

August 2, 2007

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))	
)	

**ANSWER OF THE NUCLEAR ENERGY INSTITUTE OPPOSING THE STATE OF
NEVADA'S MOTION FOR A DECLARATORY RULING TO DEFINE AND TO
COMPEL COMPLIANCE BY DOE WITH 10 C.F.R. § 2.1003(a)**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Nuclear Energy Institute (“NEI”) hereby files this opposition to the State of Nevada’s (hereinafter “the State”) July 23, 2007 Motion for a Declaratory Ruling to Define and to Compel Compliance by DOE with 10 C.F.R. § 2.1003(a) (“Motion”) and the accompanying proposed Order.¹ The relief requested by the State is contrary to (1) the Nuclear Regulatory Commission’s (“NRC” or “Commission”) regulations governing the pre-application phase of the high-level waste repository proceeding; (2) longstanding, clear statements by the Commission in promulgating those regulations; (3) the Pre-Application Presiding Officer (“PAPO”) Board’s July 6, 2007 Revised Second Case Management Order; and (4) Atomic Safety and Licensing Board (“ASLB”) Panel guidance for the LSN. Consequently, the PAPO Board should deny the State’s Motion.

¹ 10 C.F.R. § 2.323(c) provides that “a party may file an answer in support of or in opposition to the motion.” Although not technically a “party” to the instant proceeding, NEI is a member of the Licensing Support Network (“LSN”) Advisory Review Panel and has participated as a “potential party” in the instant proceeding since its inception. NEI will seek party status in the Yucca Mountain licensing proceeding at the time called for in the Commission’s regulations. *See also* Second Case Management Conference Transcript at 402 (Judge Karlin characterizing NEI’s participation in the resolution of an earlier LSN issue as being in the nature of an “amicus”).

II. THE COMMISSION’S REGULATIONS REQUIRE DOE TO MAKE AVAILABLE DOCUMENTARY MATERIAL IN EXISTENCE AT THE TIME OF ITS INITIAL CERTIFICATION AND PERMIT THE CONTINUED CREATION OF DOCUMENTARY MATERIAL THEREAFTER

10 C.F.R. § 2.1009(b) requires that DOE certify that “the documentary material specified in § 2.1003 has been identified and made electronically available.” The Commission promulgated a definition of documentary material that speaks in general terms, not in terms of specific documents. That definition identifies three categories of documentary material, namely (1) “any information” upon which a party intends to rely on and/or to cite in support of its position; (2) “any information” known to a party and in its possession that does not support a party’s position; and (3) “reports and studies” and circulated drafts thereof prepared by or on behalf of a party relevant to both the license application (“LA”) and the Topical Guidelines in Regulatory Guide 3.69. *See* 10 C.F.R. § 2.1001 (emphases added). Section 2.1003(a) provides that

DOE shall make available, no later than six months in advance of submitting its license application . . . an 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 . . . [DOE].

10 C.F.R. § 2.1003(a), (a)(1) (emphases added).² By using the past-tense of “generated” and “acquired,” it is clear that the Commission considered documentary material to mean documents or information already in existence. DOE’s initial certification must encompass only material existing at the time of its initial certification.

It is also clear that the Commission expected additional documentary material to be created after the initial certification. Hence, the Commission promulgated 10 C.F.R. § 2.1003(e),

² This is the same provision quoted by the State on page 1 of its Motion. However, the State’s quotation does not include the words “generated” and “acquired.”

which requires DOE and other participants to supplement their collections of documentary material after their initial certifications. Section 2.1003(e) provides:

Each potential party, interested governmental participant, or party shall continue to supplement its documentary material made available to other participants via the LSN with any additional material created after the time of its initial certification

A plain reading of sections 2.1009(b), 2.1003(a), and 2.1003(e) together clearly indicates that DOE's initial certification can encompass only documentary material in existence at the time of its initial certification, and that DOE must continue to supplement its documentary material collection with any such material created after its initial certification. Indeed, the repeated use of the phrases "initial certification" or "certification of initial compliance" throughout Subpart J – *see* 10 C.F.R. §§ 2.1003(e), 2.1009(b), 2.1010(a)(2), 2.1012(a) – demonstrates that the Commission expects that DOE's first certification will not be its last, and that more documentary material will be created and produced after the initial certification. *See* 10 C.F.R. § 2.1009(b) ("DOE shall also update this certification at the time DOE submits the [LA].")

