

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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
)	

CLI-08-12

MEMORANDUM AND ORDER

The State of Nevada (Nevada) appeals¹ from the Pre-License Application Presiding Officer (PAPO) Board's denial² of Nevada's Motion to Strike the United States Department of Energy's (DOE's) certification of the availability of its documentary material on the Licensing Support Network (LSN) and to suspend the obligation of the other potential parties to the proceeding to make their documentary material available on

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) (Nevada's Notice); *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's Appeal).

² LBP-08-1, slip op., 67 NRC ____ (Jan. 4, 2008) (January Memorandum); Order (Denying Motion to Strike) (Dec. 12, 2007) (unpublished) (December Order). (The PAPO Board heard oral argument on Nevada's motion on December 5, 2007. It issued a short denial of Nevada's motion in December, followed by a memorandum setting forth its full reasoning in January.)

the LSN within ninety days thereafter. DOE,³ the NRC Staff,⁴ and the Nuclear Energy Institute (NEI)⁵ oppose Nevada's Appeal.

Nevada also filed a motion for leave to file a reply and a reply brief.⁶ DOE,⁷ the NRC Staff,⁸ and NEI⁹ answered opposing Nevada's motion for leave to file a reply (but requesting the opportunity to respond should Nevada be allowed to file its reply).

We agree with the PAPO Board's decision denying Nevada's motion to strike, and therefore, affirm its decision for the reasons it gives. We also deny Nevada's motion to file a reply.

I. NEVADA'S MOTION TO STRIKE DOE'S CERTIFICATION

Subject to certain exclusions, 10 C.F.R. § 2.1003 requires DOE to "make available, no later than six months in advance of submitting its license application for a geologic repository . . . all documentary material (including circulated drafts but

³ *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) (DOE Brief).

⁴ *NRC Staff Brief in Opposition to State of Nevada's Appeal from the December 12, 2007 and January 4, 2008 PAPO Board Orders* (Jan. 28, 2008) (Staff Brief).

⁵ *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* (Jan. 28, 2008) (NEI Brief).

⁶ *The State of Nevada's Motion for Leave to File a Limited Reply* (Feb. 4, 2008) (Nevada Reply Motion); *The State of Nevada's Reply on Appeal from the PAPO Board's January 4, 2008 and December 12, 2007 Orders* (Feb. 4, 2008) (Nevada Reply Brief).

⁷ *Answer of the Department of Energy Opposing "The State of Nevada Motion for Leave to File a Limited Reply"* (Feb. 13, 2008).

⁸ *NRC Staff Answer to the State of Nevada's Motion for Leave to File a Limited Reply* (Feb. 13, 2008).

⁹ *Answer of the Nuclear Energy Institute Opposing "The State of Nevada's Motion to File a Limited Reply"* (Feb. 11, 2008).

excluding preliminary drafts) generated by, or at the direction of, or acquired by” DOE.¹⁰ Explicitly among the exclusions to this requirement is documentary material that falls under 10 C.F.R. § 2.1003(e), specifically, “any additional material created after the time of . . . initial certification.”¹¹

“Documentary material” is defined to include three categories:

- (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 [this] 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, interested governmental participant, or party, . . . regardless of whether they will be relied upon and/or cited by a party. . . .¹²

Our regulations, at 10 C.F.R. § 2.1009, require DOE to certify that it has established procedures for implementing the requirements of § 2.1003, that it has trained its personnel to comply with these procedures, and that the documentary material specified in § 2.1003 has been made available.¹³ This initial DOE certification is the subject of Nevada’s motion to strike. DOE’s certification started the clock for certification of documentary materials by the NRC Staff (30 days) and by other potential parties (90 days).¹⁴ DOE’s certification must be updated “at the time DOE submits the license application.”¹⁵

¹⁰ 10 C.F.R. § 2.1003(a).

¹¹ 10 C.F.R. §§ 2.1003(a) and (e).

¹² 10 C.F.R. § 2.1001.

¹³ 10 C.F.R. §§ 2.1009(a)(2) and (b).

¹⁴ 10 C.F.R. § 2.1003.

¹⁵ 10 C.F.R. § 2.1009(b).

