August 3, 2007

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)	)	

THE DEPARTMENT OF ENERGY'S
RESPONSE TO STATE OF NEVADA'S MOTION FOR DECLARATORY RULING

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Pursuant to 10 CFR § 2.323, the U.S. Department of Energy (DOE) responds to "The State of Nevada's Motion for a Declaratory Ruling to Define and to Compel Compliance by the DOE with 10 C.F.R. § 2.1003(a)," (Nevada's Motion) dated July 23, 2007. For the reasons set forth below, the Pre-License Application Presiding Officer (PAPO) Board should deny Nevada's Motion.[1]

PRELIMINARY STATEMENT

The State of Nevada's motion can be interpreted in two ways. The Board should deny the motion under either interpretation.

Nevada's core argument -- reflected in its prayer for relief and its proposed order -- is absolutist. It seeks a blanket declaration that 10 C.F.R. § 2.1003(a) prohibits DOE from making its initial Licensing Support Network (LSN) certification until DOE completes and makes available on the LSN all work product that DOE "knows or expects to cite or rely on in the Yucca [Mountain] licensing proceeding."[2]

Nevada's absolutist interpretation is at odds with the plain language of the regulation. Indeed, it is telling that Nevada never cites and discusses the full text of § 2.1003(a) at any point in its brief. Nevada ignores the actual language of § 2.1003(a) because it does not support Nevada's position. Section 2.1003(a) plainly contains no requirement that DOE complete its supporting information before making its initial LSN certification.

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[1] Service of Nevada's motion with exhibits was not completed through the Electronic Information Exchange until July 24, 2007. Accordingly, and with the concurrence of the State of Nevada's counsel, the Department of Energy's response is due on August 3, 2007, the date of this filing.

[2] Nevada Motion for Declaratory Ruling [hereafter, Nevada Motion] at 41; Nevada Proposed Order at 1. At other points in its motion, Nevada seems to argue that, at a minimum, all the materials DOE expects to rely on it its license application must have been completed in fully final form before DOE's initial certification. This is a distinction without a difference under § 2.1003(a) and other relevant provisions of the Subpart J regulations.

Nevada's absolutist position is also inconsistent with the rulemaking history. The Commission expressly recognized when it promulgated the current formulation of § 2.1003(a) in 2001 that DOE would continue to work on materials for the license application after its initial certification. The Commission expressed that intent again when it adopted the supplementation requirement of § 2.1003(e) in 2004.

Nevada too has previously evinced that understanding. Nevada never objected to the Commission's expressions of intent during the rulemaking history or otherwise indicated that DOE should be required to finish its supporting material before certification. Nevada similarly acknowledged in its motion to strike DOE's June 2004 certification that § 2.1003(a) requires the production of documentary material extant at the time of certification and made no assertion of any additional requirement that DOE's supporting material must be finished by that time as well.

The absolutist declaration Nevada now seeks is also impracticable in the real world. There will not be a time during the pre-license application phase when DOE stops technical work on the Yucca Mountain repository and has in hand, in totally final form, everything ever to be cited or relied on in the proceeding. Indeed, the regulatory process contemplates that DOE will continue to develop and refine technical information throughout the licensing proceeding.[3] The Commission could not have intended a certification requirement that would be impossible to satisfy in a dynamic, real-world licensing process.

Indeed, not even Nevada could comply with the interpretation it advocates. The same regulation, § 2.1003(a), that Nevada contends requires DOE to complete its work before certification applies equally to Nevada and all other potential participants. Thus, if § 2.1003(a) means what Nevada argues, Nevada's experts must complete all their analyses, calculations and

[3] *See, e.g.*, 10 CFR Part 63, Subpart F (performance confirmation program).

any other work product that Nevada expects to use in the licensing proceeding within 90 days after DOE's initial certification when § 2.1003(a) requires Nevada to make its own certification.

This cannot be what the Commission intended, and it highlights the error of Nevada's position. Section 2.1003(a) also cannot mean one thing when applied to DOE and something different (and more favorable) when applied to Nevada. That is not how regulatory interpretation works. The Commission's Subpart J regulations are to be interpreted faithfully as written and not as wished or "improved" by Nevada. To do otherwise would be to repeat the error in the approach to the Commission's regulations that Nevada advocated, unsuccessfully, in its earlier motion to compel production of the draft license application on the LSN.

Nevada's potential alternative interpretation fares no better. Portions of Nevada's motion suggest that the Board should subjectively assess the "materiality" or "sufficiency" of DOE's document production at certification even if DOE is not required to have completed all its technical work product by the date of initial certification. That plea is not grounded in the text of the Subpart J regulations either. Section 2.1003(a) no more imposes a materiality test than the absolutist test that Nevada requests in its prayer for relief.

Moreover, even if Subpart J allowed a materiality test, which it does not, it would not be ripe to apply such a test at this time. Any materiality test must necessarily depend on the composition of DOE's LSN document collection when DOE certifies, measured against the specific information Nevada then contends is not yet available and the specific prejudice Nevada claims from the absence of that information. That would be a highly fact-specific and detailed calculus undertaken on a document-by-document and issue-by-issue basis to assess what information is available, what has not been finished, and the significance of the yet-to-be

completed information when weighed against the available information. That calculus is speculative now and will remain speculative until DOE makes its initial certification.

