

August 17, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD

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

NRC STAFF RESPONSE TO STATE OF
NEVADA'S REPLY TO RESPONSES TO MOTION

INTRODUCTION

Pursuant to an order issued by the Pre-License Application Presiding Officer (PAPO) Board, the staff of the Nuclear Regulatory Commission (Staff) hereby files its response to "State of Nevada's Reply to the Responses to Nevada's Motion for a Declaratory Order," filed on August 9, 2007 (Nevada's Reply). Order (Schedule for Filing Responses to the Reply of the State of Nevada), Aug. 10, 2007. For the reasons set forth below, Nevada's Motion, as modified by its Reply, should be denied. Further, the PAPO Board should defer any ruling on whether DOE's document collection at initial certification satisfies the requirements of 10 C.F.R. § 2.1003 until after DOE has submitted its certification.

BACKGROUND

On July 24, 2007, Nevada filed "The State of Nevada's Motion for a Declaratory Ruling to Define and to Compel Compliance by DOE with 10 CFR § 2.1003(a)," dated July 23, 2007 (Nevada's Motion). Responses to Nevada's Motion were filed by the Nuclear Energy Institute¹

¹ "Answer of the Nuclear Energy Institute Opposing the State of Nevada's Motion for a Declaratory Ruling (continued. . .)"

on August 2, 2007 and by the Staff² and the Department of Energy (DOE)³ on August 3, 2007. A statement of support of Nevada's Motion was filed by the Nevada Nuclear Waste Task Force on behalf of several organizations on August 3, 2007.⁴ On August 9, 2007, Nevada filed a motion requesting leave to file a reply and the accompanying reply.⁵ On August 10, 2007, the PAPO Board issued an order permitting the filing of responses to Nevada's Reply by any of the potential parties who filed initial responses to Nevada's Motion by August 20, 2007. The Staff's response is set forth below

DISCUSSION

In its initial Motion, Nevada requested the PAPO Board rule that compliance with section 2.1003 requires DOE "to make all its documentary material publicly available on the LSN, including those material technical studies and reports it plans to and knows it will rely on in the licensing proceeding." Nevada's Motion at 10-11.⁶ In its Reply, Nevada claims to narrow its prayer for relief by suggesting that in determining whether DOE has complied with section 2.1003, the "appropriate test is . . . whether the collection is substantially complete when DOE initially certifies." Nevada's Reply at 2. Nevada asserts that in order to be "substantially complete" DOE's document collection must include "the basic substantive building blocks

(. . .continued)

to Define and to Compel Compliance by DOE with 10 C.F.R. § 2.1003(a)," Aug. 2, 2007.

² "NRC Staff Response to State of Nevada's Motion for a Declaratory Ruling," Aug. 3, 2007 (Staff Response).

³ "The Department of Energy's Response to State of Nevada's Motion for Declaratory Ruling," Aug. 3, 2007.

⁴ "Statement in Support of 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)," Aug. 3, 2007.

⁵ "State of Nevada's Motion for Leave to File Reply to Responses," Aug. 9, 2007.

⁶ See *also id.* at 41 ("10 C.F.R. § 2.1003(a) requires 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 Mountain proceeding.").

required of DOE's application." *Id.* Specifically, Nevada claims that documents such as Analysis Model Reports (AMRs) and the Total System Performance Assessment (TSPA) must be available on the LSN at the time of DOE's initial certification.⁷ *Id.* at 3. Nevada urges the PAPO Board to rule now, before DOE has even submitted its initial certification, that without certain documents or collection of documents, DOE's initial certification cannot be in compliance with section 2.1003 because without these documents the ability to draft adequate contentions would be impaired. *See id.* at 1, 3.

Nevada claims that the "substantially complete" test was suggested in the Staff's Response. *Id.* at 2. Nevada, however, misunderstands the Staff's Response. The Staff, in its Response, did not agree with Nevada's assertion that section 2.1003 requires DOE to make publicly available at the time of initial certification all documentary material it plans to and knows it will rely on if that documentary material is not in existence at the time of initial certification. Staff Response at 2-5. The Staff acknowledged that there was an expectation that the majority of documents supporting DOE's license application would be available on the LSN at the time of initial certification. However, it was also clear that the Commission recognized that additional documentary material may be created after initial certification. *Id.* at 4-6. Further, it was not reasonable to expect DOE to stop all activities on the license application simply because it had certified its document collection. *Id.*

The Staff recognized that it could be possible for DOE to certify its document collection at such an early point as to have "virtually no documentary material available and thereby defeat the purpose of the LSN rule." *Id.* at 6 n.5. A determination regarding the adequacy of DOE's initial certification, however, would require a factual determination that DOE's document

⁷ Nevada also asserts that not only does documentary material have to be available, but it has to be available in a 'form usable by other proceeding participants.' Nevada's Reply at 3. Nevada does not provide any further explanation for this assertion and it is not clear what relationship, if any, this assertions had to either its initial Motion or Reply.

collection was “substantially incomplete.” *Id.* In its Response, the Staff stated that at the time DOE certifies, the PAPO Board could entertain challenges asserting that the documentary material provided as a whole was insufficient to meet the requirements of section 2.1003. *Id.* at 7-8. Such a determination should be based on the totality of the circumstances, such as the nature and amount of the documentary material that was available and the significance of the missing documentary material. *Id.* The Staff took no position on whether the lack of any particular document or set of documents on the LSN would render DOE’s initial certification inadequate prior to initial certification.