Nevada argues, based on these provisions and on its perception of their purpose, that DOE was required to finalize and place all core technical documentary material that it intends to rely on in the proceeding on the LSN prior to DOE's initial certification of compliance with § 2.1003. Nevada argues that the PAPO Board's view, that certification based on the production of *extant* documents alone, with more documents to be created and produced later, satisfies § 2.1003, defeats the purpose of the certification requirement. According to Nevada, the purpose of the certification requirement is to guarantee a minimum six-month period — before DOE files its license application — during which potential parties will be able to review a complete set of all core technical documents required to evaluate the license application and prepare contentions. Nevada argues that the Board's construction of the regulations makes the certification requirement meaningless: carrying the Board's logic to its extreme, Nevada says, DOE could have certified before it had any documents available.

Nevada argues that the word "intends" (in the phrase "intends to rely") in the first part of the § 2.1001 definition of "documentary material," was meant to encompass *all* core documents that DOE might end up relying on in its license application. Nevada also argues that because the documentary material on the LSN must be complete at certification, DOE cannot certify compliance until it has created and finalized all documents that it will rely on in its license application and has placed them on the LSN. In Nevada's view, rather than wait until the all of the documents were complete and ready for the LSN, DOE certified its document collection simply to satisfy its own arbitrary deadline. Nevada argues that this tactic deprives DOE's adversaries of the six-month review period (to frame contentions) Nevada believes the regulations guaranteed.

"Supplementation" of the document collection pursuant to § 2.1003(e) means, according to Nevada's interpretation, relatively minor additions to the LSN rather than

the addition of documents essential to the preparation of contentions. According to Nevada, the documents that DOE has not yet finalized, which are therefore not yet on the LSN, are documents critical to preparing meaningful contentions, rather than documents appropriate for later “supplementation” — and DOE’s decision to keep these documents in “draft” form rather than finalizing them prior to certification was a deliberate effort to withhold information from its adversaries. Consequently, from Nevada’s perspective, the six-month document review period has been reduced to a six-month period during which potential parties can review a large quantity of documents that will not help in formulating contentions.

DOE counters Nevada’s position by arguing that the purpose of the certification requirement was not to create a guaranteed six-month period for reviewing a complete set of documentary material, but was rather to de-couple the document production requirement from the site selection and link it instead to the license application, in order to ease the initial burden of compliance with the requirement to populate the LSN. The NRC Staff argues that the six-month period was not a deadline, but rather was viewed as an appropriate amount of time for potential parties to prepare for the licensing proceeding.¹⁶ DOE points out that § 2.1001 is a definitional section that says nothing about certification requirements or the timing of document production. Certification requirements are addressed in § 2.1009, DOE maintains, and § 2.1009 does not require DOE to attest, as part of its initial certification, that all of the supporting documentary material for its license application is complete. Instead, according to DOE, § 2.1009

¹⁶ Staff Brief at 13, citing *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. 29453, 29,459 (May 31, 2001).

requires DOE to certify that it has procedures in place and has trained its personnel to meet its LSN obligations (including ongoing update requirements), that it has placed documentary material in its possession at the time of certification on the LSN, and that it also will place newly created or identified documentary material on the LSN in the future as it is generated or identified.

DOE argues that the “supplementation” requirement in § 2.1003(e) is not limited in any manner — the Commission referred to supplementation with “any” additional documentary material created after initial certification — even though the Commission could have limited supplementation to less significant additions had it chosen to frame the regulation in that way. According to DOE, this militates against Nevada’s view that DOE’s “complete” documentary material must be placed on the LSN at the time of initial certification. DOE also argues that the Board’s interpretation of our regulations does not, as Nevada would have it, eliminate the fundamental requirement that DOE produce the documentary material upon which it intends to rely. Rather, the Board’s interpretation clarifies that Nevada is wrong about the *timing* of the placement of the reliance material on the LSN.

