

August 3, 2007

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 STATE OF
NEVADA'S MOTION FOR A DECLARATORY RULING

INTRODUCTION

Pursuant to 10 CFR § 2.323, the staff of the Nuclear Regulatory Commission (Staff) hereby responds to "The State of Nevada's Motion for a Declaratory Ruling to Define and to Compel Compliance by DOE with 10 C.F.R. § 2.1003(a)," (Nevada's Motion) dated July 23, 2007.¹ For the reasons set forth below, the Pre-License Application Presiding Officer (PAPO) Board should deny Nevada's Motion. Further, the PAPO Board should defer any ruling on whether DOE's document collection at initial certification satisfies the requirements of 10 C.F.R. § 2.1003 until after DOE has submitted its certification.

DISCUSSION

A. Existence of a Dispute

In its Order establishing the PAPO Board, the Commission conferred on the PAPO Board the power to rule on disputes regarding the electronic availability of documents. *U.S. Dep't of Energy*, (High-Level Waste Repository), CLI-04-20, 60 NRC 15, 18 (2004). To

¹ Nevada's Motion was served via the NRC's Electronic Information Exchange (EIE) on July 23, 2007. The Staff received a copy of Nevada's Motion, but not the 34 exhibits or the draft order. Nevada's complete filing was not received until July 24, 2007. Accordingly, the Staff is responding to Nevada's Motion ten days after service was completed on July 24, 2007.

carry out this responsibility, the Commission provided that “the PAPO possesses all the general powers specified in 10 C.F.R. § 2.319 and § 2.321(c) that the PAPO requires to carry out its responsibilities....[T]he PAPO is granted this authority *solely* for the purpose of ruling on disputes over the electronic availability of documents....” *Id.* (emphasis in the original).

In its Motion, Nevada requests the PAPO Board issue an order declaring

- 1) That 10 C.F.R. § 2.1003(a) requires DOE to make electronically available on the LSN, at the time of its initial LSN certification, all Documentary Material which it knows or expects it will cite or rely on in the Yucca Mountain proceeding;
- 2) That the duties specified in 10 C.F.R. § 2.1009(b) and 2.1003(e) to “update” or “supplement,” respectively, initial LSN certifications do not lessen or otherwise alter the requirement of 10 C.F.R. § 2.1003(a) regarding the content of initial certifications.

Nevada’s Motion at 41-42. Nevada asserts that its Motion raises a dispute between itself and DOE, namely that DOE maintains it can certify compliance with 10 C.F.R. § 2.1003 even though documentary material which DOE intends to cite and rely upon does not exist and will not exist until sometime after the submittal of its initial certification. *Id.* at 6-7. Nevada maintains that DOE’s position is inconsistent with 10 C.F.R. § 2.1003. *Id.* Nevada expresses the concern that, based on public and private statements, DOE will certify its Licensing Support Network (LSN) collection knowing that “key documentary material it will cite and rely on its LA” will neither be complete nor available on the LSN. *Id.* at 28. *See also id.* at 29-41.

With respect to Nevada’s assertion that section 2.1003(a) requires DOE “to make all its documentary material publicly available on the LSN, including those material technical studies and reports it plans to and *knows* it will rely on in the licensing proceeding,” the Staff agrees that whether Nevada is correct regarding this legal issue can be resolved now. *See id.* at 10-11. As discussed below, Nevada’s position on this question is incorrect and its Motion should be denied. However, any determination regarding the adequacy of DOE’s LSN certification based on assertions in Nevada’s Motion concerning documents or categories of documents is a factual matter that should wait until DOE has actually certified its document collection.

B. 10 C.F.R. § 2.1003 Requirements

Nevada, in its Motion, requests that the PAPO Board rule that 10 C.F.R. § 2.1003 requires DOE to make all of its documentary material available at the time of its initial certification. Nevada's Motion at 11. Nevada argues that "all" means every document that DOE "plans to and knows" it will rely on in the licensing proceeding. *Id.* at 10-11. Nevada claims that the purpose of the LSN rule is to make available to potential parties to the licensing proceeding documentary material DOE would cite and rely on in the license application (LA) for a full six months before DOE submits its LA. *Id.* at 8. Nevada refers to Commission statements regarding the LSN wherein the Commission endorsed DOE's recommendation that participants should have a full six months in advance of the LA submission to review DOE's documentary material. Nevada's Motion at 12-13, *citing* 66 Fed. Reg 29453, 29459 (May 31, 2001). Nevada also relies on rulings by the PAPO Board in support of its assertion that DOE must certify all of its documentary material it intends to rely upon six months in advance of its LA submittal. *Id.* at 23-28 *citing* *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-04-20, 60 NRC 300 (2004). Finally, Nevada asserts that DOE is obligated to refrain from certifying its LSN collection until it is materially complete. *Id.* at 8. With respect to the update and supplementation of document collections after initial certification requirements, Nevada makes the unsupported assertion that those requirements do not apply to "critical technical documents" on which DOE will base its LA.² *Id.* at 38-39. Nevada asserts simply that "there are many rational reasons why the LSN document collections of every party will continue to accrue documents on a routine basis." *Id.* at 39.

