

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF BRIEF IN OPPOSITION TO STATE OF NEVADA'S APPEAL
FROM THE DECEMBER 12, 2007 AND JANUARY 4, 2008 PAPO BOARD ORDERS

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INTRODUCTION

On January 15, 2008, the State of Nevada filed a Notice of Appeal¹ and supporting brief² (collectively, "Appeal") from the decision³ of the Pre-License Application Presiding Officer (PAPO) Board ("Board"). The Board denied Nevada's October 29, 2007 motion⁴ to strike the Department of Energy ("DOE") certification of its Licensing Support Network ("LSN") document collection and to suspend the certification obligations of other potential parties until DOE had

¹ The State of Nevada's Notice of Appeal from the PAPO Board's January 4, 2008 and December 12, 2007 Orders (Jan. 15, 2008) ("Notice of Appeal").

² The State of Nevada's Brief on Appeal from the PAPO Board's January 4, 2008 and December 12, 2007 Orders (Jan. 15, 2008) ("Nevada Brief"). Consistent with 10 C.F.R. §§ 2.1015(b) and 2.1017, Nevada served its Notice of Appeal and brief electronically on January 15, 2008. The Staff also files its reply consistent with these provisions.

³ The decision consists of two orders. The first Order was issued "to provide advance notice to the State of Nevada, and other potential parties who are obliged to produce their own documentary material, and submit their own certifications, on January 17, 2008." Order (Denying Motion to Strike) (Dec. 12, 2007) (unpublished) ("December Order") at 2 (citing 10 C.F.R. § 2.1003(a)). The Board later issued a memorandum setting forth its full reasoning for denying Nevada's Motion to Strike. *U.S. Dep't of Energy* (High-Level Waste Repository: Pre-Application Matters), LBP-08-01, 67 NRC __ slip op. (Jan. 4, 2008).

⁴ 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").

validly certified its LSN collection. December Order at 1. The Board held that “[t]here is no requirement that DOE, or any other potential party, finalize and freeze all documentary material before it can certify.” LBP-08-01 at 20. Nevada raises no factual issues in its appeal. Rather, Nevada argues that the Board’s legal analysis is mistaken. Nevada Brief at 2.

Pursuant to 10 C.F.R. § 2.1015(b), the Staff of the U.S. Nuclear Regulatory Commission (“Staff”) submits this brief in opposition to Nevada’s Appeal. For the reasons set forth herein, the Staff submits that Nevada’s appeal should be denied and that the Board’s December Order and LBP-08-01 should be affirmed. The Board properly applied legal standards and, in so doing, reached the correct legal conclusion.

BACKGROUND

A. Prior Dispute

Nevada has previously raised issues relating to DOE’s compliance with its LSN certification requirements, specifically 10 C.F.R. §§ 2.1003 and 2.1009. In 2004, when DOE certified its document collection pursuant to 10 C.F.R. § 2.1009, Nevada filed a motion to strike.⁵ The Board granted Nevada’s motion, and held that “DOE did not meet its regulatory obligation to make all of its documentary material available”⁶ The Board stated that DOE’s certification obligation embodied a good faith standard for document production. *Id.* at 314. The Board found this standard was not met because DOE had not yet completed its document and privilege reviews and therefore failed to produce a significant number of documents that were in existence at the time of DOE’s certification. *Id.* at 316-37, 328. Significantly, however,

⁵ Motion to Strike the Department of Energy’s LSN Certification and for Related Relief (July 12, 2004).

⁶ *U.S. Dep’t of Energy* (High-Level Waste Repository: Pre-Application Matters), LBP-04-20, 60 NRC 300, 303 (2004).

the Board also stated that the requirement to produce “all documentary material” should not be read literally and that “perfection is not required” in order for a party to meet its regulatory obligations. *Id.* at 313-14.⁷

B. Current Dispute

On October 19, 2007, DOE certified the availability of its documentary material on the LSN as required by 10 C.F.R. § 2.1009 for the second time.⁸ Thereafter, on October 29, 2007, the State of Nevada filed a motion in which it asked the Board to strike DOE’s LSN certification and to suspend the 90-day obligations of Nevada and other prospective parties until DOE validly certified. Motion at 1. Oral arguments on Nevada’s Motion were held by the Board on December 5, 2007. See LBP-08-01 at 3.

