

November 9, 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: ) ASLBP No. 04-829-01-PAPO  
Pre-Application Matters) )

NRC STAFF ANSWER TO NEVADA MOTION TO STRIKE  
DEPARTMENT OF ENERGY LICENSING SUPPORT NETWORK CERTIFICATION

INTRODUCTION

On October 19, 2007, the Department of Energy (“DOE”) certified the availability of its documentary material on the Licensing Support Network (“LSN”) as required by 10 C.F.R. § 2.1009. The [DOE’s] Certification of Compliance (Oct. 19, 2007) (enclosing “Certification of Availability of Documentary Material” signed by Dong Kim) (collectively, “Certification”).

By motion dated October 29, 2007, but not served via Electronic Information Exchange until October 30, 2007,<sup>1</sup> the State of Nevada asked the Pre-License Application Presiding Officer (PAPO) Board to strike DOE’s LSN certification and to suspend the 90-day obligations of Nevada and other prospective parties “until 90 days after DOE validly recertifies its LSN database.” Motion to Strike DOE’s October 19, 2007 LSN Recertification and to Suspend Certification Obligations of Others Until DOE Validly Recertifies (Oct. 29, 2007) (“Motion”) at 1.<sup>2</sup>

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<sup>1</sup> The one day delay was apparently due to problems with the EIE. The response time for the U.S. Nuclear Regulatory Commission staff (“Staff”) is based on the EIE service date. See 10 C.F.R. §§ 2.323(c), 2.1017.

<sup>2</sup> Because other potential parties, including Churchill, Lander, Esmeralda and Mineral County, Nevada have previously submitted a certification of compliance under § 2.1009(b) and must certify supplementation of their LSN collections on a monthly basis, Nevada’s request to suspend the obligations (continued. . .)

For the reasons set forth below, the Staff's view is that the PAPO Board should evaluate the Motion by applying the standards of whether DOE has made a good faith compliance with LSN requirements and whether the DOE LSN collection is materially or substantially incomplete.

### BACKGROUND

This is the second time that Nevada has moved to strike a DOE initial certification. In granting Nevada's motion to strike the DOE 2004 certification of compliance, the Board noted that "perfection is not required" for compliance with NRC requirements, *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-04-20, 60 NRC 300, 313 (2004), and that the regulatory requirement to produce "all documentary material" is not to be read literally, but instead embodies a good faith standard for document production, *id.* at 314.<sup>3</sup> That is, on the date of certification, the DOE "must have made, in good faith, every reasonable effort to make all of its documentary material available" based on (1) the time DOE had to gather its documentary material, (2) the importance of the "full and fair 6-month documentary discovery period, . . . a precondition to the development of well articulated contentions" and the Commission's ability to meet the statutory three-year decision deadline, and (3) DOE's status as a Federal agency with resources. *Id.* 314-15. In short, the Board found the good faith standard to be "a rigorous one, requiring DOE to make every reasonable effort to gather, to assess for privilege, and to produce

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of potential parties and LSN participants would only affect the obligations of Nevada and any other potential party that is required to make an initial certification under 10 C.F.R. § 2.1003(a). See Revised Second Case Management Order (Pre-License Application Phase Document Discovery and Dispute Resolution) (July 6, 2007), at 21.

<sup>3</sup> The Board noted that the "Commission expects all [LSN] participants to make a good faith effort to identify documentary material within the scope of § 2.1003. However, a rule of reason must be applied to an [LSN] participant's obligation to identify all documentary material within the scope of the topical guidelines [in Regulatory Guide 3.69]." 60 NRC at 314 (quoting Submission of Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste, 54 Fed. Reg. 14,925, 14,934 (Apr. 14, 1989)).

all documentary material at the outset, without regard to artificial or self-imposed deadlines.” *Id.* at 315.<sup>4</sup> Based, in part, upon a consideration of the incomplete status of DOE’s document and privilege reviews and nonproduction of a significant number of documents created before the DOE’s cutoff date, the Board found that (1) given that DOE had 15 years to assemble and produce documents, DOE controlled the production date, and DOE’s assembling and privilege review was “far from complete,” and (2) based upon “the substantial disruption, delay, and confusion the incompleteness would cause on the pre-license application 6-month discovery process,” DOE failed to satisfy a good faith standard for making all of its documentary material available as of the date of its June 2004 certification. *Id.* at 316-27, 328.<sup>5</sup>

