

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

DOCKETED 11/21/2005

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory P. Jaczko¹
Peter B. Lyons

SERVED 11/21/2005

In the Matter of)
)
U.S. DEPARTMENT OF ENERGY)
)
(High Level Waste Repository:)
Pre-Application Matters))
_____)

Docket No. PAPO-00

CLI-05-27

MEMORANDUM AND ORDER

The NRC staff and the U.S. Department of Energy ("DOE") have appealed the Pre-License Application Presiding Officer ("PAPO") Board's ruling that certain drafts of DOE's license application for a geologic repository at Yucca Mountain must be made available on the Licensing Support Network ("LSN").² The NRC staff, but not DOE, has asked for a stay of the effectiveness of that order pending a final Commission decision on the appeals. We deny the NRC staff's stay application.

I. BACKGROUND: LSN AND PAPO BOARD'S RULING

In June, 2005, the State of Nevada filed a motion to compel DOE to make available on the LSN two particular drafts of its license application. Nevada asked that DOE be ordered to produce the drafts on or before the date DOE "certifies" that it has made its relevant documents

¹ Commissioner Jaczko has recused himself from this matter, and did not participate in today's decision.

² LBP-05-27, 62 NRC ____ (Sept. 22, 2005).

electronically available.³

Under our regulations governing repository licensing proceedings (10 C.F.R. Part 2, Subpart J), each participant must place on the LSN “all documentary material (including circulated drafts but excluding preliminary drafts)”⁴ on which the participant intends to rely or which are relevant. “Documentary material” includes “all reports and studies, prepared by or on behalf of the potential party ... including all related ‘circulated drafts.’”⁵ A “circulated draft” is a “nonfinal document circulated for supervisory concurrence or signature in which the original author or others in the concurrence process have non-concurred.”⁶ Neither “concurrence” nor “concurrence process” is defined in the regulations.

Here, DOE’s contractor delivered a draft license application in July, 2004. After undergoing an extensive agency review process, a second version was produced in September 2004. Nevada argued that these two documents constitute “circulated drafts” of relevant “documentary material” that must be made available on the LSN at the time DOE certifies its document collection as electronically available. In a lengthy opinion, the PAPO Board agreed with Nevada.⁷ The Board ordered Nevada to include the two draft license applications in the LSN “no later than” the time of DOE’s initial certification.⁸

The NRC staff has already certified its document collection. DOE’s earlier effort to do

³ See 10 C.F.R. § 2.1009(b) (each potential party must certify to the PAPO that it has made available the documents identified in 10 C.F.R. § 2.1003). DOE must make its certification at least six months prior to submitting its license application. 10 C.F.R. § 2.1003(a).

⁴ 10 C.F.R. § 2.1003(a).

⁵ 10 C.F.R. § 2.1001 (definition of “documentary material”).

⁶ *Id.* (definition of “circulated draft”).

⁷ LBP-05-27. Apparently, a third draft was produced in November 2004, but it is not subject to the Board order. See *id.* at 1 n.1

⁸ See *id.* at 52-53.

so proved unsuccessful.⁹ Pursuant to a PAPO-issued “Case Management Order,” the NRC staff has an ongoing obligation, on a monthly basis, to supplement its already-certified document collection.¹⁰

II. STAY DENIED

DOE and the NRC staff disagree with several aspects of the Board decision ordering inclusion of the draft DOE license applications in the LSN. They focus on the meaning of the term “circulated draft.” DOE argues that the draft applications in question were not “circulated,” within the meaning of our rules, because they were not yet undergoing the formal “concurrence” process used by that agency. Instead, DOE says, the drafts were only “preliminary” drafts, explicitly excluded from mandatory inclusion in the LSN. The NRC staff takes no position on whether or not the DOE draft applications are in actuality “circulated drafts,”¹¹ but expresses concern that the Board’s legal interpretation of the term will drastically expand the number of documents all parties must place on the LSN, including the NRC staff.

