November 8, 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

ANSWER OF THE NUCLEAR ENERGY INSTITUTE OPPOSING THE STATE OF NEVADA'S "MOTION TO STRIKE DOE'S OCTOBER 19, 2007 LSN RECERTIFICATION AND TO SUSPEND CERTIFICATION OBLIGATIONS OF OTHERS UNTIL DOE VALIDLY RECERTIFIES"

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323 (c), the Nuclear Energy Institute ("NEI") hereby files this opposition to the State of Nevada's (hereinafter "the State's") October 29, 2007 "Motion to Strike DOE's October 19, 2007 LSN Recertification and to Suspend Certification Obligations of Others Until DOE Validly Recertifies."[1] As explained below, the Motion is without merit and should be denied.

II. DISCUSSION

The State's Motion is grounded on a self-conceived notion of what it refers to as the "Six-Month Rule." Fundamentally, the State's position is as follows:

[1] 10 C.F.R. § 2.323(c) provides that "a party may file an answer in support of or in opposition to the motion." Although not technically a "party" to the instant proceeding, NEI is a member of the Licensing Support Network ("LSN") Advisory Review Panel and has participated as a "potential party" in the instant proceeding since its inception. NEI will seek party status in the Yucca Mountain licensing proceeding at the time called for in the Commission's regulations. *See also* Second Case Management Conference Transcript at 402 (Judge Karlin characterizing NEI's participation in the resolution of an earlier LSN issue as being in the nature of an "amicus").

(1) A principle of the Licensing Support Network (LSN) is to provide parties a six-month access period to all of DOE's core technical documents and modeling basis Documentary Material that it intends to cite and rely on in the licensing proceeding before DOE tenders its License Application (LA) to the Nuclear Regulatory Commission (NRC).

(2) DOE, itself, insisted that the NRC adopt this "Six-Month Rule."

(3) Embracing the rationale advanced by DOE and other parties in support of DOE, the NRC adopted the Six-Month Rule.

(4) DOE adopted detailed plans and schedules that would honor the Six-Month Rule.

(5) When it became clear that meeting LSN requirements would likely delay the Yucca Mountain project's schedule, DOE changed course and ignored the Six-Month Rule.

(6) Implementing a new plan, DOE certified its LSN with the knowledge that key Documentary Material it will cite and rely upon in its LA was not available on the LSN.

(7) As the purported legal basis for incomplete certification, DOE adopted a "strained and undisciplined interpretation" of the NRC's supplementation requirements for the LSN that eviscerates the Six-Month Rule and is unlawful.[2]

Requirements for certification, however, are limited to what the rules specify. And compliance with the so-called Six-Month Rule – as formulated and interpreted by the State – is not among them.

Section 2.1009 of the Commission's regulations requires that DOE certify that "the documentary material specified in § 2.1003(a) has been identified and made electronically available." 10 C.F.R. § 1009(b). Section 2.1003(a), in turn, provides that:

> DOE shall make available, no later than six months in advance of submitting its license application . . . an 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].

10 C.F.R. § 2.1003(a), (a)(1) (emphases added). By using the past-tenses "generated" and "acquired," it is clear that the Commission considered Documentary Material to mean documents

[2] *See* Motion, p. 4

or information already in existence. DOE's initial certification must encompass only material available at that time.

It is also clear that the Commission expected additional documentary material to be created after initial certification. Hence, it promulgated 10 C.F.R. § 2.1003(e), which requires DOE and other participants to supplement their collections of documentary material after their initial certifications. Specifically, section 2.1003(e) provides:

> Each potential party, interested governmental participants, or party shall 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 . . . .

A plain reading of sections 2.1009(b), 2.1003(a), and 2.1003(e) together clearly indicates that DOE's initial certification is meant to and can encompass only documentary material in existence at the time, and that DOE must continue to supplement its documentary material collection with any such material created after its initial certification. Indeed, the repeated use of the phrases "initial certification" or "certification of initial compliance" throughout Subpart J – see 10 C.F.R. §§ 2.1003(e), 2.1009(b), 2.1010(a)(2), 2.1012(a) – reflects the Commission's expectation that DOE's first certification will not be its last, and that more documentary material will be created and produced following initial certification. In fact, 10 C.F.R. § 2.1009(b) specifically directs that "DOE . . . update this certification <u>at the time DOE submits its license application</u>." (Emphasis added).

At bottom, in spite of the State's incessant incantations concerning the Six-Month Rule, the gravamen of the Motion is that certain documents were not included.[3] However, the

[3] These are referred to in various terms such as "key documents" and "core technical documents." They include, for example, the Total System Performance Assessment for the LA (TSPA-LA) and Analysis Model Reports (AMRs). *See, e.g.,* Motion, pp. 18-19.

Commission promulgated a definition of Documentary Material that speaks in categorical terms, and not of specific documents. That definition identifies three types of Documentary Material, namely (1) "any information" upon which a party intends to rely on and/or to cite in support of its position; (2) "any information" known to a party and in its possession that does not support a party's position; and (3) "reports and studies" and circulated drafts thereof prepared by or on behalf of a party relevant to both the LA and the Topical Guidelines in Regulatory Guide 3.69. 10 C.F.R. § 2.1001 (emphases added). Nowhere does the definition identify any specific material.