In its decision, the Board viewed the central issue as “whether the duty to produce ‘all documentary material . . . generated by, or at the direction of, or acquired by a potential party’ pursuant to § 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.” LBP-08-01 at 10. The Board denied Nevada’s Motion and held that DOE had not violated its duty to produce all documentary material because the “duty to produce documentary material only applies to extant documents.” *Id.* The Board reasoned that the plain language, structure, and history of the rule support this legal interpretation and application. *Id.* at 10-17. In addition, the

⁷ The Board noted “DOE and the State (of Nevada) agree that perfection is not required.” *Id.* at 313 n.26 (internal citations omitted). DOE appealed the Board’s decision on other grounds. See The Department of Energy’s Brief on Appeal from the PAPO Board’s August 31, 2004 Order (Sept. 10, 2004). Consequently, the good faith standard and whether perfection was required were not addressed by the Commission.

⁸ The [DOE’s] Certification of Compliance (Oct. 19, 2007) (enclosing “Certification of Availability of Documentary Material” signed by Dong Kim).

Board specifically stated that its denial of the Motion is without prejudice so that if new facts became available another motion to strike could be filed. *Id.* at 20 n.15.

On appeal, Nevada argues that the Board's legal analysis is incorrect. Nevada Brief at 2. Nevada asserts that the Board's decision will deprive potential parties of the six month period of time, specified in 10 C.F.R. § 2.1003(a), to review DOE's documentary material, and therefore inhibit Nevada's ability to form "meaningful contentions." See, e.g., Nevada Brief at 16, 17, 19. This rationale forms the basis for Nevada's Appeal.

DISCUSSION

I. Applicable Standard for Review

Nevada argues that its appeal of the Board's interpretation of 10 C.F.R. Subpart J raises a question of law that is reviewable *de novo* by the Commission. See Nevada Brief at 18 (citing *Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1 et al.)*, CLI-04-124, 60 NRC 160, 164 (2004)). The Staff agrees.

The Board's interpretation of the Commission's regulations is a legal issue and the appropriate standard of review for legal questions is *de novo*. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 29 (2000) (reviewing a legal question *de novo*) (citing *Sequoyah Fuels Corp. & Gen. Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding)*, CLI-97-13, 46 NRC 195, 206 (1997)). Under *de novo* review, a Board's legal ruling will be reversed if it is "a departure from or contrary to established law." See *Tennessee Valley Authority*, CLI-04-124, 60 NRC at 190 (citing 10 C.F.R. § 2.786(b)(4)(ii)).⁹

⁹ 10 C.F.R. § 2.786 has since been renumbered to 10 C.F.R. § 2.341. See Changes to Adjudicatory Process, 69 Fed. Reg. 2181, 2210 (Jan. 14, 2004). Although 10 C.F.R. § 2.341 does not apply to the high-level waste proceeding, see 10 C.F.R. § 2.341(a)(1), the standard it provides is (continued. . .)

II. Nevada's Grounds for Appeal are Unfounded

Nevada argues the Board's construction of the regulations (1) defeats the purpose that the regulations are supposed to serve, (2) eliminates DOE's requirement to produce material it intends to rely upon, (3) leads to unreasonable results, (4) precludes a meaningful six-month review, and (5) overlooks the regulatory history. See Nevada Brief at 19-29. Nevada relies on arguments similar to those presented previously to the Board.¹⁰

On appeal, Nevada reiterates that the fundamental purpose of the LSN is to allow parties to review documents in a timely fashion so that they can form "better focused contentions" resulting in a time savings during the proceeding. Nevada Brief at 5 (quoting Submission and 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, 14,926 (Apr. 14, 1989)). Nevada argues that the Board's Orders deprives it of the six-month period designed to allow "opponents like Nevada the opportunity to draft meaningful contentions." Nevada Brief at 1.