In sum, any materiality or sufficiency test does not present a dispute that can be resolved now. The Board would have to conduct an evidentiary hearing to address circumstances that do not yet exist and that are too variable and speculative to adjudicate now. Assumptions about what documents DOE's production might or might not contain at some future date is conjecture, and will remain so until DOE certifies. It would be inappropriate in these circumstances for the Board to hazard now what documents "ought" to be complete when DOE certifies.

ARGUMENT

I. NEVADA'S ABSOLUTIST INTERPRETATION IS INCORRECT

Section 2.1003(a) does not require DOE to complete all work product DOE knows or expects to cite or rely upon in the licensing proceeding as a precondition to its initial LSN certification. Nevada's request for a contrary declaration ignores the text of the regulation and contravenes established principles of regulatory interpretation. It also contradicts Nevada's previous statements about § 2.1003(a).

Because of the importance of this issue, the Board should address and dispose of Nevada's absolutist position now even if it does not technically rise to the level of a ripe "dispute." No matter how high the quality or how complete the license application filed by DOE, the development of the license application and supporting materials is an ongoing process, and DOE will continue to generate documentary material during the period prior to submittal of the license application. If Nevada intends to argue that pending work makes certification impossible, then it is in everyone's interest to resolve that legal issue now. And, the Board should resolve that issue now by rejecting Nevada's requested declaration for the reasons below.

A. The Plain Language of § 2.1003(a) Defeats Nevada's Interpretation

The Commission set forth in its decision rejecting Nevada's motion to compel production of the draft license application the legal standard that controls Nevada's current motion. As the Commission explained, the interpretation of a Subpart J regulation, "like the interpretation of a statute, begins with the language and structure of the provision itself. Further, the entirety of the provision must be given effect. Although administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation's language, its interpretation may not conflict with the plain meaning of the wording used in that regulation."[4]

In other words, the controlling consideration is the regulatory text itself, and the particular regulatory text that Nevada seeks to interpret is § 2.1003(a)(1), which provides, subject to certain exclusions not material here, that:

> DOE shall make available, no later than six months in advance of submitting its license application for a geologic repository…[a]n electronic file including bibliographic header for all documentary material (including circulated drafts but excluding preliminary drafts) **generated by**, or at the direction of, **or acquired by** [DOE].[5]

The operative language of this provision is the phrase "generated by…or acquired by." This phrase defines and limits the scope of documentary material that DOE must make available in conjunction with its initial certification. Couched in the past tense, that phrase plainly and unambiguously means only that DOE must make available at the time of its initial certification the documentary material it has generated or acquired as of some reasonable period of time

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[4] CLI-06-05, 2006 NRC LEXIS 32 (2006) at *21-22, citing *Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988), review denied, CLI-88-11, 28 NRC 603 (1988).

[5] 10 CFR § 2.1003(a)(1) (emphasis added).

before certification.[6] There simply is no language in that provision that additionally mandates that the documentary material that DOE has generated or acquired by the time of initial certification must comprise, as Nevada contends, all the information DOE "knows or expects it will cite or rely on in the Yucca [Mountain] licensing proceeding." Such a construction improperly adds language to § 2.1003(a)(1) that does not appear on the face of the regulation, in violation of the Commission's command.

The other subsections of § 2.1003(a) do not impose the requirement Nevada seeks either. Subsection (2) addresses "graphic-oriented" documentary material, *i.e.*, documentary material that is not merely text capable of production in a text-searchable electronic file. Subsection (2) specifies that for graphic-oriented documentary material, it is sufficient for a participant to make available an electronic image format of the document along with a bibliographic header. The subsection also lists examples of graphic-oriented material.

Nothing in these provisions compels DOE to have completed by the time of its initial certification all graphic-oriented documentary material that is to be cited or relied on in the licensing proceeding. To the contrary, § 2.1003(a)(2) refers to graphic-oriented documentary materials "which ***have been*** printed, scripted, or hand written."[7] Phrased in the past tense like the terms "generated" and "acquired" in subsection (a)(1), these terms merely reference graphic-

[6] As the Board has recognized, it may not be possible to capture literally all documents in existence as of the certification date, especially with an organization as large as DOE's, and thus a reasonable cutoff may be needed for documents created shortly before a participant's certification date. LBP-04-20, 60 NRC _ (2004) at 32 ("In assessing the gap document situation, we accept the proposition that, when a document production occurs in the midst of a large and ongoing project, those documents that are created after a reasonable cut-off date might not be included in the initial document production."). Statements in this response regarding extant documents at the time of certification are all subject to this qualification.

[7] 10 CFR § 2.1003(a)(2) (emphasis added).

oriented material in existence as of DOE's certification. They do not require additionally that the graphic-oriented material "printed, scripted, or hand written" at the time of certification must comprise all that DOE plans to cite or rely upon in the licensing proceeding.