In addition, statements made by the Commission when promulgating the provisions of 10 C.F.R. Part 2, Subpart J clearly indicate that the Commission fully expects DOE to continue creating and making available documentary material well after DOE's initial certification. When promulgating section 2.1003(e),³ the Commission stated

Section 2.1003(e) requires LSN participants to supplement the documentary material provided under section 2.1003(a) in its initial certification with documentary material produced after that event. While much of an LSN participant's documentary material will be made available early, it is reasonable to expect that

³ Final Rule, Licensing Proceeding for a High-Level Radioactive Waste Geologic Repository; Licensing Support Network, Submissions to the Electronic Docket, 69 Fed. Reg. 32,836 (June 14, 2004).

additional material will be created after the initial compliance period specified in section 2.1003(a).

69 Fed. Reg. at 32,843 (emphases added). Therefore, the Commission reasonably expects DOE to continue to create and make available documentary material after its initial certification.⁴

Furthermore, the Commission's expectation that documentary material would continue to be created and made available after DOE's initial certification is longstanding. When promulgating the final rule concerning design standards for LSN participant websites in May 2001,⁵ the Commission "emphasize[d] two points regarding the availability of documentary material," one of which was "[w]hen are documents created after the initial certification of compliance required to be made available?" 66 Fed. Reg. at 29,460 (emphasis added). The Commission answered its own question by stating:

Documentary material created after the initial certification of compliance is expected to be made available reasonably contemporaneous with its creation, rather than stored for entry as a group at some point during the remaining time before DOE submits the license application. This concept has been part of the regulatory framework since the original LSS rule was issued in 1989 (April 14, 1989; 54 FR 14925 at 14934) and is based on the need to provide participants with early and useful access to documentary material before DOE submits the license application. As DOE noted in its comments on the proposed rule, new information will continue to be produced during the period before it submits the license application. Participants must have timely access to the material in order to prepare for the licensing proceeding.

66 Fed. Reg. at 29,460 (emphasis added) (footnote omitted). Thus, when faced with the precise prospect raised by the State's Motion – i.e., that DOE would continue to create documentary

⁴ The State had its opportunity to persuade the Commission to prohibit DOE from creating documentary material after its initial certification, but apparently chose not to do so. Therefore, it is too late for the State to challenge section 2.1003(e) now.

⁵ Final Rule, 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 (May 31, 2001).

material after its initial certification, but before submittal of the LA – the Commission did not order the DOE to change its course or modify its premise. Rather, it accepted DOE’s reasonable expectation that it would continue to create documentary material after its initial certification and prior to its LA submittal, and required only that DOE make any such post-initial certification documentary material available on the LSN “reasonably contemporaneous” with its creation.⁶

The PAPO Board has also addressed the prospect that DOE would continue to create and make available documentary material after its initial certification and prior to submittal of the LA. The PAPO Board’s July 7 Revised Second Case Management Order states

On or before the first of each month following its certification of documents on the LSN, each potential party shall, as appropriate, either file, or make available on the LSN, the following supplementary material (1) any additional documentary material created or discovered after the time of its initial certification

Revised Second Case Management Order at 21 (emphasis added).⁷

Moreover, guidance developed by the ASLB Panel to assist participants in complying with the LSN’s requirements clearly recognizes that participants will continue to create and upload documentary material after their initial certifications. Licensing Support Network Guidelines (May 17, 2006) at 8-1 (“Subsequent to the initial certifications, participants will be loading their servers with their contemporaneous documentary material on an ongoing basis.”).⁸

⁶ As the Commission noted, the requirement that documentary material be made available reasonably contemporaneous with its creation dates back to 1989. Final Rule, 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, 14,934 (Apr. 14, 1989) (“Submission of these documents must be made reasonably contemporaneous with their creation.”).

⁷ For the purposes of the Revised Second Case Management Order, the PAPO Board defined “potential party” to include DOE. Revised Second Case Management Order at 5.

⁸ The State participated in the process that developed the Licensing Support Network Guidelines through the LSN Advisory Review Panel.

Nothing suggests that DOE must make all of its documentary material for the licensing proceeding available no later than the time of its initial certification. Rather, it is clear from the regulations, the Commission's statements of intent, the PAPO Board's Revised Second Case Management Order, and the ASLB Panel guidance that DOE is permitted to create documentary material after its initial certification.

III. THE STATE'S REQUESTED ORDER IS FATALLY AND FACIALLY FLAWED BECAUSE IT SEEKS TO REWRITE THE COMMISSION'S REGULATIONS

The State seeks a simple but sweeping Order from the PAPO Board that, in and of itself, requires denial of the Motion. The proposed Order would interpret 10 C.F.R. § 2.1003(a) to require DOE

to make electronically available on the LSN, at the time of its initial LSN certification, all Documentary Material which it knows or expects it will cite or rely on in the Yucca licensing proceeding.