The NRC staff asks us to stay the effectiveness of the Board’s order. The staff argues that it needs relief, pending the outcome of our appellate review of the PAPO Board’s order, of any obligation “to review its current process for identifying circulated drafts to determine whether it needs modification to ensure it is in compliance with the PAPO Board’s Order.”¹² For several reasons, we find issuance of a stay, which the Commission treats as “an extraordinary equitable

⁹ See *U.S. Department of Energy* (High Level Waste Repository), CLI-04-32, 60 NRC 469 (2004).

¹⁰ *U.S. Department of Energy* (High-Level Waste Repository Pre-application Matters), Second Case Management Order (Pre-License Application Phase Document Discovery and Dispute Resolution), at 21-22 (July 8, 2005).

¹¹ See NRC Staff Appeal of LBP-05-27 and Application for a Stay, at 5 (Oct. 3, 2005).

¹² *Id.* at 14.

remedy,¹³ inappropriate and unnecessary.

First, the NRC staff's stay application fails to meet the "most important" of our stay requirements – "irreparable harm."¹⁴ The staff's process-driven concern – namely, that it will have to review its files to consider whether documents meet the PAPO Board's test for "circulated drafts" – does not come close to irreparable harm in a legally meaningful sense. The Commission has held expressly and repeatedly that "litigation expense, even substantial and unrecoverable cost, does not constitute irreparable injury."¹⁵ Having consistently kept to this strict standard with licensees¹⁶ and with intervenors,¹⁷ we cannot relax it for the NRC staff.

Second, even if a document review by the NRC staff somehow could be considered irreparable harm, the staff has not explained why a stay is necessary to avoid that harm. The PAPO Board decision ordering production of the DOE draft license applications does not, as such, require the NRC staff to do anything. The staff apparently feels that an earlier Board

¹³ *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-27, 6 NRC 715, 716 (1977). *Accord Nuclear Fuel Services, Inc.* (Erwin, TN), LBP-04-2, 59 NRC 77, 79-80 (2004) (citing authorities). *See also Cuomo v. NRC*, 772 F.2d 972, 978 (D.C. Cir. 1985).

¹⁴ *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1994). *Accord Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 393 (2001). Under our rules, in considering stay applications, we also consider probability of success on the merits, harm to others, and the public interest. *See Sequoyah Fuels Corp.*, CLI-94-9, 40 NRC at 6. Our regulations codify these standards. 10 C.F.R. § 2.342(e).

¹⁵ *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984). *Accord Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-11, 55 NRC 260, 263 (2002); *Sequoyah Fuels Corp.*, CLI-94-9, 40 NRC at 6-7. *See generally FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980).

¹⁶ *See, e.g., Sequoyah Fuels Corp.*, CLI-94-9, 40 NRC at 6-8; *Three Mile Island*, CLI-84-17, 20 NRC at 802-805.

¹⁷ *See, e.g., Private Fuel Storage*, CLI-02-11, 55 NRC at 262-64.

order, on “case management,”¹⁸ which requires monthly supplements of certified document collections, compels the staff to reconsider its approach to “circulated drafts” to ensure compliance with the PAPO Board’s newly-articulated definition. But there seems no reason why the staff may not simply ask the PAPO Board to modify the case management order, temporarily, to accommodate the staff’s resource concerns during the pendency of the current appeals. Or, as Nevada suggests, the NRC staff seemingly has the option to withdraw its certification, for the time being, while the Commission reviews the current appeals.¹⁹ This would eliminate any need to file supplements. With self-help options available, there appears no reason for the Commission to stay this Board order not even directed to the staff.

Finally, although we have suggested a willingness to consider issuing a stay, despite an absence of real harm, where the chance of reversal on appeal is “overwhelming” or a “virtual certainty,”²⁰ not even the NRC staff suggests this is such a case. The staff says merely that “the proper interpretation of the term ‘circulated draft’ is complex and a stay should be granted to maintain the *status quo*.”²¹ We agree with the staff that the issues here are complex – the Board wrote a 53-page opinion, and the parties (and a prospective *amicus curiae*) have

¹⁸ See note 10, *supra*.

¹⁹ See State of Nevada’s Response to NRC Staff’s Appeal, etc., at 10 (Oct. 13, 2005). The deadline for the NRC staff’s certification is 30 days after DOE’s certification – which has not yet taken place. See 10 C.F.R. §§ 2.1003(a), 2.1009(b).