The remaining two subsections of § 2.1003(a) are silent too about the status of DOE's work product at certification. Subsection (3) merely specifies that a participant is required to make available a bibliographic header only for material that cannot be produced in a text-searchable or image format. Section (4) additionally provides that a bibliographic header only needs to provide for privileged, confidential financial or commercial information, and safeguards material.

Viewed as a whole, therefore, § 2.1003(a) does not impose any substantive constraint on, or requirements respecting, the completeness of a participant's work product at certification. The introductory portion of § 2.1003(a) provides a basic schedule for initial certification and then specifies the type of electronic file that must accompany various classes of documents, namely, searchable electronic files for non-privileged text documents (§ 2.1003(a)(1)); electronic images for graphic-oriented material (§ 2.1003(a)(2)); and bibliographic headers only for non-imageable and privileged material (§§ 2.1003(a)(3) & (4)). To read into § 2.1003(a) an additional command regarding the completeness of DOE's work product at certification is to impose a requirement that the text and structure of the regulation do not support.

Nevada's reading of § 2.1003(a) ignores all this. Nevada focuses on the phrase "all documentary material" that appears in § 2.1003(a)(1), and from that isolated phrase extrapolates that DOE's "supporting" documentary material must be complete before DOE certifies. That approach fails to read § 2.1003(a) as a whole and fails to give effect to the entirety of that regulation's provisions, in contravention of settled principles of regulatory interpretation. When

read as a whole, it is apparent that the term "generated . . . or acquired by the participant" as used in § 2.1003(a) modifies (and limits) the phrase "all documentary material" such that the only documentary material addressed by the regulation is that which the certifying participant has "generated" or "acquired" as of its certification.

This is true regardless of the true scope of Nevada's argument -- whether it pertains to the entire scope of documents DOE is intending to rely on ultimately in the licensing proceeding, or "merely" the scope of documents supporting the license application. Section 2.1003(a) speaks only to production of such documents that exist, without purporting to define or prescribe any quantum of documents (either quantitatively or qualitatively) that must exist at the time of certification.

Nor does the Board need to be concerned here with Nevada's alarmist hypothetical that absent its interpretation, § 2.1003(a) would permit DOE to certify with only a "handful of documents."[8] DOE already has made available on the LSN approximately 3.4 million documents consisting of several tens of millions of pages. Approximately 1.3 million of these documents have been available since 2004; the balance since last May; and DOE regularly supplements its collection with additional documents on a rolling basis. No one can fairly accuse DOE of a *de minimis* production. There is a wealth of information currently available for the participants to review and to form contentions they consider appropriate. This is not a situation where a participant has deliberately delayed finalization of documents in order to certify with only a handful of documents.

[8] Nevada Motion at 8.

B. The Overall Structure of Subpart J Defeats Nevada's Interpretation

The overall structure of Subpart J supports the plain reading of § 2.1003(a) as well. There is no provision among the various regulatory provisions that comprise Subpart J that presumes that § 2.1003(a) means what Nevada contends or that makes sense only if that is the case. If the Commission intended that DOE must complete all its reliance material before it could certify, it is inconceivable that the Commission would have omitted such an important requirement from Subpart J and left its existence to inference, interpolation and guesswork. The Commission would have imposed that requirement unambiguously in direct terms somewhere in the otherwise comprehensive and detailed provisions of Subpart J.

This situation is similar to that raised by Nevada's earlier motion to compel production of the draft license application.[9] There, Nevada advanced various policy arguments why access to the draft license application would make more meaningful the six-month period between DOE's initial certification and submittal of the license application. Nevada additionally labored to explain how such a production requirement could be implied in Subpart J. The Commission brushed aside Nevada's strained interpretations and declared that it would have used direct language to require production of the draft license application if that had been its intent: "If the Commission had intended to require separate LSN submission of parts of the license application, it would have stated that intention unambiguously, with no surplus language."[10]

The same is true here. If the Commission intended that DOE could not certify until it had completed all supporting documentary material, the Commission would have stated that intention

[9] Nevada's Motion to Compel Production of DOE's Draft Yucca Licensing Application, or in the alternative, for a Declaratory Order (June 6, 2005).

[10] CLI-06-05, 2006 NRC LEXIS 32, at *28.

unambiguously. It would not have used veiled language and omitted an express requirement to that effect in Subpart J.

In contrast to that omission, the Commission promulgated the express supplementation requirement found in § 2.1003(e), which requires each "party" (including DOE)[11] to "continue to supplement its documentary material made available to other participants via the LSN with any additional material created after the time of its initial certification . . . until the discovery period in the proceeding has concluded."[12] That regulation plainly contemplates that the parties, including DOE, can and will continue to create documentary material after their certifications pursuant to § 2.1003(a); that they will create additional documentary material during not only the balance of the pre-license application phase following their certifications but in the post-docketing phase as well; and that their obligation is merely to supplement their production to make available such additional documentary material.

