UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Board

Before Administrative Judges:

ASLBP BOARD
09-892-HLW-CAB04
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

In the Matter of	**)**	
	)	
U.S. DEPARTMENT OF ENERGY	**)**	**Docket No. 63-001-HLW**
	)	
(High Level Waste Repository)	**)**	**June 30, 2011**

STATE OF NEVADA ANSWER TO DOE MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION OF JUNE 10, 2011 CAB ORDER

On June 20, 2011, the U.S. Department of Energy (DOE) filed the above-referenced and captioned Motion with the Construction Authorization Board (CAB) pursuant to 10 C.F.R. § 2.323 seeking reconsideration and rescission of CAB's June 10, 2011 Order (Regarding Use of LSN). For the reasons discussed below, the State of Nevada (Nevada) supports DOE's Motion and asks that it be granted.

I. INTRODUCTION

On April 11, 2011, the CAB entered an Order (Concerning LSNA Memorandum and Parties' LSN Document Collections) in which (at 3) it directed every party to this proceeding to (1) preserve all their LSN documents in pdf, and (2) submit their respective LSN document collections (together with the associated bibliographic header files) to the NRC Office of the Secretary (SECY). In the April 11 Order, CAB directed that, "Once received, SECY shall install the documents and associated bibliographic information into a separate LSN document library of ADAMS for public access . . ." (*id.*). CAB stated in the same April 11 Order that it was

requiring these actions (by the parties and by SECY) in order to fulfill "our responsibility to preserve the document discovery materials residing on the LSN" (*id*.) **specifically because** these requirements were premised upon a memorandum CAB received from the LSN Administrator, in which he warned that "LSN shutdown must be completed by September 30, 2011" (*id*. at 1) under the Administration's FY2012 zero budget proposal. It was obvious to the parties that the purpose of the actions (required to be taken by them and by SECY) were clearly aimed at preserving the public accessibility of the LSN document collections by the creation of an alternative repository in ADAMS for those documents, should the LSN become unavailable.

On April 21, 2011, NRC Staff filed a Motion and therein sought reconsideration of the Board's April 16 Order, in part due to the alleged onerous burden it would place on SECY, in requiring SECY to create a separate, publicly accessible database on ADAMS, containing all parties' LSN collections. In its June 9, 2011 Order on NRC Staff's Motion (Granting in Part and Denying in Part Reconsideration Motion), CAB denied the portion of Staff's Motion which complained of the onerous burden placed on SECY. CAB denied it was creating any such burden. Despite its previous unqualified command that SECY create the new ADAMS database comprised of the parties' LSN collections "once received," now the CAB stated (June 9 Order at 7) that it had "set no deadline" (*id*.) on SECY, and that SECY "need only comply . . . to the extent funding is available" (*id*.).

The consequence of the CAB's June 9 Order was clear: if the LSN ceased to exist on September 30, 2011, there would be no public access to the documents contained therein, because SECY's obligation to create an alternative database on ADAMS was postponed until **at least** FY2012 or beyond. What **seemed** to have been a carefully formulated CAB plan to **avoid** any hiatus in public access to the parties' LSN collections now seemed destined to **guarantee** such a hiatus. Indeed, on the very next day, June 10, 2011, the CAB entered yet another Order –

this one **assuming** there would be an interruption in the access of the public – and the parties – to the LSN collections.

CAB's June 10, 2011 Order (Regarding Use of LSN) stated that "the LSN may cease being operational sometime before September 30, 2011" (June 10 Order at 1) and that "after any shutdown of the LSN, it could be some time before documents would again be fully accessible . . ." (*id*.). Premised upon that assumption of unavailability for an indefinite period, the Board prescribed that two major tasks be undertaken by the parties in the period **before** the termination of the LSN – one involving deposition preparation through document research on the existing LSN and the other involving the creation of indices pursuant to 10 C.F.R. § 2.1019 by the parties for every deposition deponent they may defend. For the reasons set forth below, Nevada believes that each of those tasks is not necessary to be performed at this time, that they violate the CAB's stated obligation to minimize expenditures of resources by the parties which are, or **may be**, unnecessary, and that for the reasons given herein and by DOE in its subject motion, Nevada respectfully requests that the Board reconsider and rescind its June 10 Order.