Notwithstanding Nevada's assertions, as shown below, the Board's interpretation of the regulations is fully consistent with the plain language of the regulation and the regulatory

(. . .continued)

instructive because the high-level waste appeal provision, 10 C.F.R. § 2.1015, does not address a standard of review.

¹⁰ Mindful of Commission guidance, and because the dispute involved facts within the purview of the parties, the Staff did not take a position below on whether DOE's certification should be upheld. See NRC Staff Answer to Nevada Motion to Strike Department of Energy Licensing Support Network Certification (Nov. 9, 2007) ("Staff Answer") at 5 n.12 (citing Procedures Applicable to the Proceedings for the Issuance of License for the Receipt of High-Level Radioactive Waste at a Geologic Repository, 56 Fed. Reg. 7787, 7794 (Feb. 26, 1991)). The Staff limited its response to a discussion of the regulatory requirements and the proposed standards to be applied in ruling on the dispute. See Staff Answer at 6. Because the Board did not adopt the Staff's suggested standard and Nevada does not address it in its appeal, the Staff does not address its proposed standard in this brief.

scheme adopted by the Commission. As a result, Nevada has not been deprived of a meaningful opportunity to draft its contentions.

A. Nevada Incorrectly Applies Principles of Regulatory Interpretation

Nevada argues that the Board's construction "nullifies the effect of the Commission's regulations." Nevada Brief at 19. Nevada claims that the Board incorrectly applied certain principles of regulatory construction and failed to properly interpret DOE's LSN obligations. *Id.* Nevada's arguments are based on the interpretive principles of regulatory intent and regulatory history, and an analysis of the meaning conveyed by the tense of the verb "intends" in the definition of documentary material (10 C.F.R. § 2.1001). *Id.* at 20-22, 27-28.

Nevada, however, does not consider that (1) a regulation means what its plain language and structure says¹¹ and (2) the regulation must be considered as a whole¹². Consequently, Nevada posits a legally incorrect result. The Board, however, correctly applied these principles.

1. The Board Correctly Interpreted the Plain Language of the Regulation

Nevada argues that under the regulation, DOE is required to produce all documents it "intends" to rely on at the time of DOE's initial certification, otherwise the "certification is pointless." Nevada Brief at 23. Nevada further asserts that all core technical documents must be finished and available on the LSN at the time of initial certification and that the Board's interpretation of the regulations is unreasonable because it allows DOE to certify when it has no documents or has yet to finalize documents it intends to rely on. *See id.* at 2, 22-23. Nevada's interpretation, however, ignores the plain language and structure of the regulation.

¹¹ *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 361 (2001); *Louisiana Energy Servs.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 299 (1997) (*LES*).

¹² *U.S. Dep't of Energy*, CLI-06-05, 63 NRC 143, 154 (2006) ("the entirety of the provision must be given effect").

The Board correctly interpreted the Commission's regulations, and reached a reasonable result. Citing an earlier Commission decision in this proceeding, the Board noted that "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.

LBP-08-01 at 11 (quoting *U.S. Dep't of Energy*, CLI-06-05, 63 NRC at 154 (internal quotation marks and citation omitted)).

The Board applied this principle of regulatory interpretation, by beginning with the plain language of 10 C.F.R. § 2.1003.¹³ The Board construed the regulation as delineating that: (1) the duty to produce applies to "documentary material," and only to documentary material that is in one's possession or control; (2) there are important exclusions from the duty to produce including preliminary drafts, basic licensing documents, and "any additional material created after the time of . . . initial certification;" and (3) all potential parties, not just DOE, have a duty to produce. See LBP-08-01 at 12 (internal citations omitted).

The Board also analyzed the definition of "documentary material" in 10 C.F.R. § 2.1001¹⁴ and, contrary to Nevada's position, concluded that "the duty to produce documentary material

¹³ In relevant part, 10 C.F.R. § 2.1003 requires that, "[DOE shall make available, no later than six months in advance of submitting its license application for a geologic repository, . . . and each other potential party . . . shall make available no later than ninety days after the DOE certification . . . [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, a potential party, interested governmental participant or party"

¹⁴ Documentary material is defined as "(1) Any information upon which a party, potential party, or interested governmental participant intends to rely and/or to 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.

applies only to documents and information in existence at the time when the initial certification occurs, and do[es] not impose a requirement that DOE, or any other party, . . . delay certification until all documentary material that it intends to rely on is finished and complete.” LBP-08-01 at 13. The Board determined that there is no duty to produce incomplete documents and drafts (except for circulated drafts) via the LSN. *Id.* Further, the Board noted that documentary material will be created after the initial certification. *Id.* at 13.