In the same vein is the requirement in § 2.1009(b) for DOE to update its certification with additional documentary material when it submits the license application.[13] That supplementation requirement in the overall context of Subpart J is an acknowledgement that DOE is expected to continue to create documentary material pertinent to the license application after initial certification.

Nevada tries to dismiss the significance of § 2.1003(e) and § 2.1009(b) by suggesting that they are intended to capture additional "non-supporting" documentary material only. There is no support for Nevada's narrow view of the supplementation provisions. There is no indication in

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[11] *See* 10 CFR § 2.001 (Definition of "Party").

[12] 10 CFR § 2.1003(e).

[13] 10 CFR § 2.1009(e).

Subpart J (or elsewhere) that the Commission had in mind the production of only that non-supporting documentary material in connection with these supplementation requirements. Had that been the case, the Commission could and would have limited the scope of § 2.1003(e) and § 2.1009(b) to non-supporting documentary material. That the Commission did not limit these supplementation requirements in that manner indicates that Nevada's reading of these regulations is wrong.

And then there is the fact that the Commission did not create certification requirements for all the other participants that are different than DOE's. Section 2.1003(a) applies not only to DOE, but also to "each other potential party, interested government participant or party."[14] If § 2.1003(a) were interpreted to require DOE to complete all its expected supporting information by the time of certification, the same obligation would apply to Nevada, affected units of local government, Indian tribes, public interest groups and individuals – in short, to anyone who may seek to participate in the Yucca Mountain proceeding. That would mean Nevada and every potential participant would be required to complete within 90 days after DOE's initial certification all the information they know or expect they may use in the licensing proceeding.

There is nothing in the text, structure or logic of Subpart J that demonstrates that the Commission intended Nevada and all other potential participants to have completed their review of DOE's documentary material and have finished their opposing analyses within 90 days of DOE's certification. And since no such obligation exists on the face of § 2.1003(a) with respect to Nevada and the other potential participants, no such obligation can be read into § 2.1003(a) with respect to DOE.

[14] 10 CFR § 2.1003(a).

C. The Rulemaking History Defeats Nevada's Interpretation

Because § 2.1003(a) is plain and unambiguous, it must be applied as written without regard to its rulemaking history.[15] But since Nevada tries to make an issue of that history, it should be understood that the rulemaking history corroborates the plain reading of § 2.1003(a).

In particular, the Commission recognized that DOE's initial certification is not dependent on completion of DOE's supporting documentary material when the Commission promulgated the current version of § 2.1003 in 2001. The Commission stated at that time that it was "aware that the development of the license application and supporting materials is an ongoing process" and that its reformulation of § 2.1003, with the requirement that DOE make its initial certification six months before submitting the license application, will "make it more likely that the material entered [on the LSN] will be more fully developed and current."[16]

The Commission's use of the terms "more likely" and "more fully developed" are telling. They are not synonymous with "finished" or "complete." Had the Commission intended that all of DOE's supporting material must be complete at initial certification, the Commission would have expressed itself differently. As it is, the Commission spoke in terms that contemplated that DOE's "ongoing process" of developing the license application and supporting material would likely still be underway at the time of DOE's initial certification.

The Commission went even further in the same rulemaking to expressly address the question: "When are documents created after the initial certification of compliance required to be made available?"[17] In answering the question, the Commission observed that DOE had noted in

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[15] CLI-06-05, 2006 NRC LEXIS 32 at *21-22.

[16] 66 FR 29453, 29459 (May 31, 2001).

[17] *Id*. at 29460.

its comments on the proposed rule that "new information will continue to be produced during the period before it submits the license application." The Commission did not criticize this observation or state that DOE's continued generation of information after its initial certification was antithetical to § 2.1003. Rather, the Commission merely stated: "Documentary material created after the initial certification of compliance is expected to be made available reasonably contemporaneous with its creation, rather than stored for entry as a group at some point during the remaining time before DOE submits the license application."

In other words, the Commission told DOE to make the new documents available on a rolling basis as DOE created them and not wait until its supplemental certification when submitting the license application. If the Commission had intended what Nevada now contends, the Commission surely would have said something to express that view in the rulemaking. It did not, and instead acknowledged without qualification that DOE (like all other participants) would continue to develop information after its initial certification.

The Commission reiterated that view in 2003 and 2004 when it promulgated the supplementation requirement of § 2.1003(e). In proposing that rule, the Commission made the following statement that recognized that the participants would continue to create documentary material after their initial certifications:

> Proposed § 2.1003(e) would require LSN participants to supplement the documentary material provided under § 2.1003(a) in its initial certification with documentary material produced after that event. 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 specified in§ 2.1003(a).***[18]

[18] 68 FR 66372, 66375 (November 26, 2003) (emphasis added).

The Commission made the same observation in its notice of final rulemaking.[19]

In making those statements, the Commission did not differentiate DOE from the other participants and state that DOE, unlike all the other participants, must have all its supporting documentary material completed at initial certification. The Commission's language instead clearly contemplates that while "much" of DOE's documentary material is expected to be available at initial certification, not all of it would be complete by that time. Nor did the Commission's language limit the types of information whose post-certification creation was acceptable (*e.g.*, as Nevada contends, non-supporting information). Rather, any kind of information otherwise suitable for the LSN could be created by any party and added to its LSN collection after initial certification, as long as that addition was seasonable.

