In the Matter of  
U.S. DEPARTMENT OF ENERGY  
(High Level Waste Repository)  

Docket No. 63-001-HLW  
ASLBP No. 09-892-HLW-CAB04  

October 7, 2009

ORDER
(Declining Motion to Compel and Motion to Correct Logs)

A. Before us is the State of Nevada’s motion to compel¹ the production of 29 documents listed in the NRC Staff’s July supplement to its privilege logs for which the Staff asserts the deliberative process privilege.² The State’s motion claims that the Staff’s assertion of the deliberative process privilege is untimely with respect to all 29 documents listed in the Staff’s privilege log supplementation.³ With respect to 12 of the documents that relate to the Staff’s decision concerning its adoption determination for the Department of Energy’s Environmental Impact Statement, the motion concedes that the Staff documents as described in the privilege log “possess the indicia of the deliberative-process privilege.”⁴ With respect to the remaining 17 documents, the State argues, in effect, that the privilege log entries for each Staff document fail to establish a prima facie case for the claimed privilege as required by the applicable Revised Second Case Management Order of the Pre-License Application Presiding Officer (PAPO)

¹ State of Nevada’s Motion to Compel Production of Documents Asserted as Privileged by NRC Staff (Aug. 10, 2009) [hereinafter Nevada Motion].
² NRC Staff Certification of Licensing Support Network Supplementation (July 30, 2009).
³ Nevada Motion at 4-5, 10-11.
⁴ Id. at 4.
Board, previously adopted and made applicable by the Construction Authorization Boards (CABs) in this proceeding.\(^5\) The NRC Staff opposes the State’s motion arguing that its assertion of the deliberative process privilege for all 29 documents in its July privilege log supplementation was timely and appropriate.\(^6\)

The State’s motion to compel is denied. As the State concedes,\(^7\) in addition to the RSCMO, the PAPO Board’s Fourth Case Management Order adopted by the CABs is also applicable.\(^8\) That Order specifically addresses motions to compel and requires that each such motion “shall include an appendix A that lists, in a single spaced, two-column format, the alphanumeric LSN accession number of each bibliographic header and/or redacted version of the document for which production is sought and all the privileges asserted for the sought document by the privilege claimant.”\(^9\) The Order states: “Any motion to compel the production of documents that fails to include an appendix A containing the listing of LSN accession numbers and claimed privileges will be denied.”\(^10\) Because the State’s motion to compel failed to include the required appendix A, its motion to compel is denied.

B. Also before us is the Staff’s motion for leave to correct its July 30 deliberative process privilege log supplement.\(^{11}\) The Staff’s motion was filed on the heels of its answer to

\(^5\) Id. at 6-10. See Revised Second Case Management Order (Pre-License Application Phase Document Discovery and Dispute Resolution) (July 6, 2007) (unpublished) [hereinafter RSCMO]; CAB Case Management Order #1 (Jan. 29, 2009) at 2 (unpublished).

\(^6\) NRC Staff Answer to the State of Nevada’s Motion to Compel Production of Documents Asserted as Privileged by NRC Staff (Aug. 17, 2009).

\(^7\) Tr. at 131.


\(^9\) Id. at 4.

\(^10\) Id. at 5.

\(^11\) NRC Staff Motion for Leave to Correct Its July 30, 2009 Deliberative Process Privilege Log Supplement (Aug. 19, 2009) [hereinafter Staff Motion].
the State’s motion to compel and is opposed by the State of Nevada.12 The motion asserts that, because it seeks to correct minor errors and clarify ambiguities in its deliberative process privilege log that were identified after receiving the State’s motion to compel, good cause exists to allow the corrections.13 The Staff states that its motion is filed within the time period prescribed in the PAPO Board’s Fifth Case Management Order14 and sets out two examples of the type of clarifications and one example of the type of minor corrections it seeks to make.15 With respect to the former, the Staff argues that the information it seeks to clarify is already apparent from the log entries and the Staff characterizes the minor mistakes it seeks to correct as typographical errors, claiming both types of corrections are permissible under the FICMO.16 Finally, in a footnote, the Staff asserts that its motion should be resolved prior to any ruling on the State’s motion to compel.17

The single apposite matter in the Staff’s motion is its identification and reliance upon the FICMO, as controlling here.18 To avoid future misapprehensions as to the meaning of the pertinent provisions of that Order, we repeat them. Part B of the Order states:

B. Due Diligence, Accuracy, and Care
Potential Parties and their attorneys and representatives must exercise due diligence and care in preparing and filing their privilege logs. As with all pleadings and discovery filings, each time a log is submitted (or supplemented or corrected) it must be accompanied by a certification by the attorney or other