Here, in its Reply, Nevada asserts that compliance with section 2.1003 requires that documents such as AMRs and the TSPA must be available on the LSN at the time of DOE’s initial certification, presumably even if DOE has not created or finalized these documents at the time of initial certification. See Nevada’s Reply at 3. For the same reasons discussed in the Staff Response, Nevada’s revised position is incorrect. The Commission expected that documentary material would continue to be created after initial certification, even material supporting the license application. See Staff Response at 5, *citing* 69 Fed. Reg. 32836, 32843. The regulations provide for all participants to supplement their document collection with documents created after initial certification and DOE has an obligation to update its certification at the time it submits the license application. See 10 C.F.R. §§ 2.1003(e); 2.1009(b).

Further, any determination regarding the adequacy of DOE’s document collection at initial certification should not be made until DOE has made such a certification. As indicated in the Staff’s Response, it is possible that the issue Nevada raises will become moot. *Id.* at 7. Moreover, such a determination should be based on the totality of the circumstances, such as the nature and amount of the documentary material that was available. It is impossible to determine the impact of the absence of any particular document from the LSN on a potential party’s ability to formulate contentions until it is known what information is available to the potential parties. Accordingly, Nevada’s Motion, as revised by its Reply, should be denied.

CONCLUSION

For the reasons discussed above, the PAPO Board should deny Nevada's Motion as modified in its Reply. The PAPO Board should defer any ruling on whether DOE's document collection at initial certification satisfies the requirements of 10 C.F.R. §2.1003 until after DOE has submitted its certification.

Respectfully submitted,

/RA/

Marian L. Zabler
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 7th day of August, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD

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
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF RESPONSE TO STATE OF NEVADA'S REPLY TO RESPONSES TO MOTION" in the above captioned proceeding, has been served on the following persons this 17th day of August, 2007, by Electronic Information Exchange.

Thomas S. Moore, Chair
Administrative Judge
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board
Mail Stop: T-3F23
Washington, DC 20555-0001
E-mail: PAPO@nrc.gov

G. Paul Bollwerk, III
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: PAPO@nrc.gov

Alan S. Rosenthal
Administrative Judge
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board
Mail Stop: T-3F23
Washington, DC 20555-0001
E-mail: PAPO@nrc.gov
rsnthl@comcast.net

Office of the Secretary
ATTN: Docketing and Service
Mail Stop: 0-16C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
E-mail: HEARINGDOCKET@nrc.gov

Alex S. Karlin
Administrative Judge
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board
Mail Stop: T-3F23
Washington, DC 20555-0001
E-mail: PAPO@nrc.gov

Edward P. Noonan, Esq.
W. Jeffrey Edwards, Esq.
Kelly L. Faglioni, Esq.
Melissa Grier, Esq.
Donald P. Irwin, Esq.
Stephanie Meharg, Esq.
Michael R. Shelbelskie, Esq.
Audrey B. Rusteau
Belinda A. Wright
Pat Slayton
Hunton & Williams LLP
951 East Byrd Street
Richmond, VA 23219

E-mail: dirwin@hunton.com
kfaglioni@hunton.com
enoonan@hunton.com
arusteau@hunton.com
jedwards@hunton.com
mgrier@hunton.com
smeharg@hunton.com
bwright@hunton.com
mshebelskie@hunton.com
pslayton@hunton.com

Michael A. Bauser, Esq.
Associate General Counsel
Anne W. Cottingham, Esq.
Ellen C. Ginsberg, Esq.
Nuclear Energy Institute
1776 I Street, NW, Suite 400
Washington, DC 20006-3708
E-mail: mab@nei.org
ecg@nei.org
awc@nei.org

Timothy C. Gunter, Director
Susan L. Rives, Esq.
US Department of Energy
Office of Civilian Radioactive Waste
Management
Office of Repository Development
1551 Hillshire Drive
Las Vegas, NV 89134-6321
E-mail: timothy_gunter@ymp.gov
Susan_rives@ymp.gov

Jason Pitts
White Pine County
City of Caliente
Lincoln County
E-mail: idt@idservices.com