Significantly, Nevada did not object to § 2.1003(e), propose that DOE be carved out of its scope and treated differently, or otherwise complain that the Commission's statements were at odds with § 2.1003(a). Indeed, DOE is unaware of any comment by Nevada in conjunction with the rulemakings in 2000/2001 and 2003/2004 to the effect that DOE must complete its supporting documentary material before its initial certification. Nevada instead acquiesced in the Commission's statements of consideration in the two rulemakings regarding the certification requirement.[20]

In fact, Nevada's comments on the certification requirement during the rulemaking process evince an opposite understanding of that requirement than Nevada's motion asserts. As noted by the Commission, the LSN regulations originally required DOE and NRC to make documentary material available beginning 30 days after DOE's submission of its site

[19] 69 FR 32836, 32843 (June 14, 2004).

[20] *See* January 9, 2004 comments from Nevada (DOE Ex. 2).

recommendation to the President, and the other participants to begin their productions no later than 30 days after the site selection became final after review by Congress. These regulations did not, however, specify a time for the participants' certifications, and thus the Commission proposed in 2000 to require certifications at the time of a participant's initial production to the LSN of their documentary material.[21]

In its comments on the rulemaking, Nevada proposed to alter the time for both the availability of documentary material and certification. Nevada wanted to delay both the time participants had to begin making documents available and that for their initial certifications, and to tie those events to submittal of the license application rather than the site selection. That deferral, Nevada advocated, could "ease the burden of compliance" by allowing participants to omit from their production documents that had become "obsolete, invalid or irrelevant" due to changes in the repository design or other intervening developments. Deferral could help "eliminate the possibility of expending resources on unnecessary review of documents that might be superseded by the time of the license application." Deferral also would allow the LSN Administrator more time to design the LSN with the "most up-to-date technology." For these reasons Nevada recommended that the "initial capture" of documentary material on the LSN be postponed and tied to submittal of the license application.[22] Nevada made no suggestion about the required scope or completeness of initial certifications. The Commission accepted both of Nevada's proposals.

Thus, the motivation behind the six-month provision of § 2.1003(a) was not to ensure that DOE had completed all its supporting documentary material six months in advance of license

[21] 65 FR 50937 (August 22, 2000).

[22] 66 FR 29453, 29459 (May 31, 2001).

application submittal. It was to avoid unnecessary expense by deferring the "initial capture" of documents on the LSN by all participants, including Nevada. It was not conceived as a substantive deadline for completion of DOE's, or any other participants', work product.

D. The Board's Decision Striking DOE's Prior Certification Is Not Germane

Nevada's citation to the Board's decision striking DOE's prior certification is not well founded. The Board's decision did not address whether DOE must have completed all of its supporting work product before DOE can certify. The Board's decision did not address that issue because Nevada did not raise that issue in its motion. Nevada's motion complained about the unavailability of existing documents, primarily because DOE had not finished the process of collecting and identifying existing documents that qualified as documentary material. Nevada did not contend that DOE's certification was insufficient because all of DOE's expected documentary material was not finished. Statements from this Board's decision granting Nevada's motion, therefore, must be read against that backdrop. Those statements did not prejudge whether DOE's supporting work product must be finished by the time of its initial certification, and cannot fairly be construed now as having done so.[23]

If anything, the only pertinence Nevada's motion to strike has to the instant motion is the inconsistency between Nevada's arguments in the two motions. Nevada knew at the time of DOE's certification in 2004 that not all of DOE's supporting material was finished, including the Total System Performance Assessment (TSPA), the Analysis Model Reports (AMRs), and the Preclosure Safety Analysis. Nevada knew this because DOE regularly reported in public on the status of its work product such as at the NRC's Quarterly Management Meetings. Nevada's

[23] Reflective of that fact, the questions the Board ordered DOE to answer regarding Nevada's motion to strike asked about "extant documentary material." The Board asked no question about work product DOE had not completed. *See* 2004 NRC LEXIS 15 (2004) at *1, Questions 2 and 3.

representatives attended those meetings and/or received the summaries of the meetings that included copies of DOE's presentations.

The status reports leading up to DOE's 2004 certification made clear that DOE's supporting documentary material was not finished. At the February 2004 Quarterly Management Meeting, DOE reported the following metrics:

Preclosure Safety Assessment	45% complete
Design	56% complete
KTI Agreements	70% complete
TSPA	76% complete[24]

At the May 2004 Quarterly Management Meeting, held just one month before DOE's certification, DOE reported progress but still reported that its work was not complete:

Preclosure Safety Assessment	62% complete
Design	79% complete
KTI Agreements	70% complete
TSPA	81% complete[25]

That briefing also reported that of DOE's total data sets, 33% were still being verified and 8% (some 105 altogether) were still being developed. Of DOE's software codes, 56% were not finally verified, and 5% were still being developed. The AMRs were reported as only 92% complete.[26] The schedule also showed that the KTIs would not all be closed by the time of DOE's certification in June, as DOE would still be submitting responses through August.[27]

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[24] February 2004 Quarterly Management Meeting Summary, License Application Status PowerPoint at 4 (DOE Ex. 3).

