

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Atomic Safety and Licensing Board

Before Administrative Judges:

ASLBP BOARD 09-892-HLW-CAB04 Thomas S. Moore, Chairman Paul S. Ryerson Richard E. Wardwell
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In the Matter of)	
)	
U.S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
)	
(High Level Waste Repository))	January 21, 2010

STATE OF NEVADA'S COMMENTS ON LSNA QUERIES

The following are the State of Nevada's (Nevada) comments regarding the correspondence from the Licensing Support Network Administrator (LSNA), Mr. Dan Graser, dated December 17, 2009, addressed to the judges of Construction Authorization Board 4 (CAB04). Subsequent to Mr. Graser's December 17 correspondence, CAB04 issued an Order on December 22, 2009, in which it stated (at 1) that any "party that wishes to comment in writing on the LSNA's memorandum is encouraged to do so, preferably no later than January 21, 2010."

Mr. Graser's correspondence (at 2) recommends that DOE and the other parties to the proceeding be queried as to three specific questions which he articulates. While the questions themselves invite short and concise responses, their subject also bears further comment. Nevada will endeavor to first provide answers to the specific queries and then provide its further comments.

I. Responses to LSNA's Queries

The first two queries posed by the LSNA pertain specifically to the Department of Energy (DOE). Query A asks for the exact DOE budget and FTE allocations for the operation of its LSN collection that could be expected for the remainder of FY2010 and for FY2011. Nevada is not privy to this information. Likewise, in Query B, the LSNA recommends that DOE provide its precise plans, and contingency plans, for maintaining its LSN document collection under FY2010 and FY2011 budget allocations. Again, Nevada is not privy to DOE's plans in regard to these issues. Finally, the LSNA directs Query C to all the parties and asks (assuming a scenario in which they would no longer be required to maintain an active LSN document collection) each party's intended disposition plans for all its data and documents that are currently regulated pursuant to 10 C.F.R. Part 2, Subpart J. In response to Query C, Nevada states that all data and documents that are currently regulated pursuant to 10 C.F.R. Part 2, Subpart J, will be maintained in readily available and searchable form (unless LSN exempt) for a period long into the future. The premise for Query C (that the parties no longer maintain an active LSN document collection) will apparently only arise should another of the LSNA's hypotheses in his December 17 correspondence come to pass: DOE's deactivation of its LSN database. Under that circumstance, the maintenance of Nevada's relevant document collection would still be fully protected as prescribed by Nevada state law.

Under Nevada state law, its governmental agencies are required to retain, and archive, all documentary material generated or maintained by the agency (NRS 239.073, *et seq.*). Even in the event of the termination of an agency's existence (with no successor agency), the State Department of Cultural Affairs, Division of State Library and Archives (hereinafter Archives) is required to retain the documents of the defunct agency (NAC 239.750). All documents

pertaining to any litigation are required to be separated, protected, and not destroyed until the legal action is finally resolved. In the past, the State's retention of historical documents was implemented by storage in hard copy form, in indexed boxes. Beginning recently and continuing in the future, this retention will be implemented in electronic media, both at Nevada's Agency for Nuclear Projects, and should it become appropriate, at the State's Archives.

Nevada's LSN document collection can be stored on CDs and DVDs. Both the complete text of every document in its LSN document collection, and all the headers associated with each of those documents, will be stored on CDs or DVDs with backup copies. Each header can be tied to its corresponding document through the Participant Accession Number assigned to each document and identified on each bibliographic header.

The headers and documents making up the Nevada collection can be made available to third parties in at least two ways. First, parties, such as the NRC, can be provided with searchable copies of the CDs containing all that data. Second, Nevada may be able to place the data on an internet website, if the agency funding still exists or if funding is allocated to the Nevada Department of Information and Technology, and they take over the website and information database, making all the data available in word searchable and printable form to any person or entity.