The Board reasoned that the predominate use of past tense words such as “developed” , “prepared” and “circulated drafts” in 10 C.F.R. § 2.1001 and the past tense of the words “generated” and “acquired” in both 10 C.F.R. § 2.1001 and 10 C.F.R. § 2.1003 referred to information in DOE’s possession and that nothing in the regulation was consistent with Nevada’s assertion that DOE or any other LSN participant must complete all documentary material it plans to rely on. *See id.* at 12-13. Also, the use of “intends” indicates DOE’s reliance on the information will occur when DOE submits its license application in the future. *Id.* at 13. Further, the Board concluded that “[t]here is no good reason to construe [the regulation] as a broad mandate that all core technical documentation that DOE intends to rely on must be finished and frozen six months prior to the license application,” because the Commission would not have left unstated such a “fundamental requirement.” LBP-08-01 at 13-14.

Noting that, “what’s sauce for the goose is sauce for the gander,” the Board found that applying Nevada’s interpretation would impose unfair burdens and limits on potential parties by requiring them to finish and freeze their own core technical documents within 90 days after DOE certifies, a date outside of their control and chosen by DOE. *Id.* 14 (internal quotation marks and citation omitted).

The wisdom of the Board’s interpretations is evident. The plain meaning of the terms used in the regulations, including provisions requiring production of documentary material in the possession or control of LSN participants, is that only existing documents must be made

available via the LSN at the time of DOE's initial certification. Thus, the Board correctly rejected Nevada's argument that the tense of the word "intends" requires that, at the time of certification, DOE must have already completed and produced all of the documentary material that DOE will use to support its position in the post-license application phase of the hearing. See *id.* at 13. Nevada provides no basis to question the reasonableness of the Board's ruling.

2. The Board Correctly Considered the Regulations as a Whole.

In contrast to Nevada's partial regulatory analysis, the Board applied the interpretive principle of giving meaning and effect to the regulation, read as a whole. *Id.* at 14.¹⁵ The Board concluded correctly that "the duty to produce documentary material only applies to documentary material in existence (with a reasonable lag time) at the moment of certification." LBP-08-01 at 14. The Board observed that the regulations require DOE to supplement materials created after the initial certification, and two different provisions require DOE to update its certification at the time it submits its license application. *Id.* (citing 10 C.F.R. §§ 2.1003(e), 2.1009(b), 2.1012(a)). Hence, the Board found that the requirement that DOE update its certification at the time DOE submits its license application, would be "superfluous if . . . DOE is obliged to finish, produce, and freeze all of its core technical documentary material at its initial certification." *Id.* at 14-15.

The Board's interpretation of the regulation as a whole is supported by Commission precedent and established principles of regulatory construction. See *Northeast Nuclear Energy Co.*, CLI-01-10, 53 NRC at 366 (stating the board is required to examine the agency's entire

¹⁵ For example, the Board has previously stated that "[a] statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." *U.S. Dep't of Energy*, LBP-04-20, 60 NRC at 329 n.49 (citing 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.05 (6th ed. 2000)).

regulatory scheme); *U.S. Dep't of Energy*, CLI-06-05, 63 NRC at 154. Nevada's interpretation would make the updating and supplementation requirements meaningless. See 10 C.F.R. §§ 2.1009(b), 2.1003(e).

In light of the update requirement for DOE and supplementation requirement for all LSN participants, it is clear that the overall scheme of the regulations is that DOE is only required to include documents in existence at the time of its initial LSN certification and does not require all core documents to be made available at initial certification. LBP-08-01 at 10, 14. Thus, by considering the Commission's entire regulatory scheme, the Board showed the weakness of Nevada's arguments and correctly concluded that only "extant" documentary material need be available at the time of initial certification.