[25] May 2004 Quarterly Management Meeting Summary, License Application Status PowerPoint at 3 (DOE Ex. 4).

[26] *Id*. at 4.

[27] *Id*. at 6.

Further, there was open discussion at the meeting that some of the "building blocks" of the license application would not be completed until after DOE's contractor delivered a draft of the license application in July.[28] The completion of those "building blocks" self-evidently would occur only after DOE's certification in June.

Despite that state of affairs, Nevada did not object to DOE's certification on the ground that the TSPA, AMRs, Preclosure Safety Analysis, KTIs and other "building blocks" of the license application were incomplete and not yet finished. To the contrary, Nevada affirmatively recognized in its motion to strike that the LSN regulations permitted DOE to certify in these circumstances so long as DOE made available its documentary material in existence at the time of certification.

In this regard--and in stark contrast to the omission in Nevada's current motion--Nevada's motion to strike acknowledged that the rulemaking history recognized the likelihood that DOE would generate additional documentary material after its initial certification:

> The notice of final rulemaking also pointed to the likelihood that additional "documentary material" would be generated after the date of DEN's initial certification, and it made provision therefor: "Documentary material created after the initial certification of compliance is expected to be made available reasonably contemporaneous with its creation, rather than stored for entry as a group at some point during the remaining time before DOE submits the license application." *Id.* at 29460 This ongoing delivery of newly created material – not in existence at the time of DEN's initial certification – would be consistent with "the need to provide participants with early and useful access to documentary material before DEN submits the license application. As DEN noted in its comments on the proposed rule, new information will continue to be produced during the period before it submits the license application.[29]

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[28] *Id*., Summary Minutes at 5.

[29] Nevada Motion to Strike the Department of Energy's LSN Certification and for Related Relief (July 12, 2004) [hereafter, Nevada Motion to Strike] at 7, ¶ 15.

Nevada then set forth its view of § 2.1003(a). That regulation, Nevada maintained, "could not be clearer that [DOE's] initial certification must include all documentary material that is known to, in the possession of, or developed by or at the direction of [DOE] ***at the time of certification***."[30] Nevada reiterated that view on the following page of its motion, declaring: "it follows that the initial certification must correspondingly apply to all the available [DOE] documentary materials ***in existence at the time of initial certification***."[31] Nevada never maintained in its motion that § 2.1003(a) requires anything more.

Nor did Nevada express its current view about DOE's certification in the various case management conferences in which the Board and the parties discussed the procedures for monthly updates following initial certification. If Nevada truly believed that DOE had to complete its documentary material before certification, it is inconceivable that Nevada would not have advised the Board of its position in those conferences.

Nevada now ignores its own positions of record and contends that it is not sufficient under § 2.1003(a) for DOE to make available all its known documentary material in existence at the time of initial certification. The Board should not allow Nevada to assume inconsistent positions in this proceeding.

II. APPLICATION OF ANY MATERIALITY TEST IS NOT RIPE

Though espousing an absolutist argument about the content of DOE's initial LSN certification, Nevada also indirectly invites this Board to formulate standards for, and to make anticipatory merits judgments on, the prospective substantive sufficiency of DOE's as-yet uncertified LSN document production. For the reasons explained in the preceding section,

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[30] Nevada Motion to Strike at 9, ¶ 4 (emphasis added).

[31] *Id*. at 10, ¶ 7 (emphasis added).

§ 2.1003(a) does not impose any such "materiality" or "sufficiency" test on DOE's LSN certification. A participant's obligation is to make available all known extant documentary material in its possession at the time it certifies, and then to supplement its production as new documentary material is created. If a participant makes a substantial good faith effort to make available all its known extant documentary material at certification, its certification is valid without regard to the qualitative or quantitative completeness of its technical work product.

Furthermore, adjudication of the prospective sufficiency of DOE's document production would not be ripe now in any event. Any such assessment, whatever standard were used, would necessarily depend on the facts and circumstances that exist when DOE certifies and would require an evidentiary hearing to ascertain such matters as what information has been made available, what information is not yet available, and the relative significance of the not-yet-available information in light of the available information. And, review of just the LA Product Baseline Schedule shows that those kinds of assessments could vary materially depending on whether DOE certifies in September versus December.

Nor should the Board hazard rulings now based on speculation about what documentation will be available and when. Things change. To take just one example from the LA Product Baseline Schedule that Nevada emphasizes, item 1541 is an update to a report that, when the schedule was prepared at the beginning of this year, was proposed for completion in January, 2008. As shown on the LA Product Baseline Schedule as of last month, however, that update is no longer planned and has been stricken from the schedule.[32] This illustrates why the Board

[32] DOE Ex. 1. Nevada states that it requested an updated schedule dated June 12, 2007 on "numerous occasions" and "beginning even before its issuance" -- however that is possible -- but that it never received the document. *See* Nevada Motion at 10. Nevada, however, did not make a FOIA request for the document until July 2, 2007. *See* DOE Ex. 11. DOE timely provided a copy in response on July 24, 2007. *See* DOE Ex. 15.

should not make rulings based on conjecture about the future composition of DOE's LSN collection.