II. Nevada's Additional Comments Regarding the LSNA's Memorandum of December 17

Nevada intends to participate to the fullest extent possible in the Yucca Mountain licensing proceeding and maintain its LSN collection in accordance with NRC's regulations and the CAB's orders. Even under the (Query C) hypothetical scenario suggested by Mr. Graser, Nevada's LSN document collection will be preserved, including both its documents and the headers associated therewith, in a readily accessible and searchable form for the foreseeable

future. Should DOE allow the LSN to be "deactivated," as the LSNA postulates, there would be numerous consequences, some of them addressed by the LSNA's correspondence and some not. As stated by the LSNA, termination of the DOE participation in the LSN would raise a number of issues including:

- the 98.9 percent of the LSN collection belong to DOE would become unavailable to the other parties and the public;
- the DOE document collection could not operate in a "lights-out" mode, and any effort by DOE to do so for an extended period would render the DOE collection inaccessible;
- the LSN portal itself operated by the LSNA would likely take five years and multiple millions of dollars to resurrect if decommissioned; and
- the DOE document collection would be extremely difficult to salvage and so should be restructured into aggregated pdf document form instead of its current individual page level data files (exceeding 80 million) to avoid their loss.

In addition to the points specifically raised by the LSNA's correspondence, should DOE allow its LSN collection to become deactivated, it would be in violation of myriad NRC regulations and CAB orders applicable to the conduct of this proceeding, which violations would compel denial of DOE's License Application due to its non-compliance. For example, DOE could not comply with the CAB requirement for monthly updated certifications of its LSN compliance. In addition, discovery (which is presently authorized to proceed in Phase I through November 30, 2010, and beyond calendar year 2010 in other phases) for any of the parties could not proceed because the vast majority of the document collection anticipated to be relied upon by the parties in conducting discovery would be unavailable to them; and without adequate

discovery, there could not be a fair hearing conducted as required under the procedures of Subparts G and J of 10 C.F.R. Part 2. Furthermore, numerous regulatory requirements under 10 C.F.R. 2 with respect to the availability of **all** DOE Documentary Material would be abrogated (for example, Section 2.1003(e) requires that "each party shall continue to supplement its LSN collection until the discovery period in the proceeding has concluded").

Finally, without meaningful discovery and without a fair hearing, the DOE License Application would necessarily be denied. It is worth noting that DOE has always been militant in thrusting itself forward as gate keeper of this proceeding by alleging LSN non-compliance by Nevada and at least six other parties and seeking to exclude them from the proceeding (*see* Nevada Reply to DOE'S Answer to Nevada's Petition to Intervene as a Full Party at 14). As DOE has itself asserted, the LSN regulations apply equally to all parties in this proceeding, and the abdication by any party of its LSN responsibilities concludes its continued participation, including that of the license applicant.

III. Need for Preservation of DOE Documentary Material Regarding Yucca Mountain

There are important reasons why DOE's document collection must be maintained in an accessible and searchable form for the public, regardless of DOE's continuation or discontinuation of its Yucca Mountain project. As observed by the LSNA in his correspondence (at 2), "to preserve this **valuable scientific, engineering, and historical information** would require aggregating the current page-level data back into document-level entities and converting the document-level data to text searchable Portable Document Format (pdf)" (emphasis added). DOE presently has the personnel, time, and resources to accomplish such an effort. It appears from recent "press reports" (and it is "press reports" on which the LSNA relies for the entire premise of his memorandum) that the current administration has declared that the actual

construction of a nuclear waste repository at Yucca Mountain is "not an option." This often repeated statement was most recently reiterated in a January 14, 2010 *Wall Street Journal* article by Stephen Power (copy attached as Exhibit 1).

The LSNA's observations with respect to the scientific value of the information gleaned by 20 years' and many billions of dollars' effort spent by DOE on the "world's most studied piece of real estate" are seconded by Energy Secretary Steven Chu, who is quoted in the same *Wall Street Journal* article as stating that funding is needed in FY2011 "to support the wrap-up of the Yucca Mountain project" including the retention of "**critical knowledge and data**" (emphasis added). Should DOE fail, in response to the Board's December 22, 2009 Order, to commit unequivocally to the preservation of its 80 million pages of documents which DOE itself concluded are relevant Documentary Material for the Yucca Mountain licensing proceeding, then it should be promptly required to do so by the CAB. In view of the most recent "press reports" suggesting that White House Budget Director Peter Orszag "has proposed cutting \$46 million that the DOE had sought to fund its Office of Civilian Radioactive Waste Management, which is responsible for managing the Yucca Mountain project" for FY2011 (*id.*), presumably all such activities would need to be completed by DOE during the time it has funds remaining to do so (i.e., between now and September 30, 2010).

