

February 13, 2008

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:)	ASLBP No. 04-829-01-PAPO
Pre-Application Matters))	
_____)	

NRC STAFF ANSWER TO
THE STATE OF NEVADA'S MOTION FOR LEAVE TO FILE A LIMITED REPLY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") submits this answer in opposition to the State of Nevada's February 4, 2008 motion¹ for leave to reply to certain issues raised by the Department of Energy ("DOE") in response to Nevada's appeal of a Pre-License Application Presiding Officer (PAPO) Board ("Board") decision.²

BACKGROUND

On October 29, 2007, Nevada filed a motion ("Motion") asking the Board to strike DOE's certification of its Licensing Support Network ("LSN") document collection.³ The Board denied

¹ The State of Nevada's Motion for Leave to File a Limited Reply (Feb. 4, 2008).

² The decision consists of two orders. The first order provided advanced notice to the State of Nevada, and other potential parties of their obligation to produce their own documentary material, and submit their own certifications. Order (Denying Motion to Strike) (Dec. 12, 2007) (unpublished) at 2 (citing 10 C.F.R. § 2.1003(a)). The Board subsequently 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).

³ Motion to Strike DOE's October 19, 2007 LSN Recertification and to Suspend Certification (continued. . .)

Nevada's Motion, and on January 15, 2008, Nevada filed an appeal⁴ ("Appeal"). On January 25, 2008, DOE filed a responsive brief⁵ (the "DOE Answer") opposing Nevada's Appeal.

Nevada now moves for leave to file a reply to two of the arguments in DOE's Answer, which Nevada alleges 1) attempt to change the standard the Commission uses to evaluate Nevada's Motion and 2) uses selective quotes out of context to suggest that Nevada can frame contentions based on documents on the LSN.⁶

DISCUSSION

The Staff opposes Nevada's Motion because, as Nevada itself admits, there is no provision in Subpart J of the Commission's rules that explicitly allows Nevada to file a reply to DOE's Answer. Motion at 1. 10 C.F.R. § 2.1015 provides that "[n]o appeals from any Pre-License Application Presiding Officer or Presiding Officer order or decision issued under this subpart are permitted, except as prescribed in . . . this section." Although 10 C.F.R. § 2.1015 goes on to prescribe in detail the procedures that govern appealing both a Board order, including a PAPO order, (10 C.F.R. § 2.1015(b)), and an initial or partial initial decision, (10 C.F.R. § 2.1015(c)), to the Commission, it does not include any provision that allows Nevada to reply to DOE's Answer.⁷ Therefore, since the rules provide that appeals from Board orders and decisions are governed exclusively by 10 C.F.R. § 2.1015 and this section does not allow Nevada to reply, Nevada does not have a right to reply to DOE's Answer. Therefore,

(. . .continued)

Obligations of Others Until DOE Validly Recertifies (Oct. 29, 2007).

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

⁵ The Department of Energy's Brief on Appeal in Opposition to the State of Nevada's Notice of Appeal from the PAPO Board's January 4, 2008 and December 12, 2007 Orders (Jan. 25, 2008).

⁶ Nevada attached a copy of its proposed reply to its Motion.

⁷ There are also no other provisions elsewhere in Subpart J that would allow Nevada to reply to DOE's Answer.

Nevada's Motion should be denied.

However, if the Commission wishes to consider the Motion further, the Staff suggests that the Commission apply the analogous standards of 10 C.F.R. § 2.323 that govern a moving party's right to reply to an answer opposing its motion. Under 10 C.F.R. § 2.323(c), there is no right to reply to answers to motions. Permission to file a reply may be granted, but "only in compelling circumstances, such as where the moving party demonstrates that it could not have reasonably anticipated the arguments to which it seeks leave to reply."

Nevada has not shown compelling circumstances. The only argument Nevada offers in support of granting its Motion is the unsupported assertion that two of DOE's arguments are "unfair" and that they "go to the heart" of Nevada's appeal. Motion at 1. Unsupported allegations of unfairness and claims to the effect that DOE's arguments are well focused ("go to the heart" of Nevada's appeal) do not show compelling circumstances. Therefore, Nevada fails to satisfy the compelling circumstances standard.

Nevada does not show, or even claim, that it could not have anticipated DOE's arguments or that it could not have made responsive arguments in its Appeal. Nevada merely alleges, without explanation, that DOE's Answer included new statements, to which Nevada has never had a chance to respond. Motion at 2. Nevada's assertion that DOE included new statements, even if correct, is not the same as saying that Nevada could not have anticipated those arguments. Whether or not the specific arguments that DOE made and to which Nevada now seeks to reply could have been anticipated is a question to be decided on the basis of the relevant facts. However, Nevada's Motion does not offer any facts to support its position. Therefore, Nevada fails to show that DOE's arguments could not have been anticipated.

CONCLUSION

For the reasons stated above, the Staff submits that the State of Nevada's Motion for Leave to File a Limited Reply to DOE's Answer should be denied.

Respectfully submitted by,

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Dated at Rockville, Maryland
This 13th day of February, 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))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC Staff Answer to the State of Nevada's Motion for Leave to File a Limited Reply" in the above-captioned proceeding have been served on the following persons this 13th day of February, 2008, by Electronic Information Exchange.

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