In sum, to the extent Nevada contends that a materiality requirement constrains DOE's future certification, there is no ripe controversy. There is no present dispute that can be decided now, and any consideration of the sufficiency of DOE's LSN document collection must await DOE's actual certification and the development of a record based on existing facts.

III. NEVADA'S FACTUAL MISCHARACTERIZATIONS

In addition to its unsustainable interpretation of § 2.1003(a), Nevada mischaracterizes various documents and events throughout its motion. Though those documents and events are not germane to the legal issues raised by Nevada's motion, DOE addresses certain principal ones to prevent confusion and to forestall any suggestion that DOE has acquiesced in Nevada's assertions through silence.

A. DOE Statements About The Adequacy Of Its Certification. Nevada repeatedly argues that DOE officials and counsel have conceded that DOE's upcoming certification will be "knowingly incomplete." Nevada suggests through that argument that DOE has conceded either that its certification will omit existing documents in DOE's possession known to be documentary material or that DOE intends to certify in the face of requirements DOE knows it will not have met. That is not at all what DOE has said. The statements to which Nevada points merely acknowledge an obvious point, which is that DOE's LSN document collection at certification will not include documentary material that has not yet been completed.

B. NRC Regulatory Guide 3.69. Nevada contends that NRC Regulatory Guide 3.69 supports its requested declaration. This repeats an error Nevada made in connection with its motion to compel production of the draft license application. The Commission held in

connection with that motion that Regulatory Guide 3.69 is merely guidance and cannot be used to "supplement or alter" the Subpart J regulations.[33] Further, Regulatory Guide 3.69 does not purport to address the issue raised by Nevada's current motion. The guidance merely identifies types of documents to be considered as possible documentary material. It does not discuss whether DOE must complete particular documents before it can certify.

C. DOE's Frequently Asked Questions. DOE's Frequently Asked Questions (FAQs) do not support Nevada either. The FAQs provide general advice to project personnel on the potential relevance of various documents. They do not address whether all of DOE's supporting documentary material must be finished before DOE's initial certification. Nevada cites a statement in the FAQs to the effect that DOE must make its documentary material available "before DOE submits the license application." However, that generalized reference on its face does not address DOE's initial certification, much less opine that all of DOE's supporting material must be finished by its initial certification.

D. DOE's 2005 Certification Plan. Nevada expresses umbrage at DOE's 2005 certification plan, which refers to a "reasonable cutoff date" in connection with DOE's certification. Nevada's reaction is difficult to fathom. That just reflects what this Board has recognized, namely that there needs to be a reasonable tolerance for documents completed shortly before certification and that are still in the processing pipeline at certification. *See supra* note 6.

E. DOE's Prior Work Schedules. Nevada reads too much into a handful of DOE work schedules from several years ago. They were highly generalized depictions of schedules and are not interpretations of regulatory requirements.

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[33] CLI-06-05, 2006 NRC LEXIS 32, at *25.

F. Draft LSN Strategy Documents. Nevada's reference to several draft LSN strategy papers from the 2000/2001 timeframe is of no moment.[34] They were drafts that never were approved, although Nevada omits that fact. Nevada provides only part of Exhibit 8 and omits the part that shows that the OCRWM Director did not endorse the policy.[35] The fact is that proposal (referenced by the working title DOE/RW-0535) never was adopted.[36]

Nevada also mischaracterizes its Exhibit 6. Nevada describes this as a document DOE "published" to describe "licensing strategy policy and strategic assumptions."[37] A review of the document in the LSN, however, shows that the document was an attachment to an email that was circulating a draft list of issues for discussion. It was never a publicized DOE policy.[38]

Similarly, Nevada obscures that its Exhibit 20 (discussed on page 21 of its motion) is a draft memo, which the full document makes clear.[39] It is also clear that this draft did not discuss what documents must exist as of DOE's initial certification. It addressed what types of documents might be considered documentary material.

G. TSPA Documentation. Nevada erroneously suggests that the LSN will be devoid of information concerning the TSPA until the final version of the TSPA-AMR is available. The TSPA in initial form dates back to the early years of the Yucca Mountain Project, and DOE has already made available on the LSN tens of thousands of documents concerning the

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[34] *E.g.*, Nevada Exs. 8 and 9.

[35] *See* DOE Ex. 14.

[36] DOE Ex. 5.

[37] Nevada Motion at 16.

[38] DOE Ex. 13.

[39] DOE Ex. 12.

TSPA and its evolution. These include TSPA runs performed in connection with the Viability Assessment and the Site Recommendation for the Yucca Mountain repository. A partial list of these prior TSPA runs available now on the LSN is attached as DOE Exhibit 6.