²⁰ See *Sequoyah Fuels Corp.*, CLI-94-9, 40 NRC at 7.

²¹ NRC Staff Appeal of LBP-05-27 and Application for a Stay, at 14 (Oct. 3, 2005). The Staff cited to *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977) for the proposition that a tribunal may issue a stay when there is a “difficult legal question and the equities in the case suggest that the status quo be maintained.” In the instant case irreparable injury has not been demonstrated so as to raise substantial equity concerns. As the *Holiday Tours* Court stated: “An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and *when denial of the order would inflict irreparable injury on the movant.*” *Id.* at 844 (emphasis added).

provided us well more than a hundred pages of appellate briefs. But significant and difficult issues do not justify a stay in and of themselves, absent a strong showing of irreparable harm.²² Where, as here, there is no irreparable harm whatever, the Commission is reluctant to rush to judgment on the merits of an appeal before it has the opportunity to examine the Board's ruling and the parties' arguments in detail.

III. CONCLUSION

For the foregoing reasons, the NRC staff's application for a stay pending appeal is *denied*.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 21st day of November, 2005

²² See *Sequoyah Fuels Corp.*, CLI-94-4, 40 NRC at 8.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM ORDER (CLI-05-27) have been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (*)).

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
Washington, DC 20555-0001
Thomas S. Moore, Chair
Administrative Judge
E-mail: PAPO@nrc.gov
Alex S. Karlin
Administrative Judge
E-mail: PAPO@nrc.gov
Alan S. Rosenthal
Administrative Judge
E-mail: PAPO@nrc.gov & rsnthl@comcast.net
G. Paul Bollwerk, III
Administrative Judge
E-mail: PAPO@nrc.gov
Anthony C. Eitrem, Esq.
Chief Counsel
E-mail: PAPO@nrc.gov
James M. Cutchin
E-mail: PAPO@nrc.gov
Bethany L. Engel
E-mail: PAPO@nrc.gov
Jonathan Rund
E-mail: PAPO@nrc.gov
Susan Stevenson-Popp
E-mail: PAPO@nrc.gov
Bradley S. Baxter*
E-mail: bxh@nrc.gov
Daniel J. Graser
LSN Administrator
E-mail: djg2@nrc.gov
ASLBP HLW Adjudication
E-mail: ASLBP_HLW_Adjudication@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop - O-16 C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov
Andrew L. Bates
E-mail: alb@nrc.gov
Adria T. Byrdsong
E-mail: atb1@nrc.gov
Emile L. Julian, Esq.
E-mail: elj@nrc.gov
Evangeline S. Ngbea
E-mail: esn@nrc.gov
Rebecca L. Giitter
E-mail: rll@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Congressional Affairs
Mail Stop -O-17A3
Thomas R. Combs
E-mail: trc@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Public Affairs
Mail Stop - O-2A13
David McIntyre
E-mail: dtm@nrc.gov

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**U.S. Nuclear Regulatory Commission
Office of Nuclear Material Safety and
Safeguards**

Mail Stop - T-7 F3
Washington, DC 20555-0001
Jeffrey A. Ciocco
Email: jac3@nrc.gov

**U.S. Nuclear Regulatory Commission
Office of the General Counsel**

Mail Stop - O-15 D21
Washington, DC 20555-0001

Karen D. Cyr, Esq.*

General Counsel
E-mail: kdc@nrc.gov

Gwendolyn D. Hawkins

E-mail: gxh2@nrc.gov

Janice E. Moore, Esq.

E-mail: jem@nrc.gov

Trip Rothschild, Esq.*

E-mail: tbr@nrc.gov

Harry E. Wedewer, Esq.

E-mail: hew@nrc.gov

Mitzi A. Young, Esq.

E-mail: may@nrc.gov

Marian L. Zobler, Esq.

E-mail: mlz@nrc.gov

OGCMailCenter

E-mail: OGCMailCenter@nrc.gov

Hunton & Williams LLP

Counsel for the U.S. Department of Energy

Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219

W. Jeffery Edwards, Esq.

E-mail: jedwards@hunton.com

Kelly L. Faglioni, Esq.

