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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Alex S. Karlin
Alan S. Rosenthal

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository:
Pre-Application Matters)

Docket No. PAPO-00

ASLBP No. 04-829-01-PAPO

January 4, 2008

MEMORANDUM

(Setting Forth Full Reasoning for Denying Nevada's Motion to Strike)

Before the Pre-License Application Presiding Officer (PAPO) Board is the motion of the State of Nevada (Nevada) (1) to strike the October 19, 2007 certification by the United States Department of Energy (DOE) that DOE made all of its documentary material available on the Licensing Support Network (LSN), and (2) to suspend the obligation of other potential parties to make their documentary material available within 90 days thereafter.¹ The Board heard oral argument on the Motion on December 5, 2007, and issued a short order denying the motion on December 12, 2007.² That order stated that we would be issuing a memorandum, more fully articulating our ruling on the Motion, in due course. Order at 2. This memorandum provides our fuller analysis of the issues.

¹ 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]. The Motion was dated October 29, 2007, but Nevada experienced difficulties in filing it on the NRC Electronic Information Exchange and thus the Motion was not served until October 30, 2007.

² Order (Denying Motion to Strike) (Dec. 12, 2007) (unpublished) [Order].

I. BACKGROUND

This proceeding concerns the pre-license application phase of DOE's planned application for an authorization to construct a geologic repository for disposal of high-level radioactive waste (HLW) at Yucca Mountain, Nevada. As its name implies, the "pre-license application phase" is a period of time prior to the date when DOE submits its application. This phase is established and governed by the Nuclear Regulatory Commission (NRC) regulations at 10 C.F.R. Part 2, Subpart J.

We discussed the regulatory structure of the pre-license application phase at some length in our August 31, 2004 decision, LBP-04-20, 60 NRC 300 (2004) (granting Nevada's July 12, 2004 motion to strike an earlier DOE certification) and we need not repeat that discussion here. Suffice it to say, the regulations require that DOE make all of its documentary material available on the LSN, and to so certify to the PAPO Board, at least six months before DOE files its application to construct the HLW geologic repository at Yucca Mountain. See 10 C.F.R. §§ 2.1003(a), 2.1009(b), 2.1012(a). DOE's production of documentary material and certification triggers the duty of other potential parties, including Nevada, to make their documentary material available 90 days thereafter. 10 C.F.R. § 2.1003(a).

In accordance with this scheme, on October 19, 2007, DOE submitted a certification by Mr. Dong Kim, the LSN Project Manager, DOE Office of Civilian Radioactive Waste Management (OCRWM) and the "official responsible for administration of [DOE's] responsibility to provide electronic files of documentary material."³ Mr. Kim stated that "to the best of my knowledge, DOE has identified and made electronically available the documentary material specified in 10 C.F.R. § 2.1003 in existence as of a reasonable processing date prior to this certification." DOE Certification, Attachment. On October 29, 2007, Nevada filed its Motion to Strike. See

³ The [DOE's] Certification of Compliance (Oct. 19, 2007), Attachment, Certification of Availability of Documentary Material [DOE Certification, Attachment].

supra note 1. On November 9, 2007, DOE filed its response, urging that the Motion be denied.⁴ Three other potential parties submitted answers to the Motion. The Nuclear Energy Institute (NEI) filed a response opposing the Motion.⁵ The Nevada Nuclear Waste Task Force (NNWTF) filed a response supporting the Motion.⁶ The NRC Staff filed a response taking no position as to whether the DOE Certification met the relevant standards, but instead proffering the Staff's views on several legal issues.⁷ On December 5, 2007, the PAPO Board heard oral argument on the Motion.

II. POSITIONS OF THE PARTICIPANTS

The "crux of Nevada's complaint" is that DOE's document production "is incomplete because [DOE has not provided] key documents [that] are in development or not yet prepared." Motion at 17. Nevada argues that DOE's document production is "premature" because it omitted "numerous critical, core technical documents and modeling basis information necessary for licensing and for formulating contentions." Id. at 1. This, Nevada asserts, violates 10 C.F.R. § 2.1003(a)(1), which requires that DOE, in its initial certification, "make available . . . all documentary material . . . generated by or at the direction of, or acquired by [DOE]." Id. at 2 (quoting 10 C.F.R. § 2.1003(a)(1)). Nevada states that "[a] principal purpose of the LSN is to provide parties a full and fair six months' access 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 LA [license application] to NRC – the 'Six-Month Rule.'"