Atomic Safety and Licensing Board Panel
ASLB HLW Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, DC 20555-0001
(E-mail: ASLB_HLW_Adjudication@nr.gov)

Michele Boyd, Legislative Director
Critical Mass Energy and Environment
Public Citizen
215 Pennsylvania Ave., SE
Washington, DC 20003
E-mail: mboyd@citizen.org

Joseph R. Egan, Esq.
Martin G. Malsch, Esq.
Charles J. Fitzpatrick, Esq.
Susan Montesi
Egan, Fitzpatrick, Malsch & Cynkar, PLLC
The American Center at Tysons Corner
2001 K Street, NW, Suite 400
Washington, DC 20006
E-mail: eganpc@aol.com
mmalsch@nuclearlawyer.com
cfitzpatrick@nuclearlawyer.com
smontesi@nuclearlawyer.com

Margaret Parish
Debra Wolf
James M. Cutchin
Jered Lindsay
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: papo@nrc.gov

Andrew L. Bates
Adria T. Byrdsong
Rebecca L. Gitter
Emile L. Julian
Evangeline S. Ngbea
Office of the Secretary of the Commission
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
Hearing Docket
E-mail: alb@nrc.gov
atb1@nrc.gov
rl@nrc.gov
ldl@nrc.gov
elj@nrc.gov
esn@nrc.gov

Martha S. Crosland
Angela M. Kordyak, Esq.
U.S. Department of Energy
Office of the General Counsel
1000 Independence Avenue, S.W.
Washington, DC 20585
E-mail: martha.crosland@hq.doe.gov
angela.kordyak@hq.doe.gov

William Greene
Public Information Officer
US Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585
E-mail: William.greene@hq.doe.gov

Anthony C. Eitrem, Esq.
Chief Counsel
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: papo@nrc.gov

Daniel J. Graser
Licensing and Support Network
Administrator
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: djq2@nrc.gov

Steve Frishman
Technical Policy Coordinator
Nuclear Waste Project Office
1761 East College parkway, Suite 118
Carson City, NV 89706
E-mail: ssteve@nuc.state.nv.us

Jeffrey Kriner
Yucca Mountain Project, Licensing Group,
DOE/BSC
Regulatory Programs
1180 North Town Center Drive
Las Vegas, NV 89144
E-mail: jeffrey.kriner@ymp.gov

Judy Treichel, Executive Director
Nevada Nuclear Waste Task Force
Alamo Plaza
4550 W. Oakley Blvd., Suite 111
Las Vegas, NV 89102
E-mail: judynwtf@aol.com

George W. Hellstrom, Esq.
Matthew C. Urie
U.S. Department of Energy
Office of the General Counsel
1551 Hillshire Drive
Las Vegas, NV 89134-6321
E-mail: george.hellstrom@ymp.gov
matt.urie@ymp.gov

Loreen Pitchford, LNS Administrator
for Lander, Churchill and Mineral County
3888 Snow Valley Drive
Reno, NV 89506
E-mail: qb4@charter.net

Robert Loux
Steve Frishman, Tech. Policy Coordinator
Nuclear Waste Project Office
1761 East College Parkway, Suite 118
Carson City, NV 89706
E-mail: bloux@nuc.state.nv.us
Steve.frishman@gmail.com

Diane Curran, Esq.
Eureka County and Lander County, Nevada
Harmon, Curran, Spielberg & Eisenberg,
LLP
1726 M. Street N.W., Suite 600
Washington, D.C. 20036
E-mail: dcurran@harmoncurran.com

Chris Howard, GIS/LAN Administrator
Inyo County (CA)
Yucca Mtn Nuclear Waste
Repository Assessment Office
163 May St
Bishop, CA 93514
E-mail: choward@inyowater.org

Debora Teske
Lander County Nuclear Waste Oversight
315 S. Humboldt
Battle Mountain, NV 89820
E-mail: dteske@landercounty.com

Patricia Larimore
Talisman International, LLC
1000 Potomac St., NW
Suite 300
Washington, DC 20007
E-mail: plarimore@talisman-intl.com

Barry S. Neuman, Esq.
Carter Ledyard & Milburn, LLP
Counsel for Lincoln County
1401 Eye Street, NW
Suite 300
Washington, DC 20005
E-mail: neuman@clm.com

Margaret Plaster, Management Analyst
City of Las Vegas
400 Stewart Avenue
Las Vegas, NV 89101
E-mail: mplaster@lasvegasnevada.gov

John M. Peebles, Esq.
Darcie L. Houck, Esq.
Fredericks & Peebles, LLP
1001 Second St.
Sacramento, CA 95814
E-mail: jpeebles@ndnlaw.com
dhouck@ndnlaw.com

/RA/

Marian L. Zabler
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 17th day of August, 2007