

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 09/10/07

Before Administrative Judges:

SERVED 09/10/07

Thomas S. Moore, Chairman
Alex S. Karlin
Alan S. Rosenthal

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository:
Pre-Application Matters)

Docket No. PAPO-00

ASLBP No. 04-829-01-PAPO

September 10, 2007

ORDER

(Denying Nevada's Motion for a Declaratory Ruling)

Before us is the July 23, 2007, Motion of the State of Nevada (State) requesting a declaratory ruling to the effect that, at the time the Department of Energy (DOE) certifies its document collection on the Licensing Support Network (LSN), 10 C.F.R. § 2.1003(a) requires DOE to make available all documentary material DOE expects to cite or rely upon in the Yucca licensing proceeding.¹ The State also tells us, however, that it is not asking DOE "to stop

¹ 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) (July 23, 2007) at 10-11, 41-42 [hereinafter State Motion].

producing documents, or to achieve perfection or ‘absolute’ compliance in its document listing.”²

Pursuant to 10 C.F.R. § 2.323, the NRC Staff, DOE, and the Nuclear Energy Institute each filed answers opposing the State’s Motion.³ Additionally, the Nevada Nuclear Waste Task Force submitted a statement supporting the State’s position.⁴

² State of Nevada’s Reply to the Responses to Nevada’s Motion for a Declaratory Order (Aug. 9, 2007) [hereinafter State Reply] at 1. Along with its Reply, the State filed a Motion for leave to file a reply. See State of Nevada’s Motion for Leave to File Reply to Responses (Aug 9, 2007). The Motion represented that the State had contacted the NRC Staff, DOE, and the Nuclear Energy Institute concerning its Motion and that none of them had objected. Id. at 1. The Board then invited the three potential parties who had filed answers to respond to the State’s Reply. Order (Schedule for Filing Responses to the Reply of the State of Nevada) (Aug. 10, 2007) (unpublished). The Staff and DOE both filed responses to the State’s Reply. See NRC Staff’s Response to State of Nevada’s Reply to Responses to Motion (Aug. 17, 2007); The Department of Energy’s Response to the State of Nevada’s Reply to Responses to Motion (Aug. 20, 2007). The Board hereby grants the Motion for leave to file a reply and accepts the State’s Reply.

³ See NRC Staff Response to State of Nevada’s Motion for a Declaratory Ruling (Aug. 3, 2007); The Department of Energy’s Response to State of Nevada’s Motion for Declaratory Ruling (Aug. 3, 2007); Answer of the Nuclear Energy Institute Opposing the State of Nevada’s Motion for Declaratory Ruling to Define and to Compel Compliance by DOE with 10 C.F.R. § 2.1003(a) (Aug. 2, 2007).

⁴ See Nevada Nuclear Waste Task Force’s Statement of 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).

According to the State, “[t]his is a dispute over the electronic availability of documents.”⁵ The State has expressed its concern that DOE “will certify the LSN well before it has obtained, completed, or even created many of the most important technical documents on which its [License Application] will heavily depend,” and that such a certification would be “contrary to law.”⁶

While the State asserts that it has posed a “definite and concrete” dispute warranting proscriptive action from the Board,⁷ this dispute is neither, and is clearly not ripe for resolution. In its Reply, the State summarizes its Motion as requesting “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.”⁸ But even assuming arguendo the validity of the State’s formulation of the documents that DOE must make available at the time of its certification, any such assessment depends on the facts and circumstances in existence at the time DOE certifies its LSN document collection – an event that has yet to occur.⁹ Assumptions about what documents may or may not be present or may or may not be needed are conjecture, and will remain so until DOE certifies. Thus, the State’s

⁵ State Motion at 1.

⁶ Id. at 1-2.

⁷ Id. at 6.

⁸ State Reply at 1.

⁹ Even the State characterizes the disputed standard in 10 C.F.R. § 2.1003 as requiring that DOE “refrain from certifying its LSN until it is *materially complete* and not to certify it when it simply contains *whatever* documents happen to be complete and existence when an arbitrary cutoff date arrives.” State Motion at 8 (emphasis in original). Thus, the State’s own interpretation of DOE’s obligation suggests that any resolution would require a fact-specific evaluation of the composition of DOE’s document collection to ensure that it is “materially complete.”

asserted dispute is not ripe for resolution at this time and its Motion for a Declaratory Ruling is DENIED.

It is so ORDERED.

The Pre-license Application
Presiding Officer Board

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

/RA/

Alex S. Karlin
ADMINISTRATIVE JUDGE

/RA/

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 10, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing PAPO BOARD ORDER (DENYING NEVADA'S MOTION FOR A DECLARATORY RULING) have been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (*)).

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PAPO BOARD ORDER
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