STATE OF NEVADA’S ANSWER IN OPPOSITION TO NRC STAFF’S MOTION FOR LEAVE TO CORRECT ITS JULY 30, 2009 DELIBERATIVE-PROCESS PRIVILEGE LOG SUPPLEMENT

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The State of Nevada ("Nevada") files this Answer in Opposition to NRC Staff's ("Staff") Motion for Leave to Correct Its July 30, 2009 Deliberative-Process Privilege Log Supplement (Motion for Leave) and urges that it be denied for the multiple reasons detailed below. In what was not Staff's most forthright fortnight, Staff began by filing a deficient privilege log on July 30, 2009 (fraught with the inadequacies detailed in Nevada's pending Motion to Compel filed August 10, 2009). Staff ended the period filing its Motion for Leave on August 19, 2009 (which is the subject of this Answer in Opposition), asking for concurrence by the parties and leave of the Board, while concealing the proposed privilege log corrections from both. Staff spent the intervening 20 days contradicting itself, reversing its field, repeatedly violating the Licensing Board's orders regarding privilege logs, and repeatedly violating the Commission's regulations requiring pre-motion consultation. In summary form, with details thereafter, the circumstances which constrain denial of Staff's Motion for Leave include:

I. RELEVANT ACTIONS – JULY 30 TO AUGUST 19, 2009

1. Staff's July 30 filing: Previously, the PAPO Board had required privilege logs to be accompanied by the signer's certification that both the information in the log and the privilege claim asserted are correct. The July 30 filing included no certification whatsoever.

2. August 5 Consultation:

   Nevada – All 29 log entries are untimely; and 17 of 29 are inadequate to assert privilege.

   Staff – All 29 are timely; and all 17 are properly asserted; no reason to change a thing.
3. **Nevada Motion to Compel** (August 10): All 29 log entries are untimely; and 17 of 29 are inadequate to assert privilege.

4. **Staff Answer** (August 17): All 29 are timely; and all 17 are properly asserted; no reason to change a thing.

5. **Staff email** sent to all parties (August 17): Staff wants to file a motion to correct "potential ambiguities" in its privilege log; requests non-objection to the motion. [Nevada observation: **What changes?**]

6. **August 19 Consultation:**

   **Nevada** – May we see the proposed corrected log?

   **Staff** – No.

   **Nevada** – Will you tell us what the changes are?

   **Staff** – No. [Nevada observation: Just trust us?]

7. **Staff files this Motion for Leave** (August 19, 2009): tells CAB the purpose is to correct "minor mistakes"; does not provide either the proposed privilege log or a list of changes to CAB either. [Nevada observation: CAB, you trust us, too?]

8. **Staff Motion for Leave**: in addition, Staff asks CAB to act on Staff's Motion first – to allow its secret corrections to be filed before the CAB looks at Nevada's Motion to Compel. In support of this proposition, Staff cites a case which supports Nevada's position, not its own.

9. **Staff admits its true motive** for its desperate concealment of unprivileged documents: "Disclosure of pre-License Application discussions may lead to the mistaken belief that the Staff had already reached its regulatory decision." (Staff Answer to Motion to Compel at 11-12.)
II. ARGUMENT AND AUTHORITIES

1. Belying the cavalier attitude displayed by Staff both in filing the Motion for Leave and in attempting to correct its July 30 privilege log, the PAPO Board has long required something much more:

   Each time a log is submitted (or supplemented or corrected), it must be accompanied by a certification from the attorney or other representative that "to the best of the signer's knowledge, information and belief, formed after reasonable inquiry, that the information on the privilege log and the claimed privilege document is correct."

   11/1/2007 Case Management Order No. 5 (CMO#5) at 4. The PAPO Board went on to admonish "this certification is a serious matter . . . mistakes are strongly disfavored and should be rare." Id.

2. Staff's July 30 privilege log was invalid from its inception, since it was accompanied by no certification whatsoever.

3. On Wednesday, August 5, after requesting a day and time convenient to Staff, Nevada consulted telephonically with Staff, seeking to avoid the necessity for filing a motion to compel, discussing possible resolution of differences, and offering a compromise, which was not accepted. Nevada explained that all 29 entries in Staff's privilege log were untimely, and that as to 17 of 29 entries, Staff's purported articulation of its deliberative-process privilege claims was improper and not in accordance with the requirements of the PAPO Board, found in its July 6, 2007 Revised Case Management Order No. 2 (Revised CMO#2) and Appendix C of that Order (setting out the specific requirements for the assertion of deliberative-process privilege claims).

4. Staff refused to make any change whatsoever in its privilege log, asserting that all entries were timely and that its articulation of the deliberative-process privilege was proper and in accordance with the Revised CMO#2 and its Appendix C.
5. On August 10, Nevada filed its Motion to Compel, alleging the failure of Staff to assert the deliberate-process privilege in accordance with Revised CMO#2 as to 17 of its 29 entries and the failure of Staff to make the privilege assertion in a timely fashion as to all 29 (the precise issues it had raised in the consultation on August 5).

6. On August 17, Staff filed its Answer to Nevada's Motion to Compel repeating its refrain that its assertion of the deliberative-process privilege was proper and in accordance with Revised CMO#2 as to the 17 entries whose assertion was questioned by Nevada, and that its submission was timely as to all 29 entries in its privilege log.