Finally, the NRC Staff, while not taking a position on whether DOE’s certification satisfied the regulatory requirements, and while not embracing all of DOE’s various arguments, argues that the Board correctly interpreted the plain meaning of our regulations. We agree. “The interpretation of a regulation, like the interpretation of a statute, begins with the language and structure of the provision itself.”¹⁷ Recourse to

¹⁷ CLI-06-5, 63 NRC 143, 154 (2006), quoting *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988), *review denied*, CLI-88-11, 28 NRC 603 (1988), and referring also to *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), LBP-01-25, 54 NRC 177, 184 (2001).

regulatory history is not necessary unless the language and structure of the regulation reveal an ambiguity that must be resolved.¹⁸ Like the Board, we see no ambiguity here.¹⁹ The use of the word “intends” in the first part of the definition of “documentary material” is, as the Board found, “simply the natural result of the fact that the ‘reliance’ in question will necessarily occur in the future, when DOE submits the license application”²⁰ and does not indicate that DOE (or any other party) must provide a complete set of all documents it plans to rely on during the licensing proceeding at the time of certification. Moreover, Nevada’s reading of our regulations violates the fundamental precept that “the entirety of the provision must be given effect.”²¹ Nevada’s interpretation renders superfluous DOE’s (and the other participants’) continuing duty, under our regulations, to supplement the LSN with *any* additional documentary material created after the time of initial certification, as spelled out in § 2.1003(e). Nevada’s *reductio ad absurdum* extrapolation — that under the Board’s reading of the regulations DOE could have certified before it created any documents at all — is not illustrative of the reality here, and would not satisfy our good faith expectations.²²

¹⁸ See *Shoreham Nuclear*, ALAB-900, 28 NRC at 288.

¹⁹ Even if there were an ambiguity, the regulatory history of Subpart J (as the Board notes) supports the Board’s finding that our regulations do not prohibit certification prior to the completion of all “reliance” documentary material, and Nevada cites to no contrary statement in the regulatory history. LBP-08-1, slip op. at 15.

²⁰ *Id.* at 13.

²¹ *Id.* at 12, citing CLI-06-5, 63 NRC 143, 154 (2006).

²² See, e.g., *Licensing Proceeding for the Receipt of High-Level Radioactive Waste at a Geologic Repository; Licensing Support Network, Submissions to the Electronic Docket*, 68 Fed Reg. 66372, 66376 (Nov. 26, 2003).

We agree with the Board that “the duty to produce documentary material applies only to documents and information in existence at the time . . . initial certification occurs, and [our regulations] do 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.”²³ As the Board notes, § 2.1003’s reference to “all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by” clearly “conveys that possession or control of the documentary material is a pre-requisite [to] the duty to produce it.”²⁴ Thus, as our regulations indicate and as the PAPO Board held, at the time it made its initial certification, DOE was required to place on the LSN only *extant* information upon which it intends to rely.

The use of the LSN was intended, among other things, to “enabl[e] the comprehensive and early review of the millions of pages of relevant licensing material by the potential parties to the proceeding, so as to permit the earlier submission of better focused contentions resulting in a substantial saving of time during the proceeding.”²⁵ That is not to say that documents were not envisioned to be entered into the LSN post-certification and we support the Board’s ruling that the LSN does not have to be frozen at the time of certification.

²³ LBP-08-1, slip op. at 13.

²⁴ *Id.* at 12.

²⁵ *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. 14925, 14926 (April 14, 1989).

In practicality, during the six-month period between DOE's certification and the filing of the license application, potential parties had access to millions of DOE documents upon which to begin formulating meaningful contentions.²⁶ And DOE's ongoing duty to supplement its document collection potentially creates additional opportunities to file meaningful new and amended contentions based on that supplementary material. This is by no means an unfair or prejudicial document production procedure.²⁷

For these reasons, and for the reasons given by the PAPO Board, we affirm the Board's denial of Nevada's motion to strike DOE's LSN certification.

II. NEVADA'S MOTION FOR LEAVE TO FILE A LIMITED REPLY

As Nevada concedes in its pleading, our Subpart J rules, applicable here, do not provide for the filing of reply briefs in the context of appeals from interlocutory decisions (10 C.F.R. § 2.1015(b)). Nor do our Subpart J rules permit reply briefs in connection with appeals from initial or partial initial decisions of the presiding officer (10 C.F.R. § 2.1015(c)). When reply briefs are permitted, our rules provide explicitly for their filing (10 C.F.R. § 2.341(b)(3), or set strict conditions on their filing (10 C.F.R. § 2.323(c)). Because reply briefs are not provided for here, we deny Nevada's motion for leave to file a limited reply. If DOE files a repository application that the NRC Staff accepts for docketing, the ensuing litigation is likely to prove complex, with numerous pleadings.

