

January 24, 2008

**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))	DEN-3
)	

**THE DEPARTMENT OF ENERGY'S MOTION TO STRIKE
JANUARY 14, 2008 CERTIFICATION OF THE CITY OF LAS VEGAS**

The Department of Energy (DOE) moves to strike the January 14, 2008 certification to this Board made by the City of Las Vegas (Las Vegas), Nevada pursuant to 10 C.F.R. § 2.1009. Las Vegas's certification is invalid and does not evidence a substantial, good faith effort to establish, provide training on, and implement the procedures required by 10 C.F.R. § 2.1009 and, accordingly, to make available all documentary material as required by 10 C.F.R. § 2.1003.

Las Vegas's certification is premised on its apparent misunderstanding of the full scope of the terms "documents" and "documentary material." It, moreover, relies on the efforts of another potential participant to satisfy its independent obligations under the Licensing Support Network regulations contained at 10 C.F.R. Part 2, Subpart J. If Las Vegas wants to be a party to the licensing proceeding, it must comply with the rules established for the licensing proceeding. Fairness requires that all potential parties in the licensing proceeding comply in good faith with the requirements of Subpart J.

BACKGROUND

Las Vegas's involvement with what is now known as the Licensing Support Network (LSN) dates back to early meetings of what was then known as the HLW Licensing Support System Advisory Committee. *See* Exhibit A (June 29-30, 1988 minutes, page 22) and Exhibit B (October 10-11, 1990 Draft Minutes). In the early 1990's, the City formed a special committee called the Yucca Mountain Nuclear Repository Committee made up of the City Manager and two council members. *See* Exhibit C.

On January 14, 2008, Las Vegas filed with this Board a Certification of Compliance that is dated January 17, 2008. The Certification of Compliance appends the one-page certification of Margaret Plaster, who is identified as the official responsible for the administration of Las Vegas's responsibility to provide electronic files of its documentary material. This signed certification, also dated January 17, 2008, states that Las Vegas has implemented the procedures specified in 10 C.F.R. § 2.1009(a)(2).

Upon request, the City identified as its procedures four documents obtained from the State of Nevada and embodied in the attached Exhibit D (which also include a DOE memorandum addressing LSN obligations). The City stated that it obtained those documents in late 2007, read them, and "complied with the parts that were applicable to the City of Las Vegas." *See* Exhibit D. The State of Nevada's documents that were provided to Las Vegas in late 2007:

- embody instruction to a distribution list of *Nevada* personnel and agents regarding their obligation to retain and collect documents for production on the LSN;
- refer to training of *Nevada* staff, counsel, and contract consultants regarding document retention and production for the LSN and in connection with licensing litigation; and
- require certification of *Nevada* personnel to the responsible *Nevada* official of compliance with LSN procedures.

There is no indication that any Las Vegas staff or agents were provided such instruction or training or were subjected to such a certification requirement.

Las Vegas's January 17, 2008 certification also states that, to the best of the certifying official's knowledge, Las Vegas has identified and made electronically available the documentary material specified in 10 C.F.R. § 2.1003. The certification then makes the following statement: "The City of Las Vegas has not generated documents of its own and will rely on the document collections of the State of Nevada and Clark County."¹ Although Las Vegas's certification states that it intends to rely on the document collections of Nevada and Clark County, neither of those jurisdictions had certified their document collections at the time of Las Vegas's certification on January 14, 2008. Also, although Las Vegas certified that it has not generated documents of its own, Las Vegas did make one document available on the LSN. It is a report prepared on behalf of Las Vegas.² Finally, Las Vegas failed to provide an authentication statement that indicates where an authenticated image copy of the document can be obtained pursuant to 10 C.F.R. § 2.1003(a)(1).

ARGUMENT

The Board should strike Las Vegas's certification because that certification is facially invalid and clearly demonstrates that Las Vegas has not made a substantial, good faith effort to implement the procedures required by § 2.1009(a)(2) and make available its documentary material.

¹ The City of Las Vegas, Nevada's Certification of Compliance at 2 (attached hereto as Exhibit E).

² See LSN Accession No. [LAS000000001](#).

A. Las Vegas's Certification Is Facially Invalid.

The requirements for Las Vegas's LSN certification, like that of all potential participants in the Yucca Mountain proceeding, are set forth in 10 C.F.R. § 2.1009(b). That regulation requires Las Vegas's responsible official to certify that (i) "the procedures specified in paragraph (a)(2) of this section have been implemented" and (ii) "to the best of his or her knowledge, the documentary material specified in § 2.1003 has been identified and made electronically available."³

In its August 31, 2004 Memorandum and Order granting the State of Nevada's motion to strike DOE's earlier LSN certification, this Board emphasized that "a straightforward certification of compliance" is required to satisfy that regulation.⁴ The Board made clear as well that this command applies not only to DOE but also to "other participants" for "future certifications."⁵

Las Vegas's purported certification does not meet this standard. Las Vegas's certification recites the correct words required by § 2.1009(b), but then caveats that recital by stating that "Las Vegas has not generated documents of its own and will rely on the document collections of the State of Nevada and Clark County." That caveat precludes Las Vegas's certification from being valid.