⁴ The [DOE's] Response to the State of Nevada's [Motion] (Nov. 9, 2007) [DOE Response].

⁵ Answer of the Nuclear Energy Institute Opposing the State of Nevada's [Motion] (Nov. 8, 2007) [NEI Response].

⁶ Statement in Support of the State of Nevada's [Motion] (Nov. 7, 2007) [NNWTF Response].

⁷ NRC Staff Answer to Nevada Motion to Strike [DOE] Licensing Support Network Certification (Nov. 9, 2007) [Staff Response].

Id. at 4 (emphasis in original). The purpose of this Six-Month Rule, insists Nevada, is to provide participants with the “opportunity to frame focused and meaningful contentions.” Motion at 8 (quoting 69 Fed. Reg. 32,836, 32,843 (June 14, 2004)). Nevada quotes from several DOE documents that state that DOE’s documentation in support of the application must be “essentially complete,” when DOE submits its initial certification and must remain “frozen” for the next six months. Id. at 10-11.

Proceeding from that proposition, Nevada identifies a number of “unfinished key documents,” and “core technical documents and modeling basis information” that DOE “knows it will cite or rely on” but that DOE is still working on and did not include in its initial document production and certification. Id. at 18-20. The Total System Performance Assessment for the License Application (TSPA-LA),⁸ which is to be a critical component of DOE’s license application, is one of Nevada’s prime examples of an unfinished document that DOE failed to produce on October 19, 2007. Id. at 22. Nevada cites DOE “document schedules” to show that DOE’s completion date for the TSPA-LA is not until sometime in 2008. Id. at 21-22. Likewise, Nevada complains that DOE has not finished or provided its Preclosure Safety Analysis (PSA),⁹ which is a required component of the license application. Id. at 25-27. Nevada asserts that there are numerous other important documents that DOE has not finished and thus not provided, such as certain documents associated with key technical issues (KTIs), id. at 27-28, analysis model

⁸ A DOE draft “technical guidance” document describes the TSPA-LA as follows: “There will be a single total system performance assessment (TSPA) developed and documented in accordance with applicable procedures, as part of the technical basis for the LA. The TSPA will be developed to be a defensible case that provides reasonable expectation that postclosure performance standards are met, considering the use of best available science and necessary simplifying assumptions needed to obtain acceptance by the NRC. The TSPA is expected to reflect a combination of some models and parameters that represent a reasonably expected behavior of the system and other models and parameters that . . . are more conservative.” Motion at 12 (quoting Motion Exhibit 11 at 9).

⁹ DOE’s Safety Analysis Report, which is a required part of its license application, must include a preclosure safety analysis. 10 C.F.R. § 63.21(c)(5).

reports (AMRs), id. at 22, 28-30, a probabilistic volcanic hazard analysis (PVHA) report, id. at 30-33, and a DOE “vulnerability assessment” (VA).¹⁰ Id. at 34-37. It is Nevada’s position that these documents must be finished and produced in DOE’s initial document production and certification.

Nevada relies primarily on two regulatory excerpts to support its legal position. First, Nevada focuses on 10 C.F.R. § 2.1003(a)(1), which specifies that DOE, like all potential parties, must produce “all” of its documentary material. Motion at 9. Second, Nevada points to the definition of documentary material at 10 C.F.R. § 2.1001, noting that it includes any information upon which a party, potential party, or interested governmental participant “intends to rely.” Tr. at 1228-29, 1239. Nevada asserts that the word “intends” reflects future actions and means that, at the moment of initial certification, DOE must have completed and must produce all of the documentary material it intends to rely on in the licensing proceeding. See id. at 1229, 1246; see also id. at 1261.

Turning to the regulations that require DOE and all other potential parties to supplement and to update their documentary material productions after their initial certifications, Nevada maintains that supplementation does not refer to documentary material that DOE intends to rely on, but instead applies mainly to such things as post-certification emails and other types of documentary material that may “crop up” after initial certification. See id. at 1229-32.