² In its July 2004 Motion to Strike, however, Nevada had a different view on the supplementation and certification requirements of the regulations. In that Motion, Nevada asserted that "... the Commission was quite clear that parties and potential parties may supplement their documentary materials after the initial certification only to the extent such materials are 'created after the time of the initial certification'. . . . The opportunity to provide additional certifications as new documentary material comes into existence cannot remedy defects in the initial certification." "Motion to Strike the Department of Energy's LSN Certification and for Related Relief," July 12, 2004 (Motion to Strike) at 10-11 *citing* 10 C.F.R. § 2.1003(e).

The rules and the statements of consideration regarding the LSN and its predecessor, the Licensing Support System (LSS), are silent on the issue of whether DOE's initial certification would be in compliance with section 2.1003 notwithstanding the fact that some of the documentary information DOE plans to and knows it will rely on in the LA will not be available because such information has not yet been created or finalized. See Nevada's Motion at 26 ("...the crux of Nevada's complaint this time is DOE's intent to certify an LSN that is admittedly incomplete because of key documents that are in development or not even prepared yet."). However, there is a clear expectation that the majority of documents supporting DOE's license application will be available on the LSN at the time of DOE's initial certification. It is well established that one of the purposes of the LSN is to facilitate the timely review of DOE's application by providing access to relevant documents before the application is submitted, rather than through the traditional discovery process. *Licensing Proceeding for High-Level Radioactive Waste Geologic Repository; Licensing Support Network, Submissions to the Electronic Docket*, 69 Fed. Reg. 32836, 32837 (2004). See also *U.S. Dep't of Energy, LBP-04-20*, 60 NRC at 304-306. To that end, the Commission has stated that it "strongly recommends that those who are parties or potential parties to the HLW repository proceeding make every effort to provide access to as much of their existing . . . documentary material as soon as possible. . . ." *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. 29453, 29460 n.4 (2001).

However, the Commission also recognized that not all documentary material will be known at the time of initial certification. When the Commission revised the LSN rules in 2001 to, among other things, require certification 6 months before LA submittal, the Commission discussed the issue of when documents created after the initial certification of compliance would be required to be made available. There, the Commission acknowledged a comment from DOE that new information will continue to be produced during the period before it submits the license

application while at the same time conceding that participants must have timely access to this material in order to prepare for the licensing proceeding. 66 Fed. Reg. at 29460. It is not unlikely that even after initial certification certain key licensing documents may still be developed or finalized.³ See 69 Fed. Reg. at 32843 (“While much of an LSN participant’s documentary material will be made available early, it is reasonable to expect that additional material will be *created after* the initial compliance period.”) (emphasis added); see *also* 66 Fed. Reg. at 29460 (“Documentary material created after the initial certification of compliance is expected to be made available reasonably contemporaneous with its creation.”).⁴ In fact, the regulations provide for DOE to update its initial certification at the time it submits its license application. 10 C.F.R. §2.1009(b). Further, all participants are required to continue to supplement its documentary material *created after* the time of their initial certifications. 10 C.F.R. § 2.1003(e)(emphasis added); see *also* U.S. Dep’t of Energy, LBP-04-20, 60 NRC at 327.

Based on the above consideration, compliance with section 2.1003 does not require that DOE must make publicly available at the time of initial certification all documentary material it plans to and knows it will rely on if that documentary material is not in existence at the time of initial certification. It is clear that the Commission recognized that additional documentary material may be created after initial certification. Moreover, it is not reasonable to expect DOE

³ Nevada also spends several pages discussing DOE’s plans with respect to providing documents for its initial certification. Nevada’s Motion at 16-23. While DOE’s plans may be indicative of its intention with respect to providing documents, they are not relevant to the overarching legal question presented by Nevada’s Motion

⁴ Earlier, Nevada recognized that documentary material may be created after initial certification. In its Motion to Strike, Nevada repeatedly references the obligation of DOE to make all of its documentary material, in existence at the time of certification, available. See, e.g., Motion to Strike at 10 (“Since this section [2.1003] can only be satisfied with full availability of all DEN documentary materials, it follows that the initial certification must correspondingly apply to all available DEN documentary materials in existence at the time of initial certification.”). See *also* Motion to Strike at 5, 7.

to stop all activities on the license application simply because it has certified its document collection.⁵ Accordingly, the PAPO Board should deny Nevada's Motion.