²⁶ "DOE indicates that it has produced approximately 3.5 million documents on the LSN, consisting of more than 30 million pages." LBP-08-1, slip op. at 6.

²⁷ Nevada filed a *State of Nevada's Motion to the Commission to Establish a Reasonable Schedule for the Filing of Contentions on Yucca Mountain* (April 28, 2008). We will act on that motion separately.

The Licensing Board and the Commission should permit extra filings only where necessity or fairness dictates.

III. CONCLUSION

We affirm the PAPO Board's decision (in LBP-08-1) denying Nevada's motion to strike DOE's initial LSN certification. We also deny Nevada's motion to file a limited reply brief.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of June, 2008

Additional Views from Commissioner Gregory B. Jaczko:

I write separately on this order because I believe the Commission should be providing high-level guidance to the PAPO Board and the potential parties in this matter on the appropriate standard that would have to be met to challenge a certification of the LSN, something the majority's order does not do. Thus, while I agree that certification of the LSN only requires documents currently in existence to be certified, and that the LSN was not intended to be "frozen" at the time of certification, I do not agree that these limited holdings provide potential parties with much additional guidance. These holdings help identify the extreme edges of the LSN certification issue, but offer little to guide the parties through the many gray areas in-between.

The LSN is critical to a potential proceeding on this application. As the Commission has made clear, it was the Commission's expectation that the LSN, "among other things, would provide potential participants with the opportunity to frame focused and meaningful contentions and to avoid the delay potentially associated with document discovery, by requiring parties and potential parties to the proceeding to make all their Subpart J-defined documentary material available through the LSN prior to the submission of the DOE application." See "Final Rule, Licensing Proceeding for a High-Level Radioactive Waste Geologic Repository; Licensing Support Network, Submissions to the Electronic Docket," June 14, 2004, 69 FR 32836, 32843. The LSN clearly was established for a multitude of purposes, not the least of which is to help the agency fulfill its three-year statutory commitment to reach a decision on the licensing of a potential HLW repository. If the PAPO Board and the Commission spend unnecessary time dealing with arguments over the certification issues, the purpose of the LSN is essentially defeated.

Therefore, I believe the Commission should establish a standard for review of any motion to strike an LSN certification. The appeal of the Board's decision on this matter provides us the opportunity to do so and I believe that not doing so will leave the potential parties in the unfortunate position of having to continually challenge the certification efforts in order to probe the Commission for insight into how the Commission will view these motions. I do not believe this is an efficient approach, especially in a case where the Commission will be operating under a strict statutory timeframe.

Thus, I believe this order should include a standard for review of the certification motions, such as the standard laid out by the NRC staff in its brief to the Board on this issue. See "NRC Staff Answer to Nevada Motion to Strike Department of Energy Licensing Support Network Certification," Nov. 9, 2007. In that filing, the staff described its view of how the review of these motions should be approached. The staff noted that the Board had previously ruled that DOE must satisfy a good faith standard for document production, one that depended upon a consideration of a number of factors. The staff continued by noting that because now there were claims of "omissions" from the Certification, the Board should also determine the completeness of the DOE LSN collection by applying a standard of whether the DOE LSN collection is materially or substantially incomplete based on documents "created" at the time of certification. I believe the approach outlined by the staff is reasonable and would provide the potential parties with some much-needed guidance on how motions to strike LSN certifications would be considered by the Board and the Commission.

I also believe the Commission should use this opportunity to remind the potential parties of the Commission's expectation of good faith compliance with the Subpart J LSN requirements. The Commission recognized that compliance with certain classes of

documentary material required to be included in the LSN would be difficult to judge, at least until the proffered contentions are admitted into the proceeding, but nonetheless, good faith compliance is vital if the Commission is to meet its statutory three-year obligation.

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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 COMMISSION MEMORANDUM AND ORDER (CLI-08-12), dated June 17, 2008, have been served upon the following persons by Electronic Information Exchange.

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COMMISSION MEMORANDUM AND ORDER (CLI-08-12)

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[Original Signed by L. Lewis]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 17th day of June 2008