With regard to extant documentary material, Nevada states it is “[c]onceding[,] for the sake of argument[,] that DOE has made available all Documentary Material ‘in existence as of a reasonable cutoff date’ before certification.” Motion at 18 n.4. Nevada does not assert that DOE has failed to produce any documentary material that is currently in existence. Tr. at 1222-24.

¹⁰ The VA appears to be part of a plan by DOE for its “timely discovery and resolution of issues relating to the core technical and modeling basis supporting submittal of an LA to NRC.” Id. at 36 (quoting Motion Exhibit 48 at 2).

DOE opposes Nevada's Motion, asserting that DOE has fully complied with the regulatory requirements. DOE recounts that it has "implemented procedures to identify potential documentary material," has "implemented training on those procedures," and has "completed everything required by the Orders of this Board" including the review of ten million emails on the DOE back-up tapes, manual reviews of each document subject to a privilege claim, the production of redacted versions of certain privileged documents, and the production of privilege logs for other privileged documents. DOE Response at 1. DOE indicates that it has produced approximately 3.5 million documents on the LSN, consisting of more than 30 million pages. Id. DOE points out that "Nevada does not take issue with the sufficiency of DOE's production of existing documents, but complains instead about the absence of documents that do not yet exist in final form." Id. at 3. DOE rejects Nevada's new and "novel formulation for DOE's initial certification" i.e., that DOE must produce all "core technical documents and modeling basis Documentary Material," arguing that those terms are undefined and do not appear in Subpart J. Id. at 4. DOE states:

The practical reality is that DOE's LSN collection contains numerous documents intended to be cited or relied on in the LA as well as extensive underlying calculations, data, and other material on which those documents are based. The limited amount of remaining material will promptly be made available on the LSN when completed, and Nevada and all other potential participants will have an ample opportunity to review it.

Id. at 5.

DOE argues that the "LSN regulations impose no requirement that DOE complete a particular document or amount of work before its initial certification," id. at 5, and that the plain language of the regulations defeat the Motion. Id. at 8. DOE notes that 10 C.F.R. § 2.1003(a)(1) mandates that potential parties produce all documentary material "generated by or . . . acquired by" them, and that use of these past-tense verbs shows that the duty applies only to existing

documentary material. Id. Likewise, says DOE, the duty to produce graphic-oriented material under 10 C.F.R. § 2.1003(a)(2) is stated in the past tense, referring to materials that “have been printed,” thus it applies only to documents in existence at the date of certification. Id. at 9.

DOE also asserts that the overall structure of the regulations defeats the Motion because “[i]f the Commission intended that DOE must complete all its reliance material six months before submitting the LA, it is inconceivable that the Commission would have omitted such an important and unprecedented requirement and left its existence to inference, interpolation and guesswork.” Id. at 11. DOE claims that Nevada’s position that all key documents must be complete, and the DOE documentary material production “frozen” for 6 months, is inconsistent with the regulations imposing the duty to “continue to supplement” documentary material after the initial certification (per 10 C.F.R. § 2.1003(e)), and the duty to “update” the certification when the LA is submitted (per 10 C.F.R. § 2.1009(b)). Id. at 11-13.

Turning to the regulatory history of these rules, DOE points to the absence of any mention of Nevada’s current position and asserts that “[i]t defies reason that the Commission would have been silent all those years about a requirement for DOE to complete its supporting material before initial certification if that were its intent.” Id. at 15. To the contrary, DOE notes, the Commission acknowledged that the “development of the license application and supporting material is an ongoing process,” id. (quoting 66 Fed. Reg. 29,453, 29,459 (May 31, 2001)), and stated that “[d]ocumentary material created after the initial certification of compliance is expected to be made available reasonably contemporaneous with its creation.” Id. at 16 (quoting 66 Fed. Reg. at 29,460). Again, in 2003, the Commission noted that “it is reasonable to expect that additional material will be created after the initial compliance period.” Id. at 17 (quoting 68 Fed. Reg. 66,372, 66,375 (Nov. 26, 2003)) (emphasis omitted). As a consequence, DOE points out that in 2004 NRC issued 10 C.F.R. § 2.1003(e), see id. at 17-18, which states that each potential 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.” DOE Response at 12-13, 17 (emphasis added); see also 10 C.F.R. § 2.1003(e).