II. THE BOARD HAS MADE CLEAR ITS POSITION DEPLORING WASTE OF RESOURCES OR EVEN POTENTIAL WASTE OF RESOURCES

In stating a Board position welcomed by the parties, the CAB made clear in its May 20, 2011 Order (Granting Motion for Protective Order) that it was concerned that the parties not waste resources on the performance of tasks that could later prove to have been unnecessary. Indeed, the Board confirmed that this focus rose to the level of an obligation on its part. Recognizing that the continuation of the Yucca Mountain proceeding "remains subject to congressional funding and other uncertainties" (May 20 Order at 2), the Board acknowledged that "in the uncertain environment surrounding this proceeding, prudence and common sense may counsel careful allocation of resources" (*id*.).

In its May 20 Order, the Board quashed two deposition notices previously served on DOE by Nevada and asked Nevada to withdraw any others it may have filed. The Board stated its rationale for effectively suspending deposition discovery in this proceeding: it said the quash decision was based upon "the uncertain course of this unique proceeding, the apparent desires of the vast majority of the parties (including the State of Nevada that 'does not object to suspending depositions'), and **our responsibility** to control discovery and **to avoid undue and potentially unnecessary expense**" (*id*. at 3 (emphasis added)).

III. CAB'S DIRECTION WITH RESPECT TO LSN RESEARCH WOULD CAUSE UNDUE AND POTENTIALLY UNNECESSARY EXPENSE

The Board's direction in the June 10 Order with respect to the parties' conduct of LSN research (for deposition preparation) is premised upon its assumption of a hiatus in the availability of the LSN collections after September 30, 2011. Such a hiatus (anticipated due to the combination of a possible LSN shutdown and CAB's indefinite postponement of the SECY's duty to create an alternative Yucca Mountain document database on ADAMS) need not occur. Unbeknownst to the Board (until DOE's June 20 Motion), Nevada and DOE have negotiated, and nearly completed, an agreement to provide for the reciprocal sharing of their databases (DOE Motion at 2).

In its Motion, DOE discusses its intent "to ensure it [Nevada] receives a copy of DOE's public LSN document collection" (*id*.). DOE has informed Nevada that before September 30, 2011, it plans to have completed the conversion of its LSN document collection to Adobe Acrobat pdf, and DOE has committed to make this collection available to Nevada (on electronic media, supplied by Nevada and approved by DOE) for a reasonable cost approximating $5,000. DOE has also committed to providing this information to the other parties for a reasonable cost. Nevada likewise commits to provide its LSN document collection to DOE (and to any other

party who requests it) in Adobe Acrobat pdf and at a reasonable cost. Since DOE's LSN collection constitutes 99 percent of all LSN documents, and nearly 100 percent of those anticipated to be utilized in deposition discovery, DOE's commitment bridges what should otherwise have been a break in the availability of its LSN collection to the other parties. It also enables those parties to use the LSN document collection (to the extent they wish to) to prepare for the later conduct of depositions. Accordingly, the LSN research proposed by CAB would be a substantial and unnecessary expense.

IV. CAB'S DIRECTION WITH RESPECT TO THE CREATION AND EXCHANGE OF 2.1019 INDICES WOULD CAUSE UNDUE AND POTENTIALLY UNNECESSARY EXPENSE

For several independent reasons, the creation and exchange of 2.1019 indices in the next few months is premature and unnecessary. It would also be extremely costly because, as a minimum, it would require all witnesses **potentially** to be deposed in Phase I discovery, and counsel for each party defending such deposition, to expend substantial time in the creation of each index. Nevada would show that the creation of these indices **now** (in view of the uncertainties associated with this proceeding and the Board's commitment to avoid potentially unnecessary expense) is inappropriate for at least three reasons:

1. The indices need not be created now due to the anticipated availability of LSN documents.
2. A requirement to prepare indices now appears contrary to the letter and spirit of 2.1019, and as argued by DOE, both unduly expands and accelerates the requirements of that regulation.
3. The Board ruled that the indices be created not by a particular deadline, but "as soon as practicable"; Nevada believes that completion of the 2.1019 indices by a

date ten days before the particular depositions (and none are now scheduled) is "as soon as practicable."

