

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

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Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

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

Docket No. PAPO-00

CLI-04-32

MEMORANDUM AND ORDER

This proceeding concerns pre-application discovery in connection with a planned application by the U. S. Department of Energy (DOE) for a license to construct a high-level waste (HLW) repository at Yucca Mountain, Nevada. The Licensing Board granted the State of Nevada's motion to strike DOE's certification of its production of documentary material, and DOE appealed a portion of that decision. The Commission holds DOE's appeal in abeyance.

I. BACKGROUND

The Nuclear Waste Policy Act, 42 U.S.C. §§ 10101-10270, charged DOE with the responsibility of constructing and operating a geologic repository for high-level radioactive waste. DOE is now preparing a license application to construct such a HLW repository at Yucca Mountain, Nevada. Under the statute, the NRC would decide whether a license should be issued.

The adjudicatory procedures governing the licensing proceedings are set out in 10 C.F.R. Part 2, Subpart J. Review of an application likely will prove an immense undertaking. DOE has generated millions of Yucca Mountain-related documents since Congress charged it

with responsibility for the repository. What's more, Congress has imposed a three-year deadline for the licensing proceeding. Because of the sheer volume of relevant documentary material, Subpart J includes provisions to expedite the licensing process. One such provision is 10 C.F.R. § 2.1003, a requirement that parties "make available" their documentary material before DOE submits its license application. For each party, a responsible official must certify that "the documentary material specified in § 2.1003 has been identified and made electronically available."¹ NRC regulations provide that DOE certify its document production no later than six months before submitting its license application, that the NRC certify its document production no more than 30 days later, and that other potential parties do so no later than 90 days after DOE.² Thus, under this first-of-a-kind provision, initial discovery will precede a license application and should enable the parties to get off to a running start before the statutory three-year period begins.

To accomplish this pre-license application document discovery, the NRC established a Licensing Support Network (LSN). NRC regulations define the LSN as

the combined system that makes documentary material available electronically to parties, potential parties, and interested governmental participants to the proceeding for a license to receive and possess high-level radioactive waste at a geologic repository operations area . . . , as part of the electronic docket or electronic access to documentary material, beginning in the pre-license application phase.³

The regulations provide for an LSN Administrator, a person within the NRC who is "responsible for coordinating access to and the integrity of data available on the [LSN]."⁴

¹10 C.F.R. § 2.1009.

²See 10 C.F.R. § 2.1003(a).

³10 C.F.R. § 2.1001.

⁴*Id.* The LSN Administrator "shall not be in any organizational unit that either represents the U.S. Nuclear Regulatory Commission staff as a party to the high-level waste repository

(continued...)

On June 30, 2004, DOE certified to the Secretary of the Commission that it had made its documentary material electronically available as specified under our Subpart J rules. On July 12, 2004, the State of Nevada moved to strike DOE's certification on three grounds. First, Nevada alleged that DOE failed to make all of its documentary material available. Second, Nevada maintained that placing the documents on DOE's server was insufficient because the documents must be available on the central LSN web portal. Third, Nevada challenged the wording of DOE's certification and asserted that the certification was unlawful on its face.

DOE filed an answer stating that both its certification and documentary production complied with the regulations. The Nuclear Energy Institute (NEI) supported DOE's actions. A group consisting of Public Citizen, the Nevada Nuclear Waste Task Force, and the Nuclear Information and Resource Service (NIRS) supported Nevada's motion.

The Licensing Board (*i.e.*, the Pre-License Application Presiding Officer, or PAPO, described in 10 C.F.R. §§ 2.1001 and 2.1010) heard oral argument on July 27, 2004. Daniel J. Graser, the LSN Administrator, testified at the hearing. On August 31, 2004, the Board granted Nevada's motion to strike DOE's certification.⁵ The Board ruled in favor of Nevada on each of the three independent grounds Nevada had raised in its motion.

DOE appealed one part of the Board's decision – the Board ruling that DOE's documents are not "available" under Subpart J until indexed and placed in the LSN. Nevada opposed the appeal. Public Citizen, the Nevada Nuclear Waste Task Force, and NIRS filed a

⁴(...continued)
licensing proceeding or is a part of the management chain reporting to the Director, Office of Nuclear Material Safety and Safeguards." *Id.*

⁵See *U.S. Dept. of Energy* (High Level Waste Repository Pre-Application Matters), LBP-04-20, 60 NRC __ (Aug. 31, 2004).

letter supporting Nevada's position.⁶ For the reasons we give below, the Commission holds DOE's appeal in abeyance.