The Board recently denied, on the ground that Nevada’s dispute was not ripe for resolution, a Nevada motion<sup>6</sup> which alleged that DOE planned to certify its LSN collection before completion of key documentary material. Order (Denying Nevada’s Motion for a Declaratory Ruling) (Sept. 10, 2007) (unpublished) (“September 10 Order”). Noting that Nevada’s challenge was a claim that DOE must refrain from certifying its LSN collection until it is “materially complete” and not certify when it contains “whatever documents happen to be complete . . . [on] an arbitrary cutoff date,” the Board found that, even assuming the validity of Nevada’s position regarding what documents must be available when DOE certifies, “any such assessment depends on the facts and circumstances in existence at the time DOE certifies its LSN document collection — an event that has yet to occur.” *Id.* at 3 & n.9 (citing Nevada

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<sup>4</sup> The Board opined that because it was applying a good faith standard to the DOE certification, it was not necessary to decide whether DOE was in substantial compliance with LSN requirements. LBP-04-20, 60 NRC at 315 n.28.

<sup>5</sup> DOE did not appeal the Board’s ruling that a rigorous, good faith standard applied. See *U.S. Dep’t of Energy* (High-Level Waste Repository), CLI-04-32, 60 NRC 469, 472 (2004).

<sup>6</sup> The State of Nevada’s Motion for A Declaratory Ruling and To Define and To Compel Compliance By DOE With 10 C.F.R. § 2.1003(a) (July 23, 2007) (“Nevada Declaratory Motion”).

Declaratory Motion at 8 (emphasis in original)).

After DOE certified its collection on October 19, 2007, Nevada filed the instant motion to strike the Certification as unlawful and contrary to NRC regulations because the DOE did not make available “numerous critical, core technical documents and modeling basis information necessary for licensing and for formulating contentions.” Motion at 1. The Staff’s response to this motion is set forth below.<sup>7</sup>

### DISCUSSION

#### A. The Motion Raises Factual Disputes

The gravamen of Nevada’s instant motion is that the DOE certification is invalid because DOE’s over 3 million document LSN collection is incomplete and DOE, driven by schedule concerns,<sup>8</sup> knowingly acted in a manner inconsistent with previous DOE statements concerning the six month availability of documentation supporting the repository license application (“LA”) at the time of certification. See e.g., Motion at 1-4, 9-15, 39. Nevada claims, among other things, that (1) the purpose of the LSN is to provide a full and fair six month access to all core technical and modeling basis information that DOE “intends to cite and rely on in the licensing proceeding *before* DOE tenders its LA,” (2) that DOE changed its planned schedule when it realized that “LSN requirements would likely delay” the project, (3) that DOE certified its LSN collection “*knowing* that key DOE Documentary Material it will cite and rely on in its LA is neither complete nor available” on the LSN; and (4) DOE’s incomplete certification is based on an interpretation of the LSN supplementation requirements that “eviscerates” the six-month rule and “is unlawful.”

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<sup>7</sup> Although DOE has reported that it intends to submit its repository license application (“LA”) no later than June, 30, 2008, if the Certification is upheld, DOE could submit its LA as early as April 19, 2008. See “The Department of Energy’s Thirtieth Monthly Status Report Regarding LSN Certification and License Application Submittal” (Nov. 1, 2007); 10 C.F.R. § 2.1003(a).

<sup>8</sup> Nevada claims DOE’s attempt to meet an “unrealistic” LA date and “schedule-driven approach” caused DOE to prematurely certify its LSN. Motion at 19, 24.

Motion at 4 (emphasis in original).

In contrast to its July 2004 motion,<sup>9</sup> Nevada's completeness challenge pertains not to the omission of thousands of documents that were not appropriately reviewed and made electronically available prior to certification, but to the omission of a limited number of "key" documents that contain "core technical . . . and modeling basis information that will comprise [DOE's] actual LA" are scheduled to be completed in 2008, both before and after DOE's announced June 2008 latest LA submission date. See Motion at 1, 4, 18-20. Documents that allegedly are not complete and/or not in DOE LSN collection include the Total Systems Performance Assessment for the LA (TSPA-LA),<sup>10</sup> certain analysis model reports ("AMRs"), the Preclosure Safety Analysis ("PCSA"), Vulnerability Assessment, Quality Assurance Requirement Document, Rev. 20, seismic analysis, and an update to the Probabilistic Volcanic Hazard Analysis ("PVHA-U"),<sup>11</sup> See Motion at 20-38.

The Staff offers no position on whether DOE's Certification has been made in good faith or whether DOE's document collection is materially or substantially incomplete.<sup>12</sup> Information

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<sup>9</sup> Motion to Strike the Department of Energy's LSN Certification and for Related Relief (July 12, 2004).