E-mail: kfaglioni@hunton.com

Melissa Grier

E-mail: mgrier@hunton.com

Donald P. Irwin, Esq.

E-mail: dirwin@hunton.com

Stephanie Meharg

E-mail: smeharg@hunton.com

Edward P. Noonan, Esq.

E-mail: enoonan@hunton.com

Audrey B. Rusteau

E-mail: arusteau@hunton.com

Michael R. Shebelskie, Esq.

E-mail: mshebelskie@hunton.com

Christopher A. Updike

E-mail: cupdike@hunton.com

Belinda A. Wright

E-mail: bwright@hunton.com

**Egan, Fitzpatrick, Malsch & Cynkar, PLLC
Counsel for the State of Nevada**

The American Center at Tysons Corner
8300 Boone Boulevard, Suite 340
Vienna, VA 22182

Robert J. Cynkar, Esq.

E-mail: rcynkar@nuclearlawyer.com

Joseph R. Egan, Esq.

E-mail: eganpc@aol.com

Charles J. Fitzpatrick, Esq.

E-mail: cfitzpatrick@nuclearlawyer.com

Jack Kewley

E-mail: jkewley@nuclearlawyer.com

Martin G. Malsch, Esq.

E-mail: mmalsch@nuclearlawyer.com

Susan Montesi

E-mail: smontesi@nuclearlawyer.com

Nakita Toliver

E-mail: ntoliver@nuclearlawyer.com

U.S. Department of Energy

Office of General Counsel

1000 Independence Avenue, S.W.
Washington, DC 20585

Martha S. Crosland, Esq.

E-mail: martha.crosland@hq.doe.gov

Angela M. Kordyak, Esq.

E-mail: angela.kordyak@hq.doe.gov

U.S. Department of Energy

1000 Independence Avenue, S.W.

Washington, DC 20585

William Greene, Public Information Officer

william.greene@hq.doe.gov

U.S. Department Of Energy

Office of General Counsel

1551 Hillshire Drive
Las Vegas, NV 89134-6321

George W. Hellstrom

E-mail: george.hellstrom@ymp.gov

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**U.S. Department of Energy
Office of Civilian Radioactive Waste Mgmt
Office of Repository Development**