II. DISCUSSION

DOE appealed only the portion of the Board's decision holding that DOE's documentary material must be indexed by the LSN Administrator before DOE can make an initial certification under 10 C.F.R. § 2.1009(b). According to DOE, making its documents available on its own server is all that Subpart J requires. DOE maintains first that, under principles of regulatory construction, Section 2.1009(b) requires DOE only to certify as to its own actions and that having to depend on actions within the control of the LSN Administrator would be fundamentally unfair. Second, DOE asserts that the absence of an indexing requirement does not prejudice the other participants in the high level waste adjudication.

DOE says that the Board's holding raises a question of law that is of "substantial importance" to the licensing proceeding.⁷ But on the very next page of its brief, DOE says: "DOE will continue to provide the LSN Administrator with documents on a rolling basis for indexing, as it has been doing since the beginning of May, *with the expectation that the LSN Administrator will have indexed DOE's documentary material before DOE is ready to make a new certification.*"⁸ With this sentence, DOE appears to be saying that the issue currently on appeal does not matter *now*. A Board decision that DOE admits makes no difference now and is unlikely to make any difference later does not raise a question of substantial importance to this licensing proceeding.

⁶The NRC Staff did not take a position in the appeal.

⁷See "The Department of Energy's Brief on Appeal from the PAPO Board's August 31, 2004 Order" at 1 (Sept. 10, 2004) ("DOE Brief").

⁸*Id.* at 2 (emphasis added). The LSN Administrator has testified that the system can index approximately 40,000 documents (two batches of 20,000) in a 24-hour cycle. See Transcript at 102-103 (July 27, 2004).

The holding that DOE challenges has theoretical and future significance only.⁹ Because DOE has not challenged the Board's other two independent bases for striking the document certification, DOE will have to make another certification regardless of any decision we make on the portion of the decision DOE has challenged. The Board's holding will become significant only if DOE's second certification precedes the LSN Administrator's completion of indexing the documents by a non-negligible period of time. Given DOE's stated expectation that it will not certify prior to completion of the LSN indexing, it is unclear whether any delay at all is at stake.¹⁰ A decision now – unnecessary in the current posture of the adjudication -- would amount to an advisory opinion.¹¹

Although there is no legal bar to our issuing advisory opinions in appropriate circumstances,¹² we are reluctant to do so where, as here, answering the questions left open would be a "mere academic exercise."¹³ Without affecting the critical path of a high level waste adjudication, there will be "time enough to reach [these questions]" when and if they "arise[] in a non-academic context."¹⁴ The parties have already fully briefed the issue, and there is, at a

⁹See 10 C.F.R. §§ 2.1003(a) and 2.1012(a).

¹⁰DOE does, however, qualify its statement by asserting that no one knows "what unexpected circumstances *might* arise or what technological challenges the LSN Administrator *might* encounter." DOE Brief at 2 (emphasis added). The word "might" reinforces our conclusion that the need for a decision on DOE's appeal is, at best, speculative.

¹¹And, because this is a one-of-a-kind proceeding, a Commission decision would not have any precedential value.

¹²See *Tennessee Valley Authority* (Hartsville Nuclear Plants, Units 1A, 2A, 1B, and 2B), ALAB-467, 7 NRC 459, 463 (1978).

¹³*Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 94 (1983).

¹⁴*Duke Power Co.* (Amendment to Materials License SNM-1773 – Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-651, 14 NRC 307, 323 (1981).

minimum, a six-month window between DOE's next certification and NRC's docketing of a license application.¹⁵ It is simply not sensible or productive to analyze the legal issue DOE raises and to issue a Commission decision on a controversy that may not arise at all or, even if it does arise, may have a *de minimis* effect on both the timing of NRC's review of a license application and resolution of this adjudication. Instead, we will hold DOE's appeal in abeyance.¹⁶

If future circumstances necessitate a decision on DOE's challenge to the Board's decision, DOE may reinstate its appeal by filing a motion with the Commission. At that time, the Commission will expeditiously consider the briefs the parties have already filed.

III. CONCLUSION

For the foregoing reasons, the Commission holds DOE's appeal in abeyance.

IT IS SO ORDERED.

For the Commission



/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 10th day of November, 2004

¹⁵See 10 C.F.R. § 2.1012(a).

¹⁶*Cf. Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, 59 NRC 203 (2004) (dismissing premature appeal without prejudice); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-05, 57 NRC 279 (2003) (holding Commission review in abeyance, where a related Board inquiry might obviate the need for Commission review).