁵ *Proposed Rule, Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository*, 62 Fed. Reg. 60,789, 60,789 (Nov. 13, 1997) (emphasis added). See also *Notice of Proposed Rulemaking, Rule on the Submission & Management of Records & Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste*, 53 Fed. Reg. 44,411, 44,412 (Nov. 3, 1988) ("[t]he LSS would contain the *information supporting* the DOE license application, as well as *potentially relevant documents* generated by NRC and other parties....") (emphasis added); *Final Rule, Licensing Proceedings for the Receipt of High-Level Radioactive Waste at a Geologic Repository: Licensing Support Network, Design Standards for Participating Websites*, 66 Fed. Reg. 29,453, 29,459 (May 31, 2001) ("the Commission is also aware that the development of the DOE license application and *supporting materials* is an ongoing process...that requires that some effort be expended before it is finally known whether an application will be received. The Commission

By its various statements on the subject, the Commission made it clear that it intended that the LSN would contain the technical reports and studies related to Yucca Mountain that support DOE's license application. The Draft LA does not fit this description. Thus, DOE need not make available on the LSN any draft version of the license application upon its certification pursuant to 10 CFR 2.1003 and 2.1009(b).

This result is consistent with the Commission's intent and clearly makes sense. The high level waste repository proceeding is currently in the "pre-license application discovery" phase.⁶ The plain meaning of "pre-license application discovery" is discovery conducted in advance of the license application.⁷ The PAPO Board's ruling, however, disregards such plain meaning.

Should LBP-05-27 stand, DOE must make not only the July 2004 version of the license application available upon its certification, but also the September 2004

believes that providing for a six-month period of DOE *documentary material* availability before DOE submits (tenders) the [LA] reflects an appropriate amount of pre-license application review time....") (emphasis added); *Final Rule, Licensing Proceeding for a High-Level Radioactive Waste Geologic Repository; Licensing Support Network, Submissions to the Electronic Docket*, 69 Fed. Reg. 32,836, 32,841 (June 14, 2004) (discussing the potential for large documents to be submitted electronically, including "DOE License Application and *supporting materials*.")) (emphasis added).

⁶ *Final Rulemaking, Submission & Management of Records & Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste*, 54 Fed. Reg. 14,925, 14,927 (Apr. 14, 1989).

⁷ See *id.* at 14,926 ("The LSS is intended to provide for the entry of, and access to, potentially relevant licensing information as early as practicable before DOE submits the license application...."); *Final Rule, Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository*, 63 Fed. Reg. 71,729, 71,734 (Dec. 30, 1998) (stating that the purpose of the pre-application phase is to provide access to DOE and NRC documentary material "sufficiently in advance of the filing of the license application."); 66 Fed. Reg. at 29,459 (stating the Commission's belief that "providing for a six-month period of DOE documentary material availability before DOE submits (tenders) the license application reflects an appropriate amount of *pre-license application review time*....") (emphasis added).

version of the application.⁸ Further, LBP-05-27 provides no principled basis for determining when the requirement to place draft versions of the license application on the LSN should begin or end. Should DOE create additional draft versions of the license application by the time of its certification, must it produce those versions as well? What about any of the drafts produced by DOE before July 2004? What about any drafts of parts of the license application?

The PAPO Board has failed to explain how the requirement to conduct discovery in advance of a license application turns into a requirement to conduct discovery of multiple early versions of the application. Had the Commission intended for proceeding participants to have an advance version of the license application in addition to the “information and data supporting” the application, the Commission would have said so. It did not. LBP-05-27 is plainly inconsistent with the Commission’s intent.

B. Commission Regulations Do Not Require Making Draft Contentions Available On The LSN

LBP-05-27 is deficient in another respect. The PAPO Board attempts to justify its requiring production of the Draft LA by relying on a purported concession by the State of Nevada that it would produce “circulated drafts” of its contentions on the LSN.⁹ No regulatory basis exists for requiring participants to make draft contentions available on the LSN. Thus, the analogy is flawed and does not justify the PAPO Board’s action.