3. The Regulatory History Supports the Board's Interpretation of the Regulations

Generally, regulatory history is consulted when the plain language of a regulation is ambiguous.¹⁶ In this case, as illustrated above, there are no ambiguities in the plain meaning of the Commission's regulations. Therefore, the Board's decision is sustainable based on the plain language and structure of the regulations alone. The Board, however, used the regulatory history to further support its decision. LBP-08-01 at 15. The Board correctly found that the regulatory history indicates that the Commission expected DOE to create materials after its initial certification and DOE, therefore, does not have to wait "until all 'reliance' documentary material is completed" before certifying. *Id.*

On appeal, Nevada asserts that the Board overlooked the applicable regulatory history

¹⁶ See *U.S. Dep't of Energy*, LBP-04-20, 60 NRC at 330-31 ("Because the plain language of the regulations is ambiguous . . . we look to the regulatory history to resolve this ambiguity and to ascertain the Commission's intent.") (citing *Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1)*, ALAB-900, 28 NRC 275, 288, *review denied*, CLI-88-11, 28 NRC 603 (1988); *Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251, 1269 (D.C. Cir. 2004) (referring to a statute's legislative history to resolve ambiguities)).

and if the Board is correct in its interpretation, Nevada was “misled” by the Commission. Nevada Brief at 27-28. Nevada argues the regulatory history indicates that DOE must make all the documentary material it intends to rely on (including a number of “critical documents”) available on the LSN at least six months before the license application is submitted. See, e.g., Nevada Brief at 9, 12, 27-28. Nevada’s position, however, is based on a misreading of the regulatory history.

First, nothing in the regulatory history indicates that DOE must have *all* of its core documentary material completed and on the LSN at the time of initial certification. Rather, the regulatory history indicates that one of the Commission’s reasons for creating the LSN was to provide “early access to potentially relevant licensing information as early as practicable” so parties can review the information earlier and submit better focused contentions, which in turn will result in an overall time savings in the proceeding. 54 Fed. Reg. at 14,926. In fact, the Commission has explicitly recognized on a number of occasions, that the creation of a license application is “an ongoing process,”¹⁷ and while much of DOE’s documentary material will be made available early, it is expected that additional material will be created after initial certification. See Licensing Proceedings for a High-Level Radioactive Waste Geologic Repository: Licensing Support Network, Submissions to the Electronic Docket, 69 Fed. Reg. 32,836, 32,843 (June 14, 2004). Furthermore, the Commission has specifically stated that the scope of “reliance” documentary material, in particular, may not be realized until after contentions are proffered, and therefore, the Commission expects that DOE would supplement its “reliance” documentary material when the license application is submitted. See 69 Fed. Reg.

¹⁷ Licensing Proceedings for the Receipt of High-Level Radioactive Waste at a Geologic Repository: Licensing Support Network, Design Standards for Participating Websites, 66 Fed. Reg. 29,453, 29,459 (May 31, 2001).

at 32,843. It is, however, expected that any documentary material created after initial certification will be made “available reasonably contemporaneous with its creation.” 66 Fed. Reg. at 29,460.

Thus, while the Commission expected participants to expend good faith efforts to make much of their documentary material available at the time of certification, as the Board noted, the Commission nonetheless anticipated that additional documentary material would be made available after an initial certification. See LBP-08-01 at 15 (citing 69 Fed. Reg. at 32,843). In fact, the Commission has included update and supplementation requirements in its regulations to accommodate information created after initial certification. 69 Fed. Reg. at 32,837, 32,843; 10 C.F.R. §§ 2.1009(b), 2.1003(e).