1. The Indices are not Needed Now Due to the Anticipated Exchange of LSN Documents:

As discussed, *supra*, the rationale for a short-term creation of indices evaporates in view of the parties' LSN collection availability. The Board's reason for the short-term creation and exchange of indices was that their adequacy could be determined "while the LSN remains operational" (June 10 Order at 2). Given the intention and commitment of the parties to make their LSN collections available to each other, this exchange will facilitate ongoing, uninterrupted access to the LSN documents and remove the rationale for indices being created now.

2. The Indexing Requirement is Contrary to 2.1019 and Would Unduly Expand and Accelerate Its Reach:

As argued correctly and in great detail by DOE (DOE Motion, generally), any requirement for near-term indices would be contrary to the provisions of 2.1019 which, for over 20 years, have specified compliance ten days prior to each deposition. This NRC regulation was adopted after public notice and comment and should not be altered except in extreme circumstances.

As argued by DOE, a near-term indexing requirement would both expand and accelerate the mandates of 2.1019.

The 2.1019 indexing mandate would be **expanded**, because at this point in time, to ensure compliance, each party would be forced to create an index for **every potential witness** whose deposition it might defend in Phase I discovery; and the index would have to cover **every potential topic** on which that deponent might be questioned. Under 2.1019, only persons **actually** noticed for their depositions need be "indexed," and even then, **only** on the topics actually set out in a deposition notice. No person is currently noticed for deposition, and the

CAB has expressed its "disfavor" on noticing any depositions absent "a compelling reason" (May 20 Order at 3). By definition then, the completion of indices in the near-term would require vastly more work, and expenditure of resources, than would simple **compliance** with 2.1019 as written.

The 2.1019 indexing mandate would be accelerated under the June 10 Order, since compliance would be required in the very short term (arguably within the next two to three months), when under the regulation, it would occur much later (i.e., likely sometime after September 30, 2011, and only at the end of the 60-day advance deposition notice requirement). More importantly, the uncertainties associated with the continuation of this proceeding (recognized by CAB) could result in these depositions, and their associated indices, **never** being necessary. The near-term creation of indices under that scenario would come to be seen to have been totally unnecessary.

Comparing CAB's May 20 Order to its June 10 Order, the Board has gone from prohibiting the modest expense of a handful of depositions to directing tasks requiring many multiples of that expense; and yet, none of the uncertainties have been resolved; and so the necessity of these expenses remains entirely in doubt.

3. Nevada Submits that the Time "as Soon as Practicable" for the Exchange of 2.1019 Indices is the Date Set Out in that Regulation, Ten Days Before Each Noticed Deposition:

By stripping out this undue "expansion" and "acceleration" of 2.1019's requirements, one can see the sound reasoning supporting the ten-day mandate of that 22-year-old regulation. The identity of actual deponents (as opposed to a far greater number of potential ones) will not be known until their depositions are noticed. The actual topics of those depositions (as opposed to all potential ones) will again not be known until the depositions are noticed. Presumably, the deposing party will have done extensive preparation, and therefore, the delivery of the index of

documents "in the possession" of the deponent "relevant to the subject matter of the deposition," would serve as a final check of completeness of preparation and will typically not contain anything new or different for the deposing party. That is why the NRC set as the index deadline "ten days before the **scheduled** date of the deposition." And that is why this requirement in 2.1019 should not be altered now.

No one knows if **any** deposition will ever occur in this proceeding.

No one knows **who** will be deposed, or on what subjects, in this proceeding.

No depositions are scheduled or noticed in this proceeding and may never be.

Accordingly, the creation of an expanded and accelerated scenario of index creation (a) is unnecessary; and (b) creates the **certainty** of an excessive, unnecessary waste of the parties' resources.

IV. CONCLUSION

For the reasons set out above, and the additional reasons stated by DOE (Motion, generally), Nevada requests that the CAB reconsider and rescind its May 10, 2011 Order.

Respectfully submitted,

(signed electronically)
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Dated: June 30, 2011

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *State of Nevada Answer to DOE Motion for Leave to File Motion for Reconsideration of June 10, 2011 CAB Order* has been served upon the following persons by the Electronic Information Exchange:

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