DOE then turns to its “documents to be completed,” arguing that DOE is following a “controlled process to develop its scientific, engineering and other technical work to support its application” and that the “documents DOE has yet to complete are those that logically are completed at the end of that development process.” DOE Response at 25. With regard to AMRs, DOE asserts that the LA is expected to cite approximately 150 AMRs and that all but three of them are already complete and available on the LSN. Id. As to the TSPA, DOE notes that it has made 150 gigabytes worth of information relating to the TSPA available on the LSN. Id. at 26. DOE responds to other specifics of Nevada’s complaint (e.g., the absence of certain KTI documents, the PVHA, and VA) by arguing either (a) that earlier versions of the documents have been provided on the LSN and/or (b) that the documents are not legally required to be generated at all, much less required to be finalized and included in the initial certification. Id. at 26-28.

For its part, the Staff “offers no position” on whether the DOE Certification satisfies the regulatory requirements, but instead “offers its views on 10 C.F.R. Part 2, Subpart J, requirements and the standards to be applied regarding the DOE initial certification.” Staff Response at 5-6. The Staff asserts that Nevada’s position – that DOE’s initial production of documentary material “should include all core technical documents and modeling basis information that will comprise DOE’s actual LA” and that the “Subpart J, supplementation requirements do not allow DOE to defer completion of many key technical documents until after its initial certification” – is “not correct.” Id. at 6. Likewise, the NRC Staff rejects the notion that supporting documentary material must be “frozen” at the time of initial certification. Id. at 7 n.15 (“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 it is clear that the regulations

contemplate that DOE will generate or acquire additional documentary material after its certification.”). The Staff asserts that the regulations reflect a balance between producing the documentary material early enough to give potential parties adequate time to review them, and yet not producing them so early that potential parties would waste time and money reviewing a significant number of documents that may later become irrelevant or obsolete. Id. at 7. The Staff agrees with DOE that “development of the DOE license application and supporting materials ‘is an ongoing process’” and the Commission acknowledged that DOE would continue to produce (and make available) additional documentary material after DOE’s initial certification. Id. (citation omitted). The Staff asserts:

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 the LA submission.

Id. at 10. The Staff believes that this determination should be based on the “totality of the circumstances.” Id.

NEI generally agrees with the position of DOE. It points to the use of the past tense in the regulations (e.g., “generated” and “acquired”) and to the existence of the duty to supplement as recognition that the initial production applies only to extant documents, and that additional documents will be generated after the initial certification. See NEI Response at 3-4. NEI responds to Nevada’s concerns (that, if key documents are not finished and produced until after the initial certification, potential parties will not have sufficient time to develop and file contentions) with the observation that (a) extra time will be provided to potential parties by the fact that NRC will take an additional 3 to 6 months (after the application is filed) to review and to docket the application, and (b) “late contentions may always be filed for good cause [citing 10 C.F.R. § 2.309(c)].” Id. at 4.

Meanwhile, NNWTF takes an entirely new tack. Rather than addressing the crux of Nevada's argument, NNWTF complains about the indexing of documents on the LSN, arguing that DOE's documentary material is "incomplete and inappropriately indexed on the LSN site." NNWTF Response at 1. NNWTF asserts that there are a number of new documents that are "impossible to find on the LSN, using the title or author" search method. Id. at 2. NNWTF notes that "DOE, . . . in their haste to certify the collection at this time, just dumped abbreviated notations into the LSN," and asserts "any document not accessible by title or the name of the author should be considered missing [from the LSN]." Id.

III. ANALYSIS

Nevada's Motion presents us with a legal issue: whether the duty to produce "all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, a potential party" pursuant to 10 C.F.R. § 2.1003(a)(1), is violated if a potential party has not finalized, and produced, all of the core technical documentary material that it intends to rely on in the proceeding. As the following analysis shows, the language, structure, and history of the Subpart J regulations lead us to conclude that the answer is no, and that the duty to produce documentary material only applies to extant documents. The regulations specifically contemplate that additional documentary material will be created, finished, and made available to other parties after a party's initial document production and certification. Thus, we concluded in our December 12, 2007 Order denying the motion, and reiterate here, that Nevada's legal position is unsound.