Second, Nevada has not pointed to anything in the regulatory history that would require specific “critical documents” to be made available on the LSN at the time of initial certification. Some of the “critical documents” Nevada claims should be available via the LSN at the time of DOE’s initial certification are required to be submitted with the license application. For example, the pre-closure safety analysis and post-closure assessment must be submitted with the license application pursuant to 10 C.F.R. § 63.21(c)(5) and (c)(11)-(13). See Nevada Brief at 15. The Commission has previously ruled, in rejecting Nevada’s request for the DOE draft license application to be made available on the LSN, that nothing in the regulatory history indicates that documentary material made available at initial certification must approximate the license application. *U.S. Dep’t of Energy*, CLI-06-05, 63 NRC at 150. Moreover, documentary material has been repeatedly described “as material that supports or underlies the license application,” but not the license application itself. *Id.* at 155.¹⁸ Hence, there is no requirement that DOE

¹⁸ See also Rule on the Submission and Management of Records and Documents Related to the (continued. . .)

make portions of its license application available at the time of its initial certification. *See id.* at 150.

Furthermore, to the extent DOE has not yet created or finalized a “critical document” at the time of initial certification, DOE is not required to make that document available at initial certification because the requirement to make documentary material available does not encompass preliminary drafts. 10 C.F.R. § 2.1003(a)(1). The Commission has explicitly stated that the only drafts that should appear on the LSN during the pre-license application phase are circulated drafts of reports or studies. *U.S. Dep’t of Energy*, CLI-06-05, 63 NRC at 154.

Third, contrary to Nevada’s argument, the six month period provided for in 10 C.F.R. § 2.1003(a) was not intended to act as a deadline by which DOE must make all of its documentary material available. *See, e.g., Nevada Brief* at 7, 12, 28. Rather, this timeframe was selected because the Commission believed it was an appropriate amount of time for participants to prepare for the licensing proceedings. 66 Fed. Reg. at 29,459. Therefore, while the Commission included a requirement that DOE make its documentary material available six months before it submits the license application, the Commission specifically acknowledged and agreed with DOE’s comment that “new information will continue to be produced during the period before DOE submits the license application.” *See id.* at 29,459-460.

Therefore, it is not reasonable for Nevada to suggest that the regulatory history indicates that the Board’s analysis is flawed or that it has been “misled” by the Commission. *See Nevada Brief* at 28. The regulatory history illustrates that the Commission has never stated that no

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Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste, 53 Fed. Reg. 44,411, 44,412 (proposed Nov. 3, 1988); Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository, 62 Fed. Reg. 60,789, 60,789 (proposed Nov. 13, 1997); 66 Fed. Reg. at 29,459; 69 Fed. Reg. at 32,841).

additional documentary material could be made available after an initial certification.¹⁹ Rather, it has always been recognized that the creation of a license application and production of documentary material was an ongoing process. However, even if it could be shown that Nevada's interpretation of the regulatory history is plausible, the Commission has recognized that the interpretation of administrative history cannot "conflict with the plain meaning of the wording used in that regulation." *U.S. Dep't of Energy, CLI-06-05*, 63 NRC at 154 (citing *Long Island Lighting Co.*, ALAB-900, 28 NRC at 288, *review denied*, CLI-88-11, 28 NRC 603 (1988)). As illustrated above, the plain meaning of the regulation indicates that additional information would be created after initial certification.

B. The Board's Interpretation Does Not Deprive Nevada of a Meaningful Opportunity to Draft Contentions

As discussed above, the Board's interpretation of the Commission's regulations is sound and does not support Nevada's suggestion that all documents DOE intends to rely on must be available or frozen six months before DOE can file its license application.²⁰ Although the six-month time period was chosen to avoid the potential for delay in the licensing proceeding, it is based on a balance between the need to provide an adequate pre-license application, documentary material review time, 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 or obsolete." 66 Fed. Reg. at 29,459.

¹⁹ Nevada cites to comments made by the NRC Staff during a 2001 public meeting held to explain NRC's repository licensing process for the proposition that *all* documents must be made available six months prior to LA submission. Nevada Brief at 12, 28. As the Staff has previously noted, these statements did not address the current dispute as to whether certification can occur before certain documents are completed or created. See Staff Answer at 7 n.16.

²⁰ Although Nevada disputes that it advocates that an LSN collection must be "frozen" at certification, see Nevada Brief at 23, Nevada clearly suggests that all key information which could be used to form the basis for a contention, must be available at the time of DOE's certification and not later. See, e.g., Nevada Brief at 1, 12, 19, 30.