⁸ LBP-05-27, slip op. at 1 n.1, 52-53.

⁹ LBP-05-27, slip op. at 21 n.81.

Only documentary material need be made available on the LSN during the pre-application phase of the proceeding.¹⁰ The PAPO Board, however, fails to explain how a draft contention meets the regulatory definition of documentary material. Commission regulations provide for three categories of documentary material that must be made available on the LSN: (1) information upon which a participant intends to rely and/or cite in support of its position in the proceeding; (2) information that is known to, and in the possession of, or developed by the participant, but does not support that information or its position; and (3) all reports and studies prepared by or on behalf of the participant (including “circulated drafts”) relevant both to the license application and the issues set forth in Regulatory Guide 3.69, whether or not the reports or studies will be relied upon and/or cited by a party.¹¹

A contention is a petitioner’s statement of the issue of law or fact to be raised or controverted in a proceeding.¹² The contention must, among other things, summarize the alleged facts and expert opinions that the petitioner intends to rely on in the proceeding, and then refer “to the specific sources and documents” on which the petitioner intends to rely to support its position on the issue.¹³

Whereas the “specific sources and documents” referred to by the contention would constitute documentary material that a petitioner must make available on

¹⁰ 10 CFR 2.1003(a).

¹¹ *See* 10 CFR 2.1001.

¹² 10 CFR 2.309(f)(i).

¹³ 10 CFR 2.309(f)(v).

the LSN, the contention itself or circulated drafts thereof would not constitute documentary material. By comparing the definition of a contention with that of documentary material, it is clear that the documentary material required to be made available on the LSN is akin to the sources and documents that will be referred to in petitioners' contentions pursuant to 10 CFR 2.309(f)(v). Sources and documents advancing the contention (the petitioner's position in the proceeding) would fall under the first category of documentary material. It follows, then, that sources and documents known to and in the possession of the petitioner that do not support its contention would meet the second category of documentary material. Sources and documents (i.e., reports or studies and circulated drafts thereof) prepared by or on behalf of the petitioner and relevant to the license application and the issues set forth in Regulatory Guide 3.69, but not relied on by the petitioner and not containing unsupportive information, would meet the third category of documentary material.

Thus, draft contentions are not documentary material and need not be made available on the LSN. Equating a requirement to make the Draft LA available on the LSN with a requirement to make draft contentions available on the LSN further demonstrates the error in the PAPO Board's ruling requiring the Draft LA to be made available on the LSN. Neither the Draft LA nor draft contentions are documentary material.

C. The PAPO Board Impermissibly Circumvents The Commission's Regulations

The PAPO Board contends that unless the Draft LA is made available on the LSN upon DOE's certification, "petitioners will have just thirty days (*shorter* than the normal sixty days) from the date the application is docketed within which to file" contentions.¹⁴ The PAPO Board thus suggested that the Commission's regulations fail to provide petitioners sufficient time to review the license application once it is submitted.

As a factual matter, the PAPO Board's concern is misplaced. The public will have at least six months to review the information and data supporting the license application. Indeed, in many cases, the thousands of documents supporting the license application will have been available to petitioners for *years* prior to the due date for contentions. The license application itself will likely be available for review by the public for a number of months before contentions are due.¹⁵ Thus, the PAPO Board incorrectly focused on the thirty days provided by Commission regulations after the application is docketed for the public to prepare contentions without giving credit to the far longer period that petitioners will have available to frame contentions.

Most significantly, however, the PAPO Board's suggestion that the thirty-day period provided in the regulations for filing contentions is inadequate amounts to an

¹⁴ LBP-05-27, slip op. at 47 (emphasis in original).

¹⁵ NRC Staff Appeal at 5 n.8.

impermissible attack on the Commission's regulations.¹⁶ The PAPO Board has second-guessed the Commission's regulations and attempted to redress its concerns by erroneously requiring DOE to make available Draft LAs to give petitioners additional time to frame contentions.¹⁷ The PAPO Board's attempt to play Robin Hood with the Commission's regulations is impermissible and must be rejected.

