

July 15, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
U. S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
)	
(High-Level Waste Repository))	ASLBP No. 09-892-HLW-CAB04
)	

NRC STAFF MOTION FOR LEAVE TO CORRECT
CONSOLIDATED PRIVILEGE LOGS DATED JUNE 1 AND JUNE 28, 2011

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323 and the “Fifth Case Management Order (Supplementation, Correction, and Changing of Privilege Logs),” dated November 1, 2007 (unpublished) (FCMO), as adopted by the “Case Management Order #1,” dated January 29, 2009, at 2 (unpublished), the U.S. Nuclear Regulatory Commission staff (Staff) hereby moves for leave to file corrections to the consolidated privilege logs attached to the June 1 and June 28, 2011, “NRC Staff Certification of Licensing Support Network [LSN] Supplementation.” See NRC Staff Certification of Licensing Support Network Supplementation, dated June 1, 2011; NRC Staff Certification of Licensing Support Network Supplementation, dated June 28, 2011.

DISCUSSION

The FCMO provides that if a party realizes that its privilege logs contain “materially incorrect or misleading information,” then it must inform the Board and correct the logs. FCMO at 6; Order (Addressing the NRC Staff’s Motion for Leave to Amend Privilege Log Certification), dated November 18, 2009, at 2 (unpublished) (November Order) (“only ‘materially incorrect or misleading information’ must be corrected by counsel”). A party may submit corrections without leave of the Board within ten days of the filing of a supplement to the log. FCMO at 6. Because the Staff seeks leave to correct errors in the consolidated privilege logs filed with its June 1 and

June 28 supplementations, corrections cannot be “accepted unless preceded by a motion for leave to file corrections showing good cause and an affirmative ruling from the . . . Board.” See FCMO at 6.¹ The Board has previously stated that if the Staff seeks to correct material or misleading information, to establish good cause, it should (1) identify each materially incorrect or misleading log entry, (2) propose a correction for each entry, and (3) explain, in light of the attorney’s certification, how each error occurred. Order (Denying Motion to Compel and Motion to Correct Logs), dated October 7, 2009, at 5 (unpublished) (October Order). The Staff’s good cause showing is provided below.

First, the incorrect log entries are related to five (5) documents that had previously been listed on prior privilege logs and were inadvertently removed from the consolidated privilege logs filed on June 1 and June 28, 2011 during preparation of the logs for filing.² The LSN numbers for the bibliographic headers for these documents are NRC000032358, NRC000032363, NRC000032359, NRC000032174, and NRC000032168. The entry for LSN number NRC000032168, had been added to the Staff’s privilege log on June 30, 2010, the entry for LSN document number NRC000032174 had been added to the Staff’s privilege log on July 29, 2010, and the entries for LSN numbers NRC000032358, NRC000032363, NRC000032359 had been added to the Staff’s privilege log on April 1, 2011. The entries for all

¹ The other circumstance under which errors discovered more than 10 days after the date of supplementation may be corrected is if a challenge to an assertion of privilege is registered, and both the privilege claimant and the requester agree on a joint statement of the appropriate correction that will cure any “omitted relevant information that the requester thought was necessary.” FCMO at 6-7. No challenges have been raised regarding the two compiled logs at issue.

² The FCMO states that when a party files supplements to its privilege logs, it must provide a single consolidated version of the log and an addendum with separate sections showing changes and revisions since the prior log iteration was filed. FCMO at 6. The corrections the Staff seeks leave to make are related to the single consolidated version of the privilege log filed with its June 1 and June 28 supplementations.

five documents last appeared on the consolidated log, dated April 1, 2011. See NRC Staff Certification of Licensing Support Network Supplementation, dated April 1, 2011. The errors do not relate to supplemental information added to the Staff's privilege logs on June 1 and June 28, 2011.

Second, to correct these errors, the Staff proposes to file corrected consolidated privilege logs for the June 1 and June 28, 2011, LSN supplementations that would include the five (5) omitted entries. The Staff would file corrected logs if the Board grants the instant motion.

Third, when conducting this month's LSN activities, the Staff discovered that entries for the five documents listed above had been inadvertently deleted from the consolidated version of the privilege logs filed on June 1 and June 28, 2011. Staff counsel was not aware of these omissions when the June 1 and June 28 consolidated logs were prepared or filed and has recently learned that the mishap occurred when technical staff mistakenly selected the wrong file to generate the consolidated log. The Staff has taken good faith efforts to review (1) its privilege logs to confirm that no other entries were omitted, and (2) its processing activities to prevent reoccurrence. Staff counsel has confirmed that the omissions are in the consolidated log only (i.e., there are no omissions or errors in the supplemental information). As such, recertification of the June 1 and June 28 logs is not necessary.³ These actions are consistent with the Board's direction. See October Order at 4 (stating that counsel should exercise "due diligence, accuracy and care" to ensure "that, after reasonable inquiry, the information in the log entries is correct").

³ The Board has stated that the "certification accompanying the monthly supplementation covers only the newly supplemented material." See November Order at 2.

In sum, because the Staff has demonstrated good cause by identifying each error, proposing corrections, and explaining how the errors occurred, the Board should grant the Staff leave to file the corrected versions of the June 1 and June 28, 2011, consolidated logs.

In accordance with 10 C.F.R. § 2.323(b), Staff counsel certifies that it made a good faith effort to contact counsel for the other parties regarding this motion. The Staff's good faith consultation effort included identifying the errors and proposed corrections for the omissions the Staff seeks to make in this motion. See October Order at 5 (stating that the movant should identify, as part of its consultation requirements under section 2.323(b), the log corrections it proposes to make). Counsel for the State of Nevada, the State of Washington, the State of South Carolina, the State of California, Nuclear Energy Institute, Clark County, Inyo County, Lincoln County, White Pine County, Nye County, Aiken County, National Association of Regulatory Utilities, and the Prairie Island Indian Community stated they took no position and reserved the right to respond. Counsel for DOE stated that it did not oppose the instant motion.

CONCLUSION

For the foregoing reasons, the Staff requests that the Board grant leave to file the above identified proposed corrections to the consolidated privilege logs filed with its June 1, 2011 and June 28, 2011 supplementations.

Respectfully submitted,

/Signed (electronically) by/

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/Executed in accord with 10 C.F.R. § 2.304(d)/

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Dated at Rockville, Maryland
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF MOTION FOR LEAVE TO CORRECT CONSOLIDATED PRIVILEGE LOGS DATED JUNE 1 AND JUNE 28, 2011" in the above-captioned proceeding have been served on the following persons this 15th day of July, 2011, by Electronic Information Exchange.

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