The Board's ruling leaves intact Nevada's opportunity to access the LSN to acquire information that can be used to draft "meaningful contentions." In developing the rule, the Commission was fully aware that development of the DOE license application and supporting materials "is an ongoing process," 66 Fed. Reg. at 29,459, and included both LSN update and supplementation requirements. See 69 Fed. Reg. at 32,837, 32,843; 10 C.F.R. §§ 2.1003(e), 2.1009(b). Inasmuch as DOE is required to update its LSN certification when it submits its license application, the potential always existed that Nevada would not have a full six months prior to submission of the license application to review certain documentary material made available via the LSN. Specifically, additional documents would be made available when DOE updates its initial certification at the time DOE submits its license application, and when DOE supplements its LSN collection as required by 10 C.F.R. §§ 2.1009(b) and 2.1003(e). Under these regulations, Nevada should have sufficient time to draft meaningful contentions. In addition, information made available via monthly LSN supplements and DOE's updated certification will enhance Nevada's ability to draft meaningful contentions.

The opportunity to draft contentions extends beyond the six month period prior to license application submission.²¹ Contentions are not due in this proceeding until 30 days after a notice of docketing and hearing opportunity is issued. 10 C.F.R. § 2.309(b)(2). The Board has ordered participants in this pre-license application phase of the proceeding to certify supplementation of their LSN collection on a monthly basis. LBP-08-01 at 16 (citing 10 C.F.R. § 2.1003(e); Revised Case Management Order (July 6, 2007) (unpublished) at 21). As the Board noted, "[a]s long as DOE continues to create, generate, and make available new and material documentary material, Nevada and other potential parties will have an opportunity to

²¹ The Commission's rules permit contentions to be filed based on information that becomes available after the six month period. See 10 C.F.R. § 2.309(b)(2), (c)(1), (f)(2).

file timely new and amended contentions” *Id.* at 17. Thus, the fact that the regulations permit documentary material to be made available less than six months before and after submission of the license application cannot deprive Nevada of a meaningful opportunity to draft contentions.²² Nevada has not offered any basis to conclude that it will not be able to draft meaningful contentions by the contention deadline in 10 C.F.R. § 2.309.

Even if, at a later date, it can be shown that Nevada was deprived of a meaningful opportunity or that DOE failed to adequately certify, a remedy is available. The regulations provide for a delay in docketing of the license application until at least six months from the time of initial certification. 10 C.F.R. § 2.1012(a). Moreover, because the Board stated that its dismissal of Nevada’s Motion was without prejudice and that Nevada could re-file its motion if new facts become available, it would be premature to conclude that Nevada has been deprived of a meaningful opportunity to frame contentions. See LBP-08-01 at 20 n.15. Thus, Nevada’s assertion that the Board’s ruling deprives Nevada of a meaningful opportunity to draft contentions is speculative if not premature.

²² As of the date of certification, DOE had made 3.5 million documents available via the LSN. LBP-08-01 at 6 (citing DOE Response at 1). Thus, it is apparent that a considerable volume of information is available for Nevada to draft its contentions. DOE has previously noted that Nevada has already begun drafting contentions and intends to submit thousands. 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 (Nov. 9, 2007) at 2 (citing May 5, 2005 Tr. at 400-02 (statements of Joseph Egan and Charles Fitzpatrick) and Statement of Robert Loux, Executive Director of Nevada Agency for Nuclear Projects, in S. Tetreault, *Documents Added to Yucca Database*, Las Vegas Review Journal (May 1, 2007)).

CONCLUSION

For the reasons stated above, the Board applied the proper legal standards in denying Nevada's Motion to Strike. Nevada's Appeal should be denied and the December Order and LBP-08-01 should be affirmed.

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Dated at Rockville, Maryland
this 28th day of January, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF BRIEF IN OPPOSITION TO STATE OF NEVADA'S APPEAL FROM THE DECEMBER 12, 2007 AND JANUARY 4, 2008 PAPO BOARD ORDERS" in the above captioned proceeding, has been served on the following persons this 28th day of January, 2008, by Electronic Information Exchange.

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