The PAPO Board also states that its decision "promotes the best and most efficient management" of the proceeding and that "[a]ny other conclusion likely would cause major delays."¹⁸ Although LBP-05-27 does not specify its reasons for anticipating such "delays," the transcript of oral argument sheds some light on the PAPO Board's reasoning.¹⁹ During oral argument, a PAPO Board member hypothesized that if a future licensing board or the Commission denied a request to extend the application review time by the public, "any federal court in this land" would view that denial as a violation of due process.²⁰

It appears, then, that the delays feared by the PAPO Board would result from intervention by federal courts in the licensing proceeding. The PAPO Board's premise is flawed in the first instance because, at the very least, it is sheer speculation that a future licensing board, the Commission, or a reviewing court would, under the circumstances, find a thirty day time limit for filing contentions

¹⁶ 10 CFR 2.335(a).

¹⁷ LBP-05-27, slip op. at 47.

¹⁸ *Id.*

¹⁹ *U.S. Department of Energy (High-Level Waste Repository: Pre-Application Matters), Hearing Transcript (July 12, 2005) ("Tr.")* at 485-86.

²⁰ *Tr.* at 486.

violative of due process. As explained above, the public has had ample opportunity for over two decades to become familiar with the technical bases supporting a high-level waste repository at Yucca Mountain. Millions of pages of information are currently available for public review on the LSN, and many more will become available upon DOE's certification. The Commission's regulations for this proceeding require making available to the public, up front, more information further in advance of the proceeding itself than any other administrative proceeding of which NEI is aware.

Moreover, speculating whether a future licensing board or the Commission would find a thirty day time limit violative of due process is irrelevant to the question at hand: Is the Draft LA documentary material? Further, should a proceeding participant view a Commission regulation as inadequate, it may file a petition to waive application of the regulation.²¹ The participant may also move for an extension of time to file contentions, or file late-filed contentions.²² In short, a ruling on whether the Draft LA is discoverable is not the appropriate tool for the PAPO Board to fix the flaws it perceives exist in the Commission's regulations.

D. Draft License Applications Are Protected By The Litigation Work Product Privilege

LBP-05-27 erroneously concludes that the Draft LA would not be protected under the litigation work product privilege.²³ It is a non-sequitur to reason, as the

²¹ 10 CFR 2.335(b).

²² 10 CFR 2.309(c).

²³ LBP-05-27, slip op. at 50-52.

PAPO Board did, that because a document is a draft of a document that must be filed pursuant to regulation, then the draft itself cannot be protected by the litigation work product privilege. Indeed, the PAPO Board's reliance on *United States v. Adlman* is misplaced. In *Adlman*, the Second Circuit held that litigation work product privilege would not protect "documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation."²⁴ While *Adlman* may well apply to final licensing documents, which are prepared pursuant to regulatory requirements and trigger a mandatory, trial-type, adjudicatory hearing,²⁵ the PAPO Board provided no reason for *Adlman* to apply to draft licensing documents.

III. CONCLUSION

The Draft LA is not documentary material and need not be made available on the LSN during the pre-application phase of this proceeding. In addition,

²⁴ *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998).

²⁵ See 10 CFR 2.101(f)(8), 2.700.

LBP-05-27 impermissibly challenges the Commission's regulations and negates the well established attorney work product privilege. For these reasons, the Commission should reverse LBP-05-27.

Respectfully submitted,

A handwritten signature in black ink that reads "Michael A. Bauser". The signature is written in a cursive style and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "MOTION OF THE NUCLEAR ENERGY INSTITUTE FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE APPEAL OF THE DEPARTMENT OF ENERGY FROM THE PAPO BOARD'S SEPTEMBER 22, 2005 MEMORANDUM AND ORDER" and "BRIEF OF THE NUCLEAR ENERGY INSTITUTE IN SUPPORT OF THE APPEAL OF THE DEPARTMENT OF ENERGY FROM THE PAPO BOARD'S SEPTEMBER 22, 2005 MEMORANDUM AND ORDER" have been served upon the following persons by Electronic Information Exchange.

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