In the first place, it is not credible or correct that Las Vegas has not generated any documents concerning Yucca Mountain. Subpart J defines "document" as "any written printed, recorded, magnetic graphic matter, or other documentary material, regardless of form or

³ 10 C.F.R. § 2.1009(b).

⁴ August 31, 2004 PAPO Order at 52.

⁵ August 31, 2004 PAPO Order at 48.

characteristic.”⁶ The one document produced by Las Vegas on the LSN was generated at the direction of the City. Further, review of Las Vegas’s web site (www.lasvegasnevada.gov) confirms that Las Vegas has generated “documents” concerning Yucca Mountain.

It may be that Las Vegas *meant*--although it did not say so--that it has not generated “documentary material.” However, that too would be a facially inadequate basis for Las Vegas’s certification. Such a disavowal would be an inadequate basis for certification because the definition of “documentary material,” and therefore a potential participant’s obligation to make information available on the LSN, is not limited to information generated by the potential participant.

The definition of “documentary material” for purposes of this proceeding encompasses three categories of information, often referred to generally as Class 1 or supporting information, Class 2 or non-supporting information, and Class 3 or relevant reports and studies. While Class 3 references reports or studies “prepared by or on behalf of” the potential participant, Class 1 and Class 2 information are not similarly constrained.

Class 1 documentary material encompasses any information on which a potential participant “intends to rely and/or to cite in support of its position.”⁷ This definition is not qualified by the phrase “generated by the potential participant” or the like. The plain meaning of this definition is that a potential participant must make available all information upon which it intends to cite or rely *regardless of who generated the document*.

Likewise, Class 2 documentary material includes 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

⁶ 10 C.F.R. § 2.1001 (definition of “document”).

⁷ 10 C.F.R. § 2.1001.

party's Class 1 information.⁸ This definition self-evidently is not confined to documents generated by the potential participant. A potential participant must make available all non-supporting information known to it and in its possession, irrespective of who generated the document.

To the same effect is § 2.1003(a) which defines a potential participant's production obligation. That regulation requires a potential participant to make available on the LSN "[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**" it.⁹ That provision could not be clearer. A potential party is required to make available on the LSN all the documentary material in its possession even if it did not generate that information or direct its preparation. The production obligation applies to all documentary material in a potential participant's "possession or control," irrespective of authorship.¹⁰

In light of these provisions, a participant cannot fulfill its LSN obligations by asserting that it generates no documents of its own or by simply indicating its intent to rely on the document collection of another.

Nor should Las Vegas be allowed the simple expedient of submitting a new certification that omits the last statement. A certification must be made in good faith and be based in reality. If a potential participant has not established and implemented the required procedures and training, it cannot overcome that failure merely by filing a certification that recites the language of § 2.1009(b). It must take appropriate corrective action so it can certify in good faith that it has

⁸ *Id.* (emphasis added).

⁹ 10 C.F.R. § 2.1003(a)(1).

¹⁰ January 4, 2008 PAPO Board Memorandum at 12, 13.

in fact established and implemented the necessary procedures and training and that it has to the best of its knowledge made available all the documentary material in its possession, custody and control.

B. Las Vegas's Certification Does Not Demonstrate Compliance With the Applicable Regulations.

Even if removing the “caveat” from Las Vegas’s certification corrected its facial invalidity, that would not remedy the underlying substantive deficiencies of its certification. The PAPO Board should strike Las Vegas’s certification for the additional reason that it reveals that Las Vegas did not make a substantial, good faith effort to comply with 10 C.F.R. § 2.1009(a)(2 & 3). Las Vegas implemented no LSN procedures, conducted no training and, accordingly, cannot in good faith certify under § 2.1009(b).

The PAPO Board made clear in its August 2004 Order that the procedures required by § 2.1009(a)(2) must amount to “an advance plan for gathering the right documents.”¹¹ To accomplish that, the PAPO Board observed, the procedures cannot be after-the-fact creations. The “procedures are to precede the implementation and the certification is to assure that the procedures were implemented.”¹² The Board additionally reminded potential participants in its September 9, 2005 Order that a “potential party ‘may not be granted party status under § 2.309, or status as an interested governmental participant under § 2.315, if it cannot demonstrate substantial and timely compliance with the requirements of § 2.1003.’”¹³ Part of implementation of the procedures is training of staff to those procedures and the responsibility to provide documentary material. 10 C.F.R. § 2.1009(a)(3).