1551 Hillshire Drive

Las Vegas, NV 89134-6321

W. John Arthur, III, Deputy Director*

E-mail: john_arthur@ymp.gov

Kerry M. Grooms*

Email: kerry_grooms@ymp.gov

Susan L. Rives, Chief Counsel*

E-mail: susan_rives@ymp.gov

Harry E. Leake*

E-mail: harry_leake@ymp.gov

**U.S. Department of Energy
Office of Civilian Radioactive Waste Mgmt
Office of Information Mgmt**

Mail Stop 523, P.O. Box 30307

North Las Vegas, NV 89036-0307

Mark Van Der Puy*

E-mail: mark_vanderpuy@ymp.gov

**Yucca Mountain Project, Licensing Group,
DOE/BSC**

Jeffrey Kriner

E-mail: jeffrey_kriner@ymp.gov

Lincoln County (NV) Nuclear Oversight Prgm

100 Depot Ave., Suite 15; P.O. Box 1068

Caliente, NV 89008-1068

Lea Rasura-Alfano, Coordinator*

E-mail: jcciac@co.lincoln.nv.us

Nuclear Waste Project Office

1761 East College Parkway, Suite 118

Carson City, NV 89706

Robert Loux

E-Mail: bloux@nuc.state.nv.us

Steve Frishman, Tech. Policy Coordinator

E-mail: steve.frishman@gmail.com

Nevada Nuclear Waste Task Force

Alamo Plaza, 4550 W. Oakley Blvd., Suite 111

Las Vegas, NV 89102

Judy Treichel, Executive Director

E-mail: judyntwf@aol.com

Nuclear Waste Technical Review Board

Victoria Reich*

E-mail: reich@nwtrb.gov

Clark County (NV) Nuclear Waste Division

500 S. Grand Central Parkway

Las Vegas, NV 89155

Irene Navis*

E-mail: iln@co.clark.nv.us

Engelbrecht von Tiesenhausen

E-mail: evt@co.clark.nv.us

Eureka County (NV) Yucca Mtn Info Ofc

P.O. Box 990

Eureka, NV 89316

Laurel Marshall, Program Coordinator*

E-mail: ecmarshall@eurekanv.org

**Mineral County (NV) Board of County
Commissioners**

P.O. Box 1600

Hawthorne, NV 89415

Linda Mathias, Administrator*

Office of Nuclear Projects

E-mail: mineral@oem.hawthorne.nv.us

**Nye County (NV) Department of Natural
Resources & Federal Facilities**

1210 E. Basin Road, Suite 6

Pahrump, NV 89048

David Swanson*

E-mail: dswanson@nyecounty.net

Nye County (NV) Regulatory/Licensing Adv.

18160 Cottonwood Rd. #265

Sunriver, OR 97707

Malachy Murphy*

E-mail: mrmurphy@cmc.net

**White Pine County (NV) Nuclear
Waste Project Office**

959 Campton Street

Ely, NV 89301

Mike Simon, Director*

(Heidi Williams, Adm. Assist.*)

E-mail: wpnucwst1@mwpower.net

**Inyo County (CA) Yucca Mtn Nuclear Waste
Repository Assessment Office**

P.O. Drawer L

Independence, CA 93526

Chris Kennedy, Project Coordinator*

E-mail: ckennedy@qnet.com

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**Inyo County (CA) Yucca Mtn Nuclear Waste
Repository Assessment Office**

Chris Howard
GIS/LAN Administrator
Inyo County
163 May St.
Bishop, CA 93514
E-mail: choward@inyowater.org

Nuclear Energy Institute
1776 I Street, NW, Suite 400
Washington, DC 20006-3708
Michael A. Bauser, Esq.
Associate General Counsel

E-mail: mab@nei.org
Robert W. Bishop, Esq.*
E-mail: rwb@nei.org
Ellen C. Ginsberg, Esq.
E-mail: ecg@nei.org
Rod McCullum*
E-mail: rxm@nei.org
Steven P. Kraft*
E-mail: spk@nei.org

White Pine County

City of Caliente
Lincoln County
Jason Pitts
E-mail: idt@idtservices.com

**Lander County Nuclear Waste Oversight
Program**

315 South Humboldt St.
Battle Mountain, NV 89820
Deborah Teske, Administrator
E-mail: dteske@landercounty.org

**Intertech Services Corporation
(for Lincoln County)**

P.O. Box 2008
Carson City, NV 89702-2008
Dr. Mike Baughman*
E-mail: bigboff@aol.com

Environment Protection Agency

Ray Clark*
E-mail: clark.ray@epa.gov

Lander, Churchill and Mineral County

P. O. Box 33908
Reno, NV 89533
**Loreen Pitchford, LNS Administrator
for Lander**
E-mail: lpitchford@comcast.net

Talisman International, LLC

1000 Potomac St., NW
Suite 300
Washington, D.C. 20007
Patricia Larimore
E-mail: plarimore@talisman-intl.com

Abby Johnson*

617 Terrace St.
Carson City, NV 89703
E-mail: abbyj@gbis.com

National Congress of American Indians

1301 Connecticut Ave. NW - Second floor
Washington, DC 20036
Robert I. Holden, Director*
Nuclear Waste Program
E-mail: robert_holden@ncai.org

Ross, Dixon & Bell

2001 K Street N.W.
Washington D.C. 20006-1040
William H. Briggs*
E-mail: wbriggs@rdblau.com

Churchill County (NV)

155 North Taylor Street, Suite 182
Fallon, NV 89406
Alan Kall*
E-mail: comptroller@churchillcounty.org

State of Nevada (NV)

100 N. Carson Street
Carson City, NV 89710
Marta Adams*
E-mail: maadams@ag.state.nv.us

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Public Citizen

215 Pennsylvania Ave, SE

Washington, DC 20003

Michele Boyd, Legislative Director

Critical Mass Energy and Environment

E-mail: mboyd@citizen.org

Senator Harry Reid

Attn: Sandra Schubert

Room 528 Hart Senate Office Building

United States Senate

Washington, DC 20510-2803

Email: sandra_schubert@reid.senate.gov

[Original signed by R. L. Giitter]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 21st day of November 2005