<sup>10</sup> Nevada correctly notes that the Staff expects the TSPA (which integrates many process level models such as infiltration, radionuclide transport, and corrosion in order to simulate overall system performance and calculate estimates of expected dose and which allows performance simulations to be run multiple times, varying input parameters within ranges that capture natural variability and uncertainty) to be contained in the LA and available to parties. See Motion at 23-24 (citing Exhibit 30, Letter from Dale Klein to Senator Harry Reid (Sept. 28, 2007)). That letter, however, did not suggest that the TSPA must be available six months prior to submission of the LA.

<sup>11</sup> As the DOE noted in its response to Nevada's July 2007 request for declaratory relief, Nevada's challenge to the June 2004 certification was not based on the incompleteness of supporting LA documentation even though documents such as the Total System Performance Assessment (TSPA), Analysis Model Reports (AMRs) and the Preclosure Safety Analysis (PCSA) were not complete. See The [DOE's] Response to State of Nevada's Motion for Declaratory Ruling (Aug. 3, 2007) at 16-18.

<sup>12</sup> The Commission expects the Staff "to refrain from becoming involved in procedural disputes between other parties in which the Staff does not have an interest, unless the Presiding Officer specifically request the staff's views on the matter." Procedures Applicable to Proceedings for the (continued. . .)

concerning whether the DOE LSN collection lacks available detailed technical information that would allow preparation of focused contentions regarding a potential Yucca Mountain repository or whether the documents to be completed will significantly differ from LSN information about DOE's technical approach to the repository is a factual question best answered by the DOE and Nevada.<sup>13</sup> The Staff, however, offers its views on 10 C.F.R. Part 2, Subpart J, requirements and the standards to be applied regarding the DOE initial certification.

B. 10 C.F.R. §§ 2.1003 and 2.1009 Requirements

Nevada argues that DOE's Certification should be stricken due to DOE's failure to make documentary material available via its LSN collection, which should include all core technical documents and modeling basis information that will comprise DOE's actual LA six months prior to submission of the DOE application. See Motion at 2-4, 19. Nevada also asserts that under 10 C.F.R. Part 2, Subpart J, supplementation requirements do not allow DOE to defer completion of many key technical documents until after its initial certification as "long as those technical documents are completed in time to submit them with the LA." See Motion at 38.<sup>14</sup>

Nevada's position is not correct. The provision of a six-month time period for DOE's initial certification struck a balance between the need to provide an adequate time for review of

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Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository, 56 Fed. Reg. 7787, 7794 (Feb. 26, 1991).

<sup>13</sup> For example, Nevada argues DOE instructions to protect drafts of the TSPA-LA AMR and technical data input documents (TDIPs) indicate that the recently released, TSPA-SEIS used in the "Draft Supplemental Environmental Statement ("SEIS") for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High Level Radioactive Waste at Yucca Mountain, Nye County, Nevada," (Oct. 2007) will differ from the TSPA-LA to be completed in 2008. Motion at 22-23. Nevada also notes that the TSPA-SEIS is being finalized for the purposes of the LA. *Id.* at 23 (citing Exhibit 28, page 5-3 of the SEIS).

<sup>14</sup> As the Staff has previously noted, Nevada's July 2004 Motion to Strike acknowledged that parties may supplement documentary materials to the extent they are "created after the time of the initial certification." See NRC Staff Response to State of Nevada's Motion for a Declaratory Ruling (Aug. 3, 2007) at 3 n.2.

documentary material in advance of the LA and the need to “avoid unnecessary expense and time” that could result from “review of a significant number of documents that may later become irrelevant and obsolete.” Licensing Proceedings for the Receipt of High-Level 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 was mindful that development of the DOE license application and supporting materials “is an ongoing process” and that 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.” *Id.* The Commission acknowledged DOE’s comments that new information would continue to be produced during the period before DOE submits its LA and noted that documentary material “created after the initial certification of compliance is expected to be made available reasonably contemporaneous with its creation.” 66 Fed. Reg. at 29,460.<sup>15</sup>

Thus, while the subject matter of documentary material is tied to the LA, the Commission expected that additional DOE documentary material relevant to the LA would be made available after an initial DOE certification and at the time of submission of the LA. See 10 C.F.R. § 2.1009(b), 66 Fed. Reg. at 29,466. The Commission did not insist that no additional information related to (or to be submitted with) the LA could be provided after an initial certification.<sup>16</sup>

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<sup>15</sup> To the extent Nevada implies (by quoting DOE statements) that information to be included in the LA must be frozen at the time of initial certification, see *e.g.*, Motion at 10, it is incorrect. Inasmuch as the Commission’s regulations in 10 C.F.R. § 2.1009(b) specifically require DOE to update its LSN collection, at the time of submittal of its LA, and to update and supplement its LSN collection with documentary material (*i.e.*, final documents and circulated drafts) in existence after the DOE initial certification, it is clear that the regulations contemplate that DOE will generate or acquire additional documentary material after its certification. In fact, the regulations require that all parties and LSN participants continue to supplement their LSN collections with documentary material created after the time of their initial certifications. 10 C.F.R. § 2.1003(e).