¹¹ August 31, 2004 Order at 50.

¹² August 31, 2004 Order at 50.

¹³ September 9, 2005 Memorandum and Order at 2, citing 10 C.F.R. § 2.1012(b)(1).

These are obligations that Las Vegas has failed to meet. At the close of 2007, as its certification date approached, Las Vegas obtained from Nevada documents addressing Nevada's LSN procedures. But those documents cannot reasonably be read to represent *Las Vegas's* procedures. They are documents authored by and for Nevada. They were not adopted by or adapted to Las Vegas's circumstances. Neither were they distributed to Las Vegas personnel and agents to provide notice of an obligation to retain documents, to instruct them on procedures or criteria for identifying, retaining, and submitting documentary material, or to impose a requirement to certify that documentary material had been identified and provided. In short, they do not evidence what Las Vegas did; they evidence what Las Vegas *failed* to do.

Because Las Vegas failed to establish and implement procedures or conduct the required training, it cannot validly certify pursuant to § 2.1009(b) that it has in good faith made available all its documentary material. It is the process that must drive this conclusion. The predetermined conclusion cannot excuse compliance with the required process.

Nor is it sufficient for Las Vegas to declare that it intends to rely on the document collections of Nevada and Clark County. Each potential participant has an independent duty to implement its own procedures and training and make available the documentary material in its possession, custody or control. Las Vegas has this duty not only for extant documentary material but also going forward for documentary material that may come into its possession, custody or control, whether through its own efforts or through the recently-announced joint representation agreement among Nevada, Clark County and Las Vegas.¹⁴

¹⁴ See Exhibit F (January 16, 2008 City Council Agenda, line 42; record of vote; and copy of Confidentiality and Joint Representation Agreement signed by City of Las Vegas). These materials are also available at: <http://www5.lasvegasnevada.gov/sirepub/pubmtgframe.aspx?meetid=397&doctype=Agenda>.

And while a potential participant does not have to make available on the LSN duplicates of documentary material that are known to be already available on the LSN,¹⁵ Las Vegas cannot avoid its LSN obligations in reliance on its expectation that another participant may later put documents on the LSN. Las Vegas had the obligation to make a good faith determination of what it intends to cite or rely on and what is non-supporting of its licensing positions. It then had to ensure that such documentary material was available on the LSN *at the time it certified* either in its or another party's collection. That another party may *later* produce such documentary material does not fulfill Las Vegas's independent obligation to produce this material under the regulations at the time it certified.

Las Vegas should accordingly be required to establish and implement procedures to preserve, collect and make available all documents in its possession, custody and control, including emails, that qualify as documentary material. This includes documents in the possession, custody and control of City employees, consultants, experts, contractors, and other agents. It also requires demonstration that Las Vegas has trained those persons who perform work related to the proposed Yucca Mountain repository regarding these procedures. If such training and the implementation of such procedures require Las Vegas to produce additional documents on the LSN, then it should likewise be compelled to do so. Only then can a facially valid certification be deemed in good faith.

CONCLUSION

Las Vegas's certification is facially invalid and places in substantial doubt its independent good faith effort to comply with the requirements of 10 C.F.R. § 2.1009. Accordingly, the PAPO Board should strike it. In the alternative, the PAPO Board should call

¹⁵ 10 C.F.R. § 2.1003(a)(1).

upon Las Vegas to either substantiate why its certification should be accepted as good faith compliance with 10 C.F.R. § 2.1009 or compel it to remedy its deficiencies. The PAPO Board, moreover, should ensure that whatever reliance Las Vegas places on the LSN collections of Nevada or Clark County going forward is not a substitute for Las Vegas's independent compliance with LSN regulations.¹⁶

U.S. DEPARTMENT OF ENERGY

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¹⁶ Counsel for DOE conferred with the certifying official, Margaret Plaster, prior to the filing of this Motion. In accordance with 10 C.F.R. § 2.323(b), DOE certifies that it has made a sincere effort to resolve the issues raised in this Motion, but still seeks the relief discussed above.

January 24, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	Docket No. PAPO-00
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U.S. DEPARTMENT OF ENERGY)	ASLBP No. 04-829-01-PAPO
)	
(High-Level Waste Repository:)	
Pre-Application Matters))	

**THE DEPARTMENT OF ENERGY'S MOTION TO STRIKE
JANUARY 14, 2008 CERTIFICATION OF THE CITY OF LAS VEGAS
CERTIFICATE OF SERVICE**

I certify that copies of the foregoing THE DEPARTMENT OF ENERGY'S MOTION TO STRIKE JANUARY 14, 2008 CERTIFICATION OF THE CITY OF LAS VEGAS in the above-captioned proceeding have been served on the following persons on January 24, 2008 through the Electronic Information Exchange.

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