At the outset, we note that the key facts are not in dispute. First, Nevada makes no claim that DOE has failed to make available all of DOE's extant documentary material.¹¹ Indeed, Nevada concedes that DOE has made available all documentary material "'in existence as of a reasonable cutoff date' before certification." Motion at 18 n.4. Instead, Nevada is complaining

¹¹ Even the NNWTF does not argue that extant documentary material is missing from the LSN, merely that DOE's titles and dates for the documentary material make it difficult to locate.

about the unavailability of documentary material that does not yet exist, i.e., “numerous critical core technical documents and modeling basis information” that are still in development and are not yet completed. Id. at 1. Second, it is not disputed that DOE has made available a massive amount of documentary material – 3.5 million documents, amounting to over 30 million pages, including redacted versions of some privileged documents and privilege logs for hundreds of others. Third, there is no dispute that DOE has not produced a number of important documents that are still in development. These include the TSPA-LA and PSA, both of which appear to be large, complex, and of critical importance to DOE’s license application. Fourth, there is no dispute that DOE has “knowingly” certified without completing all of its documentary material. DOE has taken its legal position – that completion of all documentary material is not required – openly and in apparent good faith.

A. Language and Structure of the Regulation

As the Commission stated in this proceeding, the proper interpretation of a regulation 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.

CLI-06-05, 63 NRC 143, 154 (2006) (internal quotation marks and citation omitted).

Accordingly, we focus on the actual language of the key Subpart J regulations. The duty to produce documentary material is stated as follows:

Subject to the exclusions in § 2.1005 and paragraphs (b), (c), and (e) of this section, DOE shall make available, no later than six months in advance of submitting its license application for a geologic repository, the NRC shall make available no later than thirty days after the DOE certification of compliance under § 2.1009(b), and each other potential party, interested governmental participant or party shall make available no later than ninety days after the DOE certification of compliance under § 2.1009(b) – (1) 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, a potential party, interested governmental participant or party.

10 C.F.R. § 2.1003(a).

Several points can be gleaned from the plain language of the regulation. First, the duty to produce applies to “documentary material.” Thus, the definition of this term is important. Second, the duty applies to a subset of documentary material: “all documentary material . . . generated by . . . or acquired by” the potential party. DOE emphasizes this provision, and its use of the past tense. DOE Response at 8. Regardless of the tense, this clause conveys that possession or control of the documentary material is a pre-requisite of the duty to produce it. Third, the introductory clause to the regulation makes clear that there are several important exclusions to the duty to produce. The exclusions include “preliminary drafts,” “basic licensing documents generated by DOE,” 10 C.F.R. § 2.1003(b); and “any additional material created after the time of . . . initial certification,” 10 C.F.R. § 2.1003(e). Fourth, the duty to produce applies to all potential parties, not just to DOE.

Next, we turn to the definition of “documentary material.”

Documentary material means:

- (1) Any information upon which a party, potential party, or interested governmental participant intends to rely and/or cite in support of its position in the proceeding . . . ;
- (2) Any information that is known to, and in the possession of, or developed by the party that is relevant to, but does not support, that information or that party’s position; and
- (3) All reports and studies, prepared by or on behalf of the potential party . . . including all related ‘circulated drafts,’ . . . regardless of whether they will be relied upon and/or cited.

10 C.F.R. § 2.1001.

The first category of this tripartite definition refers to information on which the potential party “intends to rely” when the license application proceeding commences. Nevada focuses heavily on this provision – claiming that its use of the word “intends” means that, at the moment of its initial document production and certification, DOE must have finalized and included all of the core technical documentary material it intends to rely on in the licensing proceeding. Tr. at 1225, 1229, 1239. The second and third categories of the definition of documentary material,

however, use the past tense, referring to information “developed” or “prepared” by the potential party and to drafts that have been “circulated.”

The foregoing regulatory provisions lead the Board to conclude that the duty to produce documentary material applies only to documents and information in existence at the time when the initial certification occurs, and do not impose a requirement that DOE, or any other party, must delay certification until all documentary material that it intends to rely on is finished and complete. Those provisions speak predominately in the past tense, referring to documents that have been generated, acquired, developed, or prepared. They refer to documents in the possession or control of the potential party, i.e., currently in existence. The regulations contemplate that additional documentary material will be “created after” the initial certification and that incomplete documents and drafts (except for circulated drafts), simply do not constitute “documentary material” and thus there is no duty to produce them. Meanwhile, nothing in the plain language of the regulations conforms with Nevada’s position – that DOE, or any other potential party, must finish and complete all documentary material it plans to rely on before it can certify.

