

January 28, 2008

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

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

**BRIEF OF THE NUCLEAR ENERGY INSTITUTE OPPOSING THE  
STATE OF NEVADA'S APPEAL FROM THE PAPO BOARD'S  
JANUARY 4, 2008 AND DECEMBER 12, 2007 ORDERS**

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THE STATE OF NEVADA’S APPEAL FROM THE PAPO BOARD’S  
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I. Introduction

By Order and Memorandum dated December 12, 2007 and January 4, 2008, respectively, the Pre-License Application Presiding Officer (“PAPO”) Board denied a motion filed by the State of Nevada (“Nevada” or “State”) seeking to strike the October 19, 2007 certification by the U.S. Department of Energy (“DOE” or “Department”) of its document production to the Licensing Support Network (“LSN”). On January 15, 2008, the State submitted a notice of appeal of the Board’s denial and an associated brief. Pursuant to 10 C.F.R. § 2.1015(b), the Nuclear Energy Institute (“NEI”) hereby files its brief in opposition to Nevada’s appeal.<sup>1</sup>

II. Argument

As stated by Nevada, “This appeal raises the question of whether the Department of Energy . . . can effectively deprive its adversaries—the State of

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<sup>1</sup> NEI is participating as a “potential party” in the proceedings before the PAPO Board and, by answer filed November 8, 2007, opposed Nevada’s motion below.

Nevada and others who oppose the planned nuclear waste repository at Yucca Mountain—and the Commission itself, of a six-month period of time to review DOE’s Documentary Material . . . .”<sup>2</sup> In fact, most of the State’s brief is occupied with a discussion of the self-conceived notion of what it has previously denominated the “Six-Month Rule.”<sup>3</sup> According to the State, “the whole point of the [Six-Month Rule] process is to afford a six-month period in order to draft meaningful contentions”.<sup>4</sup> Also according to the State, particularly required as part of DOE’s initial LSN document production are what it refers to as “core technical documents” and “critical documents.”<sup>5</sup>

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—and production of “core technical documents” and “critical documents” are not among them.

With respect to the regulations and what they require, much of the State’s argument is based on the history surrounding development of the LSN.<sup>6</sup> However,

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<sup>2</sup> Nevada Brief, p.1.

<sup>3</sup> *See id.*, pp. 1-19, 26-30.

<sup>4</sup> *Id.*, p. 27.

<sup>5</sup> *E.g., id.*, p. 23.

<sup>6</sup> *See, e.g., id.*, pp 9-16, 23.

“[a]s 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.”<sup>7</sup>

As detailed by the PAPO Board, the actual language of the “key Subpart J regulations” provides for initial certification of only that documentary material in existence at the time.<sup>8</sup> Certification must be updated with “any additional material created after the time of the . . . initial certification” and, in particular, “at the time DOE submits the license application.”<sup>9</sup> Further, the types of documents that must be produced – i.e., those constituting “documentary material,” as defined – are specified in categorical terms, and not in terms of specific documents. No special requirements apply to “core technical documents,” or “critical documents,” or the like.<sup>10</sup>

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<sup>7</sup> Memorandum, slip op. at 11 (internal quotation marks and citations omitted).

<sup>8</sup> *See id.*, pp. 11-15. Overall, LSN document production is subject to a “good faith” requirement. *See generally, e.g., infra* footnotes 13-16 and accompanying text.

<sup>9</sup> *Id.*, p. 14 (quoting specific Subpart J regulations; emphasis omitted).

<sup>10</sup> *See id.*, pp. 12-15.

That DOE has made all extant documentary material available is not in issue here.<sup>11</sup> Further, during the December 5, 2007 oral argument before the PAPO Board, below, Nevada’s attorney admitted that the regulations do not specify that such things as “core technical document[s]” must be produced prior to initial certification.<sup>12</sup> Accordingly, the Board correctly concluded that DOE’s certification complied with the requirements of the regulations.

Two additional points bear particular mention. First, the State takes issue with the PAPO Board’s decision on the *reductio ad absurdum* basis that, under the opinion, DOE could have certified its LSN document production at a time when it

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<sup>11</sup> See, e.g., *id.* pp. 10-11.

<sup>12</sup> >>JUDGE KARLIN: My problem is what regulation supports that? If you can give me some law that says that, that they must complete all core technical documentation before they can certify, then we can get somewhere.

>>MR. FITZPATRICK: Okay.

>>JUDGE KARLIN: But I don’t see – if I may, is there anything – these regs have been in development since 1989 or before. There was a negotiated rule making, REGNEG, I would call it, that developed these rules. Is there anyplace you can cite in all those 20 years, almost, where the State of Nevada articulated this position and said they have to have all core technical documents done before they can certify? Anyplace you can cite me for that?