Further, the State's purported reason for needing certain documents at the time of DOE's initial certification – i.e., in order to develop contentions [4] – is unavailing. As the State is surely aware, docketing and a notice of hearing will not occur until after the LA is tendered by DOE and has successfully undergone an acceptance review by the NRC. *See* 10 C.F.R. § 2.101(e). That review has been estimated to take three to six months.[5] Following docketing and notice in the Federal Register, there will be an additional 30 days to prepare contentions. *See* 10 C.F.R. § 2.309(b)(2). Accordingly, everyone, including the State, will have a minimum of between four and seven months to develop contentions following submittal of the LA. Moreover, late contentions may always be filed for good cause. *See* 10 C.F.R. § 2.309(c). Thus, the State is not and cannot be prejudiced by the absence of any material from DOE's initially certified document production.

Moreover, the State has more than enough material now to proceed with the formulation of contentions. DOE's certified LSN document collection includes over 3.5 million documents,

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[4] *See, e.g.,* Motion, pp. 2, 34, 42-43.

[5] *See, e.g.,* Yucca Mountain Review Plan, NUREG-1804, Rev. 2 (2003), App. B, p. B-1; Transcript of Advisory Committee on Nuclear Waste – 181st Meeting (Jul. 17, 2007), p. 69 (statement by Lawrence Kokajko).

estimated to exceed 30 million pages.[6] In fact, since mid-2004 Nevada has had access to more than a million documents.[7] It is disingenuous for the State now to cry foul based on an allegation of insufficient time to develop contentions when it has had more than adequate material to begin doing so for years; has even more documents now; and will have at least four months to complete the job following submittal of the LA.

In sum, there is no requirement for DOE to include the documents identified in the State's Motion in its initially certified LSN production. Further, the State is not prejudiced by the absence of those documents. Accordingly, DOE's certification should neither be stricken nor otherwise disturbed.

III. CONCLUSION

For the reasons presented above, the State's Motion should be denied *in toto*.

Respectfully submitted,

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[6] *See* Press Release, Department of Energy, "U.S. Department of Energy Certifies Its Document Collection for Yucca Mountain License Application" (Oct. 19, 2007) (attached hereto as Exhibit 1).

[7] *See, e.g.,* Answer of the Department of Energy to the State of Nevada's Motion to Strike (June 22, 2004), pp. 14-15.

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Las Vegas, NV 89134

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FOR IMMEDIATE RELEASE
Friday, October 19, 2007

U.S. Department of Energy Certifies Its Document Collection for Yucca Mountain License Application

Las Vegas, NV – The U.S. Department of Energy (DOE) today certified its document collection for the Nuclear Regulatory Commission's (NRC) electronic Licensing Support Network (LSN), further advancing the Yucca Mountain repository licensing process. DOE has made electronically available on the NRC LSN over 3.5 million documents, estimated to exceed 30 million pages. DOE is required to certify its LSN document collection prior to submitting its license application to the NRC for authorization to construct the Yucca Mountain repository.

"Yucca Mountain is one of the most studied pieces of real estate in the world," Edward F. Sproat, III, Director of the Office of Civilian Radioactive Waste Management, said. "Through the NRC's electronic network, the public can view scientific data, geologic analyses, and other documents related to DOE's license application for the nation's spent nuclear fuel and high-level waste repository."

The LSN was established by the NRC to support the licensing proceeding for the Yucca Mountain repository. The LSN is a web-based information system that enables the public to review documentary materials related to DOE's license application for the nation's first spent nuclear fuel and high-level radioactive waste repository, to be located at Yucca Mountain, in Nye County, Nevada. DOE plans to submit its license application by June 30, 2008 and will continue to add documentary material to its LSN document collection.

Today's certification represents a significant milestone on the path to DOE's submittal of a high-quality license application to the NRC. In March, DOE submitted legislation to Congress to enhance the nation's ability to manage and dispose of spent nuclear fuel and high-level radioactive waste. In June, DOE announced the final performance requirements for canisters that will minimize the need for repetitive handling of commercial spent nuclear fuel by using the same canister from the time it leaves a nuclear power plant to its disposal in Yucca Mountain. This month DOE also issued for public comment draft National Environmental Policy Act documents relating to the Yucca Mountain Project.

The NRC's Licensing Support Network is available at http://www.lsnnet.gov. Persons without access to the internet may use public access computers at the following locations: DOE public

EXHIBIT 1

reading room (1E-190), U.S. Department of Energy, Forrestal Building, 1000 Independence Avenue, SW, Washington, D.C.; Pahrump Yucca Mountain Information Center, 2341 Postal Dr., Pahrump, NV 89048; and most community libraries, colleges and universities worldwide.

Yucca Mountain was approved by the Congress and President Bush as the site for the nation's first permanent spent nuclear fuel and high-level radioactive waste geologic repository in 2002. For more information on DOE's Yucca Mountain Project, visit www.ocrwm.doe.gov

-DOE-

YMP-07-10

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing "Answer of the Nuclear Energy Institute Opposing the State of Nevada's 'Motion to Strike DOE's October 19, 2007 LSN Recertification and to Suspend Certification Obligations of Others Until DOE Validly Recertifies'" has been served via the Nuclear Regulatory Commission's Electronic Information Exchange (EIE) upon those on the Service List maintained by the EIE for the above-captioned proceeding.

Respectfully submitted,

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