Nevada’s heavy reliance on the future-tense word “intends,” standing alone, cannot sustain the weight of Nevada’s position – that DOE must have completed all of the core technical documents it plans to rely upon before it can certify. First, the use of “intends,” in this context, is simply the natural result of the fact that the “reliance” in question will necessarily occur in the future, when DOE submits the license application. There is no good reason to construe it as a broad mandate that all core technical documents that DOE intends to rely on must be finished and frozen six months prior to the license application. We do not think that the Commission would have articulated such a fundamental requirement in such an obscure and incidental way.

Like Congress, the Commission is not to be assumed to “hide elephants in mouseholes.” Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (quoting Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 468 (2001)).

Second, Nevada’s interpretation of the word “intends” leads to unreasonable results. If, as Nevada argues, DOE must have completed all of the documents it plans to rely upon before it can certify, then “what’s sauce for the goose is sauce for the gander,” Tr. at 1281, and the same rule applies to all other potential parties when they submit their initial certifications. Under this approach, all other potential parties must have finished all of the core technical documents they intend to rely upon in the proceeding on a date that is outside of their control and imposed on them by DOE’s schedule – 90 days after DOE’s initial certification. As Nevada agrees, 10 C.F.R. § 2.1003(a)(1) applies equally to all potential parties. Tr. at 1323-24. But Nevada’s construction imposes unfair burdens and limits on other potential parties because it would be unreasonable to expect that they must finish and freeze their core technical documents 90 days after a date chosen by someone else (i.e., DOE’s certification date).

Our conclusion – that the duty to produce documentary material only applies to documentary material in existence (with a reasonable lag time) at the moment of certification – is supported by the entire regulatory structure. First, as stated, the regulations require a potential party to “continue to supplement its documentary material . . . with any additional material created after the time of its initial certification.” 10 C.F.R. § 2.1003(e) (emphasis added). We focused on this provision, and others, in our 2004 ruling, repeatedly stating (although not directly holding) that the duty to produce documentary material applied to “extant” documents. LBP-04-20, 60 NRC 300, 325-26 (2004). Similarly, 10 C.F.R. § 2.1009(b) calls upon DOE to “update this certification at the time DOE submits the license application,” and 10 C.F.R. § 2.1012(a) reiterates that the license application must be “accompanied by an updated certification.” 10 C.F.R. §§ 2.1009(b), 2.1012(a) (emphasis added). These provisions would be

essentially superfluous if, as Nevada would have it, DOE is obliged to finish, produce, and freeze all of its core technical documentary material at its initial certification.¹²

B. Regulatory History

Although the structure and language of the regulations are plain enough, the regulatory history of 10 C.F.R. § 2.1003 and the associated provisions clearly confirm our construction of the regulation. These regulations were the product of a 1988-89 negotiated rulemaking involving DOE, Nevada, and other potential parties, 54 Fed. Reg. 14,925, 14,925-26 (Apr. 14, 1989), and have been amended several times since then. Yet Nevada has provided us with no statement by the Commission, Nevada, or any other commenter, to the effect that all core technical documentary material that each party intends to cite or rely upon must be finished and available on the LSN when it makes its initial certification. To the contrary, as DOE points out, see DOE Response at 15, the Commission expressly acknowledged that the “development of the DOE license application and supporting materials is an ongoing process,” 66 Fed. Reg. at 29,459, and added provisions allowing and requiring DOE and others to supplement their documentary material with “material . . . created after the initial [certification] period.” 69 Fed. Reg. at 32,843. If Nevada’s position were correct, we would have expected it, and others, to have raised a great hue and cry when the Commission made these statements. None is cited by Nevada. In short, the regulatory history supports our judgment that Subpart J does not prohibit certification until all “reliance” documentary material is completed.

C. Practical Consequences

Nevada predicts dire consequences if its position is not accepted.