<sup>16</sup> Nevada quotes statements made by the NRC during a 2001 public meeting held to explain the NRC’s repository licensing process. See Motion at 7 (citing Exhibit 5, Transcript of Public Meeting to (continued. . .)

This is not to say, however, that DOE should not have much (if not most) of its documentary material available early and at the time of certification. See Licensing Proceeding for a High-Level Radioactive Waste Geologic Repository; Licensing Support Network, Submissions to the Electronic Docket, 69 Fed. Reg. at 32,843 (“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)). The Commission’s regulations do not specifically require that all DOE documentation needed for preparation of an LA be complete and available via the LSN before DOE can certify.

It is reasonable to conclude that documentary material made available at initial certification need not amount to or approximate a draft of the license application. Nothing in the text or history of Subpart J suggests that the Commission expected a draft DOE license application would be made available in the LSN. *U.S. Dep’t of Energy*, CLI-06-05, 63 NRC 143, 150 (2006). With respect to whether a draft LA constituted information that would not support DOE’s position, the Commission found it would be impossible to determine if there are any significant differences between the draft and final version of the LA until the final LA is filed. *Id.* at 151. The Commission indicated that information independent of the draft LA must be made available via LSN and would be available during the six-month post-certification period, during the Staff’s docketing acceptance review period, and during the 30-day contention preparation period that follows docketing of the LA. *Id.* at 151. The Commission did not suggest that all information the DOE would use or submit with its LA must be available via LSN prior to tendering an LA.

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Discuss the Hearing Process for Judging the Safety of a Potential High-Level Waste Repository, at 90-91). Those statements, however, did not address the current dispute over certain documents that are not yet complete or “created.”

In addition, it was not contemplated that nonfinal documents would be included in the LSN. See 10 C.F.R. § 2.1003(a). The Commission has emphasized that the basic consideration underlying the LSN is that it will contain final documents with the exception of circulated drafts (i.e., documents to which there has been an unresolved objection or nonconcurrence by the author or other persons in the concurrence process of an LSN participant or its contractor). See CLI-06-05, 63 NRC at 157-58.

C. Good Faith and Materially or Substantially Incomplete Standards

Nevada's assertions that DOE has knowingly failed to make particular documents available via the LSN raises questions of whether DOE has acted in good faith and the significance of the alleged omissions vis a vis the completeness of the DOE LSN collection.

The Board has previously ruled that DOE must satisfy a good faith standard for document production and found that inquiry depends on a consideration of a number of facts, including whether DOE engaged in reasonable efforts to identify and make available documentary material prior to its certification. See LBP-04-20, 60 NRC at 313-26. Similarly, the Board has recently recognized that an assessment of whether DOE's certification is valid will depend on "the facts and circumstances in existence at the time DOE certifies its LSN document collection." September 10 Order at 3.

Because Nevada has identified particular documents that constitute "omissions" from the Certification, the Board should also determine the completeness of the DOE LSN collection by applying a standard of whether the DOE LSN collection is materially or substantially incomplete based on documents "created" at the time of certification.

Whether DOE has met the requirements for good faith compliance with 10 C.F.R. § 2.1003 (i.e., whether DOE has engaged in reasonable efforts to make the requisite materials

available via the LSN),<sup>17</sup> and whether the DOE collection is materially or substantially incomplete<sup>18</sup> are factual matters to be evaluated based on the totality of circumstances surrounding the Certification such as the nature and amount of available documentary material on October 19, 2007, and the significance or materiality of missing documentary material.

In order to strike the DOE certification, the Board must find that the DOE document collection is materially or substantially incomplete (*i.e.*, it fails to include a significant number of “created” documents, or information to be provided at the time of the LA will be materially or substantially different, such that a purpose of the LSN rule — a meaningful opportunity to draft focused contentions — would be defeated). This inquiry, however, should recognize that DOE may produce additional information at the time of LA submission. See 10 C.F.R. §2.1009(e). A determination as to whether the DOE collection is incomplete should be based on the totality of the circumstances such as the nature of the documentary material made available at initial certification and the likelihood that documentary material made available at a later date will significantly or materially differ in a way that precludes a meaningful opportunity to draft focused contentions and discern DOE’s technical position in the licensing proceeding.