Motion at 41 (emphasis added); *see also* the proposed Order. Thus, the State would have the PAPO Board prohibit DOE from certifying its LSN collection until DOE has "all Documentary Material it will cite and rely on in licensing available on the LSN at initial certification." Motion at 30 (emphasis added).

The plain language of the Commission's regulations, the Commission's statements of its intent in the LSN regulatory history, the PAPO Board's Revised Second Case Management Order, and the ASLB Panel guidance demonstrate that the State's request for an order prohibiting DOE from creating additional documentary material after its initial certification falls far wide of the mark of what the Commission's regulations require and, in fact, is inconsistent with common sense.

The Commission has expressly recognized that, at the time of its initial certification, DOE will not have prepared all documentary material on which it intends to rely or cite to during the entire “Yucca licensing proceeding.” However – as the State would have it – based on the simple, literal language of the requested Order, DOE must create, now, all witness testimony, exhibits, and other technical reports or studies that it may ever use in the “Yucca licensing proceeding” six months before DOE has even completed the LA; before DOE has seen a single contention; and before the NRC Staff has issued any requests for additional information. The State’s request for relief is patently “incompatible with the dynamic licensing process followed in Commission licensing proceedings,” which, *inter alia*, allows an applicant to create and to supply additional information after a license application is submitted. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 350 (1998) (quoting *Curators of the University of Missouri*, CLI-95-8, 41 N.R.C. 386, 395 (1995)). Thus, the State’s request that the PAPO Board prohibit DOE from certifying its documentary material collection until it has created and made available all documentary material for the entire “Yucca licensing proceeding” would both create new law and ignore reality.⁹

Nor is there any requirement that DOE freeze its creation of documentary material between its initial certification and the submittal of the LA. Despite the express wording of its proposed Order, which would simply and clearly prohibit the creation of any documentary material after initial certification and through the licensing proceeding, it may be that what the State really wants is an order prohibiting DOE from certifying its collection of documentary material before DOE has made available on the LSN all documentary material supporting the LA

⁹ The State also ignores 10 C.F.R. § 2.309(c), which allows intervenors to file late-filed contentions upon a showing of good cause and other factors. This provision clearly contemplates that new information may be created by an applicant and made available to a participant after the initial deadline for filing contentions.

as it will be tendered a minimum of six months later. In other words, one might speculate that the State seeks an order that (1) would require DOE to have completed and made available on the LSN all documentary material supporting the first final LA (“Rev. 0”) at the time it initially certifies its LSN collection; and (2) would prohibit DOE from creating additional documentary material in support of Rev. 0 of the LA during the minimum six month period between initial certification and submittal of Rev. 0 of the LA. Even this more narrow interpretation of the State’s request, however, is contrary to the Commission’s regulations and must be rejected. More than once the Commission has accepted that DOE will continue to create and make available documentary material following its initial certification. *See* 69 Fed. Reg. at 32,843, *supra* pp. 3-4 (“it is reasonable to expect that additional material will be created after the initial compliance period specified in section 2.1003(a)”); *see also* 66 Fed. Reg. at 29,460, *supra* p. 4 (“As DOE noted in its comments on the proposed rule, new information will continue to be produced during the period before it submits the license application”). A request by the State for even a more restrained Order than that recited in the Motion simply does not square with these clear statements by the Commission.

Moreover, at the minimum, the State is asking the PAPO Board to prohibit DOE from advancing its application until at least six months after DOE has completed and made available certain documents. However, the PAPO Board will not see a copy of the LA for at least those six months, plus any additional time until DOE initially certifies. Thus, the PAPO Board is not equipped to undertake such a sufficiency review.

IV. SUMMARY

The State’s 40-plus page Motion boils down to one question: Do the Commission’s regulations require DOE to create and make available every document that will support the LA

in the licensing proceeding six months before the LA is filed? The answer is no. There is nothing in the Commission's regulations that calls for DOE to put down its pencil the moment it makes its initial certification. In fact, the regulations; LSN regulatory history; related guidance, including both from this Board and the ASLB Panel; and common sense are all to the contrary.

V. CONCLUSION

For the foregoing reasons, the State's Motion should be denied.

Respectfully submitted,

A handwritten signature in black ink that reads "Michael A. Bauser". The signature is written in a cursive style with a horizontal line underneath the name.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing "Answer of the Nuclear Energy Institute Opposing the State of Nevada's Motion for a Declaratory Ruling to Define and to Compel Compliance by DOE with 10 C.F.R. § 2.1003(a)" has been served via the Nuclear Regulatory Commission Electronic Information Exchange (EIE) upon those on the Service List maintained by the EIE for the above-captioned proceeding.

Respectfully submitted,



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