[I]f 10 C.F.R. Part 2 and the LSN are to have any serious role as “pre-License Application discovery supplanting the traditional post-LA discovery,” then the

¹² In addition, we find no legal or regulatory support for Nevada’s assertion that the duty to produce all documentary material DOE intends to rely on applies only to “core technical documents and modeling basis documentary material.”

foregoing documents [TSPA-LA, PSA, etc.] need to be complete and available to Nevada, the NRC, and the other parties a “full and fair six months” before DOE files its LA.

Motion at 37. And again:

The Board’s mission is to ensure compliance by all the parties with their pre-LA obligations to make all their Documentary Material publicly available. The cornerstone of the parties’ obligations, and of the Board’s charter, is the Six-Month Rule. If DOE’s interpretation were credited, and if DOE could certify its LSN as complete without regard to the character and content of the documents certified (i.e., be permitted to “certify whatever it happened to have complete at the moment”), the letter and intent of the Six-Month Rule would be eviscerated. While DOE will predictably accumulate subsequent Documentary Material and will supplement its initial certification, a DOE certification update “at LA” containing the “core technical documents and modeling basis documents to support the LA” would by definition render the entire concept of pre-LA discovery a sham.

Motion at 43-44 (emphasis omitted).

We disagree. First, this Board’s “mission” is to resolve disputes by interpreting and applying the regulations as they are written. The preceding legal analysis shows that there is no regulatory requirement that DOE finish all documentary material it will rely on, much less, all “core technical documents and modeling basis documents” it will rely on, when it submits its initial certification. Indeed, the regulations demonstrate a contrary result.

Second, 10 C.F.R. Part 2 establishes a regulatory regime that accommodates the filing of contentions at numerous stages in the HLW proceeding (not just at the outset), and belies Nevada’s dire predictions. Under the regulations, DOE must make all of its extant documentary material available at least six months prior to the tendering of its license application. 10 C.F.R. § 2.1003(a). Any documentary material that DOE creates (e.g., finishes) after its initial certification must be made available in its monthly supplements. 10 C.F.R. § 2.1003(e); Revised Second Case Management Order (July 6, 2007) at 21 (unpublished). In addition, DOE must

update its document production when it submits its license application. 10 C.F.R. § 2.1009(b). Even after DOE tenders the license application, it must continue to supplement its documentary material, and discovery will continue for approximately two more years.¹³

As long as DOE continues to create, generate, and make available new and material documentary material, Nevada and other potential participants will have the opportunity to file timely new and amended contentions in the HLW proceeding, pursuant to 42 U.S.C. § 2239(a)(1)(A). Certainly, the initial six-month period between DOE's initial certification and license application provides an "opportunity to frame focused and meaningful contentions" at the initial juncture, 30 days after NRC docket the license application. See 10 C.F.R. § 2.309(b)(2). But it is not the only opportunity, and the regulations make clear that, under appropriate circumstances, petitions to intervene, requests for hearing, and new and amended contentions may be filed after the initial 30-day deadline. See 10 C.F.R. §§ 2.309(f)(2) and 2.309(c).

D. NNWTF's New Issue

NNWTF raises a completely new issue, unrelated to Nevada's Motion. The Motion complains about DOE's failure to include unfinished core technical documents in its production of documentary material. NNWTF ignores this point and instead asserts that DOE's document collection "does not meet searchability standards," Tr. at 1254, because the documents are "inappropriately indexed" and they are "impossible to find on the LSN, using the title or author" search method. NNWTF Response at 1-2. It is NNWTF's position that "any document not accessible by title or the name of the author should be considered missing." Id. at 2.

¹³ See 10 C.F.R. §§ 2.1018, 2.1019 and 10 C.F.R. Part 2, Appendix D. The Commission also noted, in the context of "additional material . . . created after the initial [certification]" the "Atomic Safety and Licensing Board can always direct that additional discovery or discovery supplementation must take place." 69 Fed. Reg. at 32,843.

The regulations do not specify whether DOE had any right to reply or respond to NNWTF's new issue.¹⁴ In any event, DOE did not respond or request leave to respond. Instead, at the oral argument, DOE objected to NNWTF's complaint, on the grounds that "the [T]ask [F]orce did not file any motion to strike on the basis of header coding" and "[i]t's not part of Nevada's motion." Tr. at 1255. (For its part, Nevada had already conceded this point. See id. at 1222-24.) Nevertheless, the Board allowed NNWTF to continue its oral presentation so that we could consider the issue. Id. at 1256.