Current documentation on the TSPA is available too. A search of DOE's document collections on the LSN using the search terms "total system performance assessment" and a date range from January 1, 2007 to July 1, 2007 returned 1,124 hits.[40] The term "tspa" from the same date range returned 3,330 hits.[41] Many of these are technical data input packages for the TSPA. For example, document ALA.20070504.1820 is a technical data input package for the Engineered Barrier System-Physical and Chemical Environment, which is an important feed into the TSPA. Document LLR.20070220.0138 provides the general seepage abstractions that are inputs into the TSPA.

Additional data packages and other TSPA-related documents will continue to be added to the LSN each month. This includes, notably, yet another, current set of TSPA runs to support the Draft Supplemental Environmental Impact Statement that DOE has announced it plans to release in October.

H. Remaining KTIs. Nevada's reference to the outstanding KTIs is a red herring. Nevada suggests that DOE is preparing some specific documentation to respond to those KTIs and suggests further that those responses are yet other documents that DOE must complete before it certifies. However, as Nevada's own exhibit shows, DOE does not intend to cite specific KTIs in its license application. DOE has stated that the license application will cover relevant KTI topics and that information may be provided to enable the NRC and others to

[40] DOE Ex. 7.

[41] DOE Ex. 8.

identify KTI-related information in the license application, but that the KTI identification system will no longer be utilized in the development of the license application.[42] Absent some regulatory requirement for such separate answers -- and Nevada points to none -- Nevada's argument is merely an expression of its preference, not a statement of a legal requirement.

I. Tier 2 Seismic Analysis. Equally infirm is Nevada's argument that the Tier 2 Seismic Analysis is some critical work product that must be completed before DOE can certify. Nevada's motion acknowledges that the tier 2 analysis is merely "confirmatory" of information to be cited in the license application and not itself information intended to be cited or relied on in the license application.[43]

J. CNWRA Report. Nevada's argument predicated on the report prepared by the Center for Nuclear Waste Regulatory Analysis is fanciful. With no evidence that DOE needs or otherwise plans additional work to respond to this report, Nevada hazards its opinion that DOE ought to do something and thus cannot certify until it completes this speculative work Nevada says DOE should do. This goes beyond even Nevada's absolutist interpretation. Nevada argues here not that there is some extant documentary material DOE must make available or even that there is some work product that DOE plans to do and must finish before certification. Nevada contends here that DOE's certification is also hostage to Nevada's views of what additional work DOE should do.

K. PVHA Update Elicitation. Nevada notes that DOE has indicated an intent to update its expert elicitation on volcanic hazards in 2008. As the concept of "update" connotes, DOE is performing such an elicitation to evaluate new information, and Nevada concedes that

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[42] Nevada Ex. 27 at 2.

[43] Nevada Motion at 34.

DOE does not intend to rely on the update in its license application.[44] Thus even by Nevada's standard that DOE should not certify until it has completed its intended license application citations, this update is irrelevant.

L. Email Database. Nevada's statements about the email warehouse border on the sanctionable. Nevada implies that this database was something revealed just last May and that DOE has not explained what this database comprises. Yet, the truth is Nevada made a FOIA request for this database in November, 2005. In that request, Nevada quoted a description of this database provided by DOE: "a searchable database of all existing Yucca emails."[45] As to the number of emails in the database, Nevada's FOIA request from 2 years ago refers to the presence of "ten million archival emails" in the database.[46] This is the same number of archival emails discussed at the time of Nevada's motion to strike. The additional emails represent the new emails added to the Yucca mountain email system since the archival emails, starting in 2004.

CONCLUSION

For the reasons stated above, Nevada's request to construe § 2.1003(a) in absolutist terms should be denied, whether it is considered to apply to the entire licensing proceeding or "just" to the license application. It is tantamount to a petition to amend an NRC regulation. This is an inappropriate use of a motion for declaratory relief, which should seek a declaration of what an existing regulation means, rather than seeking to amend it to comport with the movant's sense of what a better (or more "helpful") regulation would be.

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[44] Nevada Motion at 24, n.3.

[45] DOE Ex. 10.

[46] *Id*.

To the extent that Nevada's request may be construed as an invitation to this Board to engage in some kind of "materiality" or "sufficiency" judgment on the completeness of DOE's initial LSN certification, that request should also be denied since § 2.1003 does not impose any such text. Further, that determination plainly cannot be ascertained until the certification has been made, and is thus unripe at this point.

Because of the implications of Nevada's motion to DOE's ability to certify, DOE requests that Board provide expedited consideration to the motion.

U.S. DEPARTMENT OF ENERGY

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August 3, 2007

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 Matter)	)	

THE DEPARTMENT OF ENERGY'S
RESPONSE TO STATE OF NEVADA'S MOTION FOR DECLARATORY RULING

I certify that copies of the foregoing THE DEPARTMENT OF ENERGY'S RESPONSE TO STATE OF NEVADA'S MOTION FOR DECLARATORY RULING AND SUPPORTING EXHIBITS in the above-captioned proceeding have been served on the following persons on August 3, 2007 by Electronic Information Exchange.

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