

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))	August 9, 2007

**STATE OF NEVADA'S REPLY TO THE RESPONSES
TO NEVADA'S MOTION FOR A DECLARATORY ORDER**

The State of Nevada files this short Reply to the Responses to Nevada's Motion for a Declaratory Ruling to Define and Compel Compliance by DOE with 10 C.F.R. §2.1003(a). Nevada's Reply focuses primarily on the Response of the NRC Staff.

Nevada's Motion poses a vital and fundamental question whose resolution will determine whether the upcoming Yucca Mountain licensing proceeding, the largest such proceeding in NRC's history and arguably the most important, will be conducted in an efficient and orderly manner.

Nevada's Motion does not ask – as it has been mischaracterized – for an order requiring DOE to certify production of documents that do not exist, or to stop producing documents, or to achieve perfection or "absolute" compliance in its document listing. Instead, Nevada's Motion asks that DOE be ordered to comply reasonably with the intent of the LSN rule – to make available to other proceeding participants the documentary safety basis of its license application six months in advance; or stated otherwise, not to tender an application until six months after the DOE has complied in good faith with the LSN rule. The need for such an order now arises from DOE's clearly stated intention, both before and in its Response, to meet its projected license

application date¹ even if documents essential to the application and the early drafting of contentions are missing from its initial certification. This would compress the time available for other participants to react to DOE's license application, lead to incomplete licensing contentions, and cause unnecessary complexity and delay.

This issue should not await examination until after DOE files an application or even until it certifies initially its document submittal. It is crucial that the Board make clear to DOE now what LSN compliance requires so there will be no regulatory uncertainty, and DOE can, if necessary, adjust its document completion and delivery schedules.

Nevada finds that a reasonable approach, and one which would significantly narrow Nevada's prayer for relief and the scope of the litigation surrounding Nevada's Motion, is suggested in NRC Staff's Response. NRC's Response states on page 6, note 5, that the purpose of the LSN rule would be defeated if DOE were to certify a "substantially incomplete" document collection. Nevada *agrees* with Staff that the appropriate test is indeed whether the collection is substantially complete when DOE initially certifies, and this means that the initial LSN submittal must contain the basic substantive building blocks required of DOE's application.²

¹ The Government Accountability Office's recent report on Yucca, GAO-07-1010 (August 2007), makes clear (at p. 2) that DOE did not consult with NRC, the nuclear industry, or any other stakeholders before it established its license application schedule.

² NRC Staff's formulation would of course have to be applied carefully. If obviously critical technical documents are missing, the time needed to complete an expert review of such documents will be truncated, with the possible result that the time for filing contentions directed to such documents may need to be extended. That there are millions of DOE documents on the LSN when DOE initially certifies is irrelevant. Neither Nevada nor other participants will have the resources or time to review fully each such document, and many of them will be irrelevant or in the process of revision, making a review of them a waste of time and resources. The test is not whether a "majority" of the required documents are there, but whether the documents truly necessary for licensing are there in a substantially complete set.

Nevada also agrees with NRC Staff that compliance with a substantial completeness test presents a factual issue. But it is one that should not be difficult to apply. Application of the test does not involve production of the last absolute detail, but simply *good faith* and *reasonable compliance in view of what is required for licensing*. To avoid needless delays later, the PAPO can and should decide now the nature of *minimum compliance* and hold that the purpose of the LSN rule (early document discovery to facilitate early drafting of adequate contentions) cannot be met with vitally important safety documents like the Analysis Model Reports ("AMRs") and the Total System Performance Assessment ("TSPA") missing.³

Reasonable compliance with the LSN rule means that, not only does the documentary material have to be available, but it has to be available in a form usable by other proceeding participants. Nevada's Motion points out at page 29 that DOE is planning to certify a document collection that does not include all AMRs and the critically important TSPA. The TSPA is required by 10 C.F.R. §§63.21(c)(9)-(14), 63.102(j) and 63.114. The AMRs are required by 10 C.F.R. §63.21(c)(15); and there is no question that 10 C.F.R. §2.1003(a)(2) requires submittal of, among other things, "[TSPA] computer runs, computer programs and codes," and "digital computer printouts," for which, unlike the case in 10 C.F.R. §2.1003(a)(1), there is no exception for "preliminary drafts."

These documents are at the very core of DOE's disposal safety analysis, and without each it would be impossible to begin drafting an adequate and complete, or even substantially complete, set of contentions. To avoid a train wreck later, with recriminations on all sides,

³ Although the Yucca licensing proceeding is likely to be far more complex than most NRC proceedings, where contentions are due 60 days after publication of the notice of hearing, contentions in the Yucca proceeding are due within only 30 days after publication of the notice of hearing – half the time. NRC explained that 30 days rather than the usual 60 was appropriate "in view of the ample pre-application document disclosures provided by the LSN." 69 Fed. Reg. 2199 (Jan. 14, 2004).

Nevada respectfully requests that the PAPO instruct DOE now that an initial certification which is not, in good faith, substantially complete would defeat the purpose of the LSN rule and is not acceptable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing State of Nevada's Reply to the Responses to Nevada's Motion for Declaratory Order has been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (*)).

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