As an initial matter, the Board agrees that it is problematic for a potential party to raise an entirely new complaint in its answer to another party's motion. Answers should focus (pro or con) on the issues raised by the movant, and should not raise totally new grounds for relief. Even so, it is certainly possible that an answer will raise new facts or arguments (related to the originally asserted grounds for relief) that neither the moving party nor the opposing party raised or considered. In such cases, the movant and/or opponents would do well to request leave to respond to such new facts or arguments. In this case, NNWTF should have filed its own motion to strike, based on its apparent assertion that DOE's document production failed to comply with 10 C.F.R. §§ 2.1003(a) and 2.1009 because it was inadequately indexed and failed to meet "searchability standards." The parties could have then briefed the factual and legal issues involved in such a motion. Likewise, DOE, if it thought NNWTF's point significant, could have filed a motion for leave to respond to NNWTF's response that raised new facts and arguments.

Stepping beyond the procedural defect in NNWTF's position, we turn to the "merits" of its position. We agree that DOE's document production involves a number of cases where parts of the bibliographic headers seem to be meaningless numbers or letters. See Tr. at 1294-95.

¹⁴ 10 C.F.R. § 2.323(c) states that a moving party has no right to reply. 10 C.F.R. § 2.710(a) states that the party opposing a motion for summary disposition may respond in writing to new facts and arguments presented in any statement filed in support of the motion. Neither is directly on point here.

These documents are, however, searchable via full-text search. In addition, NNWTF failed to give us any indication as to the proportion of DOE's 3.5 million LSN documents that suffer from defective headers.

When questioned, DOE stated that it had investigated the headers challenged by NNWTF (i.e., those associated with the draft geologic repository supplementary environmental impact statement) and found that they involved a group of approximately 800 documents. Id. at 1292. DOE said that it has already updated and corrected the headers for those 800 documents. Id. at 1293. In response to further questioning, DOE stated that it had been "updating" the headers on its LSN document production regularly since 2004 and mentioned the figure of 160,000 documents. Id. at 1293-94. This is a significant number. Nevertheless, we do not know how many of these header changes were made after the DOE Certification on October 19, 2007, or to what extent these header problems rendered the documentary material unretrievable, as opposed to being simply somewhat more difficult to locate (e.g., via full-text search). Nor are the regulations clear as to whether "header searchability" is a prerequisite of certification under 10 C.F.R. § 2.1009.

Given its slim factual and legal foundation, the Board concludes that the NNWTF Response does not provide sufficient basis, either independently or in connection with Nevada's motion, to strike the DOE Certification. "Perfection is not required" in the document production, LBP-04-20, 60 NRC at 313, and in the context of DOE's 3.5 million documents, we cannot say, without a great deal more information, that the header problems mentioned by NNWTF warrant striking DOE's effort.

IV. CONCLUSION

As we stated in our December 12, 2007 Order, we conclude that Nevada's motion to strike DOE's October 19, 2007 certification must be denied because the Subpart J regulations recognize that potential parties, such as DOE, will continue to develop, prepare, and finalize

additional documentary material, and to supplement their document production, after the date of initial certification. There is no requirement that DOE, or any other potential party, finalize and freeze all documentary material before it can certify. The duty to produce documents applies to documentary material in existence (with a reasonable lag time) on the date of certification.¹⁵

Any appeal from the December 12, 2007 Order, as supplemented by this memorandum, should be filed within ten days of service hereof. See 10 C.F.R. § 2.1015.

The Pre-License Application
Presiding Officer Board

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

/RA/

Alex S. Karlin
ADMINISTRATIVE JUDGE

/RA/

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 4, 2008

¹⁵ We note, however, that the denial of the Motion is without prejudice to the opportunity to timely file another motion to strike DOE's initial certification if new facts become available.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
U.S. DEPARTMENT OF ENERGY) Docket No. PAPO-00
)
)
(High-Level Waste Repository:)
Pre-Application Matters))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing PAPO BOARD ORDER (SETTING FORTH FULL REASONING FOR DENYING NEVADA'S MOTION TO STRIKE) (LBP-08-01) have been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (*)).

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