There is a possibility that the Board may not be able to make a final determination

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<sup>17</sup> For example, Nevada notes that in 2000 and 2001, final and draft DOE documents indicated that documentation supporting the license application would be “frozen” or “essentially complete” at the time of LSN certification and that the technical basis for the LA “must be essentially complete eight months prior to LA submittal.” Motion at 8-13 (quoting DOE Exhibit 8, “Strategic Decision Support Team Issues List and Description” at 37; Exhibit 11, “[Draft] Technical Guidance for License Application Planning,” dated December 10, 2001, at 3; Exhibit 13, “Strategic Basis for License Application Planning for a Potential Yucca Mountain Repository” at 2, 8; “[Draft] Performance Assessment & Modeling Assumptions and Work Sequence, dated 2004, at 10,11.) Nevada also notes that in June 2004, DOE’s website indicated that LSN would provide access to all relevant documents in advance of the license application submittal and that any document bearing on information contained in DOE’s pre-closure safety analysis and post-closure performance assessments must be in LSN. Motion at 14-15 (citing Exhibit 22 “Frequently Asked Questions,” dated March 2004). The DOE is in the best position to address factual matters concerning these matters.

<sup>18</sup> Materiality relates to the significance of the information “omitted” (is information similar to the alleged omissions available via the LSN, regardless of the burden involved in retrieving it from the vast collection). Substantiality relates to the amount of information “omitted.”

regarding the completeness of the DOE LSN collection (and the significance of omitted information) until DOE tenders its license application to the NRC.<sup>19</sup> However, as the movant, Nevada must demonstrate that the DOE's certification fails to satisfy the good faith standard for LSN compliance, the completeness standards postulated above and that the DOE certification should await completion and inclusion of particular documents in order for Nevada to be able to frame contentions.<sup>20</sup> If Nevada makes a sufficient showing, the DOE must proffer information that demonstrates Nevada's position is erroneous and that its certification is valid, particularly since DOE's actions are the trigger for certain pre-licensing obligations. See LBP-04-20, 60 NRC at 315. These fact-specific showings are uniquely within the purview of Nevada and the DOE.

In sum, the mere fact that the DOE plans to complete certain materials after its certification does not violate the NRC LSN requirements and does not necessarily indicate a lack of good faith compliance with the LSN certification requirement as long as the DOE has engaged in reasonable efforts to comply with NRC requirements. Nevada and DOE must provide information that addresses the good faith standard and whether the DOE's LSN collection is substantially or materially incomplete with respect to information "created" at the time of certification. Facts concerning the availability and status of the "omitted" technical

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<sup>19</sup> At that time of LA submittal, a finding that the Certification is invalid or the updated certification is invalid would result in a delay in the docketing of the application until after a six-month period following a valid certification. See 10 C.F.R. § 2.1012(a) ("If the [DOE] fails to make its certification at least six months prior to tendering the application, . . . the Director of the NRC's Office of Nuclear Material Safety and Safeguards will not docket the application until at least six months have elapsed from the time of certification.")

<sup>20</sup> Information responsive to unresolved key technical issue ("KTI") agreements, the vehicle for Staff information requests during pre-licensing interactions between the Staff and DOE, may not be relevant to whether DOE can demonstrate compliance with requirements for the issuance of a construction authorization for the repository (the matter to be decided within three to four years) under the statute. Hence, the mere fact that KTI agreements are still pending does not mean that there is a lack of sufficient information available about the DOE repository that would prejudice efforts to draft focused contentions.

documents and other information will need to be addressed in terms of the nature of the included and "omitted" information and the provisions of the LSN rule.

CONCLUSION

For the reasons set forth above, the Staff's view is that the Board should rule on the Motion by applying a good faith compliance standard and also determine whether the DOE LSN collection is materially or substantially incomplete in light of the purpose of the LSN rule and the provisions for LSN supplementation.

Respectfully submitted,

*/RA/*

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Dated at Rockville, Maryland  
this 9th day of November, 2007

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO NEVADA MOTION TO STRIKE DEPARTMENT OF ENERGY LSN CERTIFICATION" in the above-captioned proceeding have been served on the following persons this 9th day of November, 2007, by Electronic Information Exchange.

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