>>MR. FITZPATRICK: 10CFR2.1003 and CFR2.1001.

>>JUDGE KARLIN: They don’t say that. We just discussed that they say you make documentary material available, and this is not documentary material, by definition.

>>MR. FITZPATRICK: I didn’t understand you to mean literally.

>>JUDGE KARLIN: No, I mean literally.

>>MR. FITZPATRICK: Okay. No, I don’t know of anywhere that that phrase core document – “core technical documentation” appears.

had available no documents whatsoever.<sup>13</sup> Such, however, is clearly not the case in that certification is subject to a test of “good faith.” As the PAPO Board has explained, good faith involves several factors.<sup>14</sup> These include, in the case of DOE’s initial certification, “initiat[ion of] the entire licensing process.”<sup>15</sup> Further, “[a]s the Applicant, DOE has the most critical role and responsibility in initiating this proceeding properly.”<sup>16</sup> Clearly, certification of the production of a null set of documents would not begin to satisfy DOE’s good faith obligation.

Second, the State’s purported concern over their need for certain documents at the time of DOE’s initial certification, i.e., in order to develop contentions,<sup>17</sup> is unavailing. As the PAPO Board pointed out, the Commission has developed a regulatory regime, embodied in 10 C.F.R. Part 2, that accommodates the filing of contentions at numerous stages of the Yucca Mountain licensing proceeding. This process adequately covers the need for sufficient time to prepare contentions.<sup>18</sup> Further, Nevada’s concerns over being “whipsawed”<sup>19</sup> and otherwise denied “the

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<sup>13</sup> See Nevada Brief, p. 19.

<sup>14</sup> See *In the Matter of U.S. Department of Energy (High-Level Waste Repository)*, LBP-04-20, 60 NRC 300, 313-15 (2004).

<sup>15</sup> *Id.* at 315.

<sup>16</sup> *Id.*

<sup>17</sup> Nevada Brief, pp. 28-30.

<sup>18</sup> See Memorandum, slip op. at 15-17.

<sup>19</sup> Nevada Brief, p. 28.

basic fairness of due process”<sup>20</sup> are purely theoretical and based on nothing more than speculation.

In addition, as the State is surely aware, docketing and a notice of hearing will not occur until after the license application (“LA”) is tendered by DOE and has successfully undergone an acceptance review by the NRC.<sup>21</sup> That review has been estimated to take three to six months.<sup>22</sup> Following docketing and notice in the Federal Register there will be an additional 30 days to prepare contentions.<sup>23</sup> 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.<sup>24</sup> Thus, the State is not and cannot be prejudiced by the absence of any material from DOE’s initially certified document production.

Moreover, Nevada already has more than enough material to proceed with the formulation of contentions now. DOE’s certified LSN document collection

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<sup>20</sup> *Id.*, p. 29.

<sup>21</sup> *See* 10 C.F.R. § 2.101(e).

<sup>22</sup> *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)

<sup>23</sup> *See* 10 C.F.R. § 2.309(b)(2).

<sup>24</sup> *See* 10 C.F.R. § 2.309(c).

includes over 3.5 million documents, estimated to exceed 30 million pages.<sup>25</sup> In fact, as of mid-2004 Nevada had access to more than a million documents.<sup>26</sup> Another 2.1 million have been available since May, 2007.<sup>27</sup> It is disingenuous for the State 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 after submittal of the LA to complete the job.

In this regard, it is interesting to note that, at the same time the State is protesting the absence of certain information in DOE's certified document production, it is complaining about the inclusion of too many documents.<sup>28</sup> This "Goldilocks" attitude toward certification – insisting that document production must not be "too big" or "too small," but "just right" – suggests that the State will never be satisfied.

In sum, there is no requirement for DOE to comply with a Six-Month Rule, or to include in its initial certification the specific documents identified in the

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<sup>25</sup> See Press Release, Department of Energy, "U.S. Department of Energy Certifies Its Document Collection for Yucca Mountain License Application" (Oct. 19, 2007).

<sup>26</sup> See, e.g., Answer of the Department of Energy to the State of Nevada's Motion to Strike (June 22, 2004), pp. 14-15.

<sup>27</sup> See, e.g., The Department of Energy's Response to 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 (November 9, 2007), pp. 1-2.

<sup>28</sup> See Nevada Brief, pp. 16-17.

State's Brief. Further, the State is not prejudiced by DOE's initial certification. Accordingly, that certification should neither be stricken nor otherwise disturbed.

### III. Conclusion

The Commission should affirm the decision of the PAPO Board below and dismiss Nevada's appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing "Brief of the Nuclear Energy Institute Opposing the State of Nevada's Appeal from the PAPO Board's January 4, 2008 and December 12, 2007 Orders" 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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