13 Staff Motion at 1.
14 Id. at 2. See Fifth Case Management Order (Supplementation, Correction, and Changing of Privilege Logs) (Nov. 1, 2007) at 6 (unpublished) [hereinafter FICMO].
15 Staff Motion at 2.
16 Id. at 2-3.
17 Id. at 3 n.3.
18 Id. at 2. See FICMO at 4, 6 (previously adopted by the CABs in CAB Case Management Order #1 (Jan. 29, 2009) at 2 (unpublished)).
representative that “to the best of the signer’s knowledge, information and belief, formed after reasonable inquiry, the information on the privilege log and the claimed privilege for the document is, inter alia, correct.” See RSCMO II.D. and Appendix A. This certification is a serious matter, and although perfection is not required, see LBP-04-20, 60 NRC 300, 313 (2004), mistakes are strongly disfavored and should be rare.19

In pertinent part, Part D.I of the Order states:

D. Rules Regarding Corrections to Logs
   1. General Rule – Prompt Corrections Required: If a potential party realizes that one of its privilege logs contains materially incorrect or misleading information, then the potential party shall inform the PAPO Board and correct the logs, as follows. If the corrections to the initial privilege logs are filed within twenty days of the initial privilege log’s filing or if corrections to supplements are filed within ten days of the supplement’s filing, then a motion and leave of the PAPO Board are not required. No other corrections will be accepted unless preceded by a motion for leave to file corrections showing good cause and an affirmative ruling from the PAPO Board.20

The standard for attorneys preparing privilege logs and privilege log supplements set forth in the FICMO is one of due diligence, accuracy, and care. In filing each supplement, the attorneys are to certify that, after reasonable inquiry, the information in the log entries is correct. The Order emphasizes that the attorneys’ certification is a serious matter and mistakes are strongly disfavored and should be rare. Further, the only corrections permitted are for information that is “materially incorrect” or “misleading” and corrections for such matters may be made within 10 days of the filing of a privilege log supplementation without leave of the Board but, after 10 days, leave of the Board, upon a showing of good cause, is required.

The Staff’s motion fails to comply with the requirements of the FICMO and is therefore denied. The Staff’s motion does not, by its terms, seek leave to correct information that is materially incorrect or misleading. On the contrary, the Staff’s motion, by its own admission,

19 FICMO at 4.
20 Id. at 6.
only “seeks to correct minor errors and clarify ambiguities.”21 The Staff alleges that it wishes merely to clarify information that is “already apparent”22 from the log entries and to correct minor mistakes that it characterizes as “typographical” errors.23 On the other hand, if the information that the Staff seeks to correct is, in fact, material or misleading, the Staff, to establish good cause, should have identified in its motion each materially incorrect or misleading privilege log entry, the proposed correction for each entry, and an explanation, in light of the Staff attorney’s certification, how each error occurred. Here, the Staff’s assertion of good cause is plainly deficient and lacking the essential elements necessary to meet the standard required by the FICMO.

Finally, we are also required to reject the Staff’s motion by the terms of the Commission’s regulation, 10 C.F.R. § 2.323(b). That provision mandates that the movant certify that it made a “sincere effort” to resolve the issues raised with the other parties and requires rejection of any motion that does not contain the appropriate certification. Although the Staff motion contains a purported certification, the Staff concedes that in discussing its motion with counsel for the State it refused to provide the State with its proposed log corrections.24 Simply put, in the circumstances presented, the sincere effort standard of section 2.323(b) is not met when counsel for the moving party refuses to identify for opposing counsel the log corrections for which Staff counsel seeks another counsel’s assent for its proposed motion. Accordingly, Staff’s counsel’s certification is necessarily not genuine and hence invalid. The Staff’s motion must be rejected.

21 Staff Motion at 1.
22 Id. at 3.
23 Id.
24 Tr. at 155.
C. As should be apparent from the rulings on motions of the State and the Staff, the Board expects all parties to comply with the terms and provisions of the applicable case management orders. Counsel for each party has an independent obligation to read and follow the requirements of those orders and counsel acts at his or her peril if counsel merely follows the practice of some other party.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 7, 2009
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

U.S. DEPARTMENT OF ENERGY

(Docket No. 63-001-HLW)

(–High-Level Waste Repository)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORDER (Denying Motion to Compel and Motion to Correct Logs), dated October 7, 2009, have been served upon the following persons by Electronic Information Exchange.

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
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ORDER (Denying Motion to Compel and Motion to Correct Logs)

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
ORDER (Denying Motion to Compel and Motion to Correct Logs)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland
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