C. The Adequacy of DOE's Compliance Is a Factual Matter

The adequacy of DOE's compliance with section 2.1003 is a factual matter which should be determined when DOE actually certifies its document collection. Nevada proposes in its Motion that in order to determine whether "all" of DOE's documentary material is available at the time of initial certification some type of a materiality requirement should be applied. Nevada's Motion at 11 n.2. Nevada states that DOE's LA Products Baseline document (exhibit 1 to its Motion) "appears conveniently to offer one logical definition." *Id.* However, it is not clear how the PAPO Board could apply such a test before initial certification. First, the LA Product Baseline document Nevada would use as a definition is not complete and apparently has been revised. *See id.* at 10. Moreover, Nevada does not limit its definition to only those documents listed on the LA Product Baseline document; Nevada asserts that other documents may also be "material" to the LA. Nevada does not identify any specific document, but simply references documents which may or may not be created. *See id.* at 33-35. For example, Nevada references a letter from DOE to the NRC in which DOE states that it intends to address any key technical issue agreements (KTI) not closed by the date of the letter in the LA.⁶ *Id.* at 34,

⁵ This is not to say that it is not possible for DOE to certify its document collection at such an early point as to have virtually no documentary material available and thereby defeat the purpose of the LSN rule. However, as discussed below, such a determination would require a factual determination that the document collection DOE has certified is substantially incomplete.

⁶ Nevada references a "sufficiency letter" NRC allegedly sent to Congress in November 2001. *Id.* at 33, referencing exhibit 26. In this letter, Nevada asserts that NRC conditioned its sufficiency finding of DOE's work on the proposed repository on DOE's completion of work promised in the 293 KTIs. However, a review of exhibit 26 indicates that the referenced letter was not sent to Congress, but rather to DOE. This letter, dated November 13, 2001, provided the NRC's preliminary comments concerning "the extent to which the at-depth site characterization analysis and waste form proposal for Yucca Mountain seem to be sufficient for inclusion in any application to be submitted by the Secretary for licensing such site." Exhibit 26, citing §114(a)(1)(E) of the Nuclear Waste Policy Act of 1982, as amended. The letter concludes that "[b]ased on the agreements with DOE, NRC has reasonable confidence DOE could assemble the (continued. . .)

referencing exhibit 27. Nevada assumes that, therefore, there will be no supporting analyses on the LSN at the time of initial certification, creating a “universe” of key technical documents that will not be produced on the LSN at the time of certification. *Id.* at 34. However, Nevada’s assertion is simply speculation. Until DOE certifies its document collection and ultimately submits its LA, there is no way to know with any certainty what documentation DOE will create in response to the issue raised in the KTIs.⁷ See also *id.* at 34-35 (referencing a report from the NRC’s Center for Nuclear Waste Regulatory Analyses (CNWRA), Nevada speculates that “this new report from CNWRA must surely lead to substantial reanalysis by DOE.”).

Ultimately, the question of whether DOE’s initial certification is sufficient with respect to documentary material not yet in existence must wait until DOE has certified its document collection. It is possible that at that time the issue Nevada raises will be moot and may never need to be decided. See *U.S. Dep’t of Energy*, CLI-04-32, 60 NRC 469, 473 (2004) (In holding in abeyance DOE’s appeal of the PAPO Board’s order striking DOE’s initial certification, the Commission stated that it was reluctant to issue an advisory opinion where “answering the questions left open would be a ‘mere academic exercise.’”)(citations omitted). At the time DOE certifies, the PAPO Board could entertain challenges asserting that the documentary material provided as a whole was insufficient to meet the requirements of section 2.1003.⁸ Such a determination would be based on the totality of the circumstances, such as the nature and

(. . .continued)

information needed for a possible license application.” Nothing in this letter suggests that resolution of the KTIs is necessary for DOE to submit a license application.

⁷ Assuming DOE determines resolution of the KTIs are even necessary to support its LA. See e.g. Letter to Joseph Ziegler from C. William Reamer, Sept. 13, 2004 (ADAMS Accession No. ML041940143) (“When DOE files an LA, the pre-licensing phase, along with the KTI resolution process, will end, and the KTIs and the related agreements will no longer be the focus of NRC staff attention.”).

⁸ It is conceivable that the significance of a particular study, report, or analysis may not be known until DOE submits the LA. If that were the case, the PAPO Board, or other licensing board, could fashion an appropriate remedy on a case-by-case basis.

amount of the documentary material that was available and the significance of the missing documentary material.

CONCLUSION

For the reasons discussed above, the PAPO Board should deny Nevada's Motion as to the relief requested. Further, the PAPO Board should defer any ruling on whether DOE's document collection at initial certification satisfies the requirements of 10 C.F.R. §2.1003 until after DOE has submitted its certification.

Respectfully submitted,

/RA/

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Dated at Rockville, Maryland
this 3rd day of August, 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF RESPONSE TO STATE OF NEVADA'S MOTION FOR A DECLARATORY RULING" in the above captioned proceeding, has been served on the following persons this 3rd day of August, 2007, by Electronic Information Exchange.

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