Seemingly, if Mr. Chu's view prevails, this proceeding will continue only until September of this year; while if Mr. Orszag's purported position is implemented, it will end several months earlier than that, since DOE will need to spend remaining FY2010 monies on these "wrap-up" functions; **either** outcome would produce only **partial** discovery and **no** hearing and would add little or nothing to the "valuable scientific information" referred to by the LSNA or the "critical knowledge and data" referred to by Mr. Chu. To continue this proceeding under those

expectations is roughly comparable to an airliner which has run out of fuel, which is plummeting straight to earth, but some of whose passengers are nonetheless playing a game of scrabble to enhance their vocabulary and improve their game strategy for the future.

Respectfully submitted,

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Dated: January 21, 2010

Exhibit 1

JANUARY 14, 2010, 3:34 P.M. ET

Chu, Orszag at Odds Over Yucca Funding

By **STEPHEN POWER**

WASHINGTON – Energy Secretary Steven Chu and White House Budget Director Peter Orszag are wrestling over how quickly to slash funding for a proposed Yucca Mountain nuclear-waste repository in Nevada, a move long advocated by Senate Majority Leader Harry Reid who faces a tough re-election campaign this year.

In a letter sent by Mr. Chu to Mr. Orszag last month, and viewed by the Wall Street Journal, the Energy Secretary expresses "deep concerns" about cutbacks that he says Mr. Orszag's office has proposed making to the Yucca Mountain project as part of Mr. Obama's 2011 fiscal year budget proposal, due to be announced in February.

According to the letter, Mr. Orszag's office has proposed cutting \$46 million that the DOE had sought to fund its Office of Civilian Radioactive Waste Management, which is responsible for managing the Yucca Mountain project.

A spokesman for Mr. Orszag's office didn't immediately respond to a request for comment on the letter, whose content was reported Wednesday by the Energy Daily, a trade publication.

Dr. Chu's letter appeals to Mr. Orszag to provide \$25 million to fund the office, saying the money is needed to support "the wrap-up of the Yucca Mountain Project," including the retention of "critical knowledge and data." It specifies that of the \$25 million, \$5 million is needed to retain project managers and technical staff "to continue to execute the legal and research activities that can only be performed by the staff that has been performing these activities over the past several years."

Asked whether the letter signaled a disagreement between the White House and the Energy Department over how quickly to kill the Yucca Mountain project, an Energy Department spokeswoman said "There is only one timetable. The President and the Secretary have been clear, across the board, that we are ending the Yucca Mountain project quickly and responsibly."

Under federal law, Yucca Mountain is the designated site for the nation's first spent nuclear fuel and high-level radioactive waste. But the repository – which has been long opposed by Mr. Reid and other Nevada politicians – is more than a decade behind schedule. As a result, nuclear waste generally remains at the commercial nuclear reactors and DOE sites where it was generated. That has led to litigation and court judgments ordering the Energy Department to compensate electric utilities for the cost of storing the waste at their facilities. Based on existing judgments and settlements, DOE has estimated the costs of such litigation at \$12.3 billion through 2020 and up to \$500 million per year after that.

In keeping with a campaign pledge, Mr. Obama persuaded Congress last year to cut off most funding for Yucca. But the budget Congress approved didn't zero out funding for the project altogether; it left a small amount available to allow the DOE and the Nuclear Regulatory Commission to move forward with a license application in favor of the project that was submitted to the NRC in 2008 by the George W. Bush administration.

"Sen. Reid and President Obama agree that Yucca Mountain is no longer an option for dealing with nuclear waste and they will continue working to bring the last remaining activities of this ill-conceived project to an end," a spokesman for Mr. Reid said Thursday.

Republicans in Congress have warned that the Energy Department could expose itself to further litigation if it ceases

work on the license application. In a letter to Dr. Chu last November, Representatives Joe Barton of Texas and Greg Walden of Oregon said abandoning the application could "increase the Department's or taxpayer liabilities and permanently strand billions of dollars in federal funding and investment in the project."

Write to Stephen Power at stephen.power@wsj.com

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NUCLEAR REGULATORY COMMISSION**

Atomic Safety and Licensing Board

In the Matter of)	
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U.S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
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(High Level Waste Repository))	January 19, 2010

CERTIFICATE OF SERVICE

I hereby certify that the foregoing State of Nevada's Comments on LSNA Queries has been served upon the following persons by the Electronic Information Exchange:

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