7. On August 17 (the same day Staff filed the foregoing Answer to Nevada's Motion to Compel), its counsel sent an email to all parties stating that the Staff had "noticed some potentially ambiguous entries in our most recent privilege log that may benefit from correction" (8/17/2009 Email attached hereto as Exhibit A) (emphasis added). Staff stated its intention to file a motion for leave to file a corrected privilege log, and asked the other parties whether they would object to such a motion. Staff did not, however, send either its proposed motion or its proposed corrected privilege log to the parties.

8. On August 19, Nevada engaged once again in a telephone consultation with Staff, this time regarding its proposed Motion for Leave (the subject of this Answer). Nevada requested a copy of the proposed changes to the privilege log. Staff refused. Nevada asked Staff to identify the changes Staff proposed to make. Staff refused. Finally, Nevada asked if Staff would at least represent that the proposed changes it intended were not aimed at revising the very same matters Nevada had raised in its pending Motion to Compel (the matters with respect to which Staff had refused to make any changes, during the consultation preceding Nevada's filing of its Motion to Compel). Again, Staff refused. Accordingly, Nevada asked Staff to recite
Nevada's objection to the Staff Motion. (Query: How can one consult in good faith if it refuses to disclose its proposed action? Answer: It cannot.)

9. On August 19, Staff filed its pending Motion for Leave. Again, it did not favor either the parties or the CAB with a copy of its proposed new privilege log. Likewise, it did not list or explain the revisions it was seeking leave to make. (Staff did give three "examples" of proposed changes; but there is no way of knowing if those examples are typical, or if they are 3 examples out of 30, or 3 examples out of 300 changes.)

10. The PAPO Board had announced its strict standard for the limited circumstances under which leave would be given to a party to correct an erroneous privilege log, consistent with its instruction that such logs were a "serious matter" and that mistakes should be "rare."

Thus, the PAPO Board's CMO#5 provides: "If a potential party realizes that one of its privilege logs contains materially incorrect or misleading information . . ." (emphasis added), then it may move for leave to correct.

11. In its desire to persuade the parties to consent to its unseen corrected privilege log, and to persuade the CAB to grant it leave to file its unseen corrected privilege log, Staff sought to trivialize the nature and scope of the changes. Thus, its email message to the parties characterized the proposed changes as only "potentially ambiguous" entries in its privilege log that "may benefit from correction." Likewise, its Motion for Leave to CAB characterizes its changes as only "minor mistakes" and "ambiguities." The Staff further tried to burn its candle at both ends by still insisting (even as it moved for leave to make corrections!) "its privilege log properly asserts the deliberative-process privilege and satisfies the requirements of the PAPO Board's Revised Case Management Order No. 2." In its zeal to minimize the significance of its hidden privilege log amendments, the Staff accordingly went the wrong direction, apparently
forgetting the PAPO Board's mandate that motions for leave to correct privilege logs would be entertained only where the document was "materially incorrect or misleading" (and not where it involved merely "minor mistakes" or "potential ambiguities").

12. Despite serving up its Motion for Leave to both the parties and to the CAB with the contents of its corrected privilege log concealed, the Staff's Motion for Leave goes yet a step further and brazenly suggests that its Motion be acted upon first ("it would be appropriate to rule on the instant motion prior to ruling on the Motion to Compel," Motion for Leave at 3 n.3).

Thus, after repeatedly urging in pre-motion consultation and in filings, that its original privilege log was timely and correct, Staff now urges that its mystery changes be allowed and be allowed now, before the CAB even looks at Nevada's Motion to Compel. Facing waiver and disclosure, this ploy may be Staff's last resort, but it should not be tolerated.

13. In support of this novel argument, Staff recites a case which does not support the proposition claimed, but which does illustrate the value of a sincere pre-motion consultation, something which Staff had just avoided, twice in the space of two weeks in this case. The case of *Vermont Yankee LLC and Entergy Nuclear Operations, Inc.*, LBP-05-33, 62 NRC 828 (2005) did not involve a motion for leave to correct an inadequate privilege log. It did involve a privilege log; it did involve a sincere effort by the privilege log challenger to consult in good faith with the privilege claimant; and most importantly, it did involve a sincere, good faith, lengthy, and successful consultation between the privilege claimant and challenger. During the consultation, the challenger disclosed its objections to the privilege log, and the claimant discussed those changes it would make in an honest effort to resolve as many issues as possible, and avoid or reduce the scope of the challenger's motion to compel. In *Vermont Yankee*, the Board pointed out the purpose of the consultation between parties required by 10 C.F.R. §
2.323(b) stating that it "seeks to avoid unnecessary litigation by requiring the movant to make a reasonable effort to discuss and perhaps resolve the problem or misunderstanding before involving the Board." *Id.* at 837. In *Vermont Yankee*, the Board explained the procedure agreed to between the privilege challenger and claimant. Specifically, the challenger would register its informal objections with the Staff within ten days of the issuance of the privilege log, and the Staff would respond, indicating what changes it would make. If the challenger remained unsatisfied, it could file its motion to compel. While the Board criticized the parties for one aspect of their agreement – it abrogated the ten-day requirement for the filing of a motion prescribed by 10 C.F.R. § 2.323(a) without permission of the Board – yet it praised the parties for their good faith effort to consult and resolve issues. The Board finally concluded that it would excuse the parties' delay with respect to the belated filing of the motion to compel, because of its beneficial goal: "We also recognize that the agreement of the parties here . . . allowing the party claiming the privilege to supplement the privilege log information at some later time and attempt to substantiate the privilege, is not an atypical approach . . . and the supplementation dialog engaged in by the parties here may be a good use of the consultation process." *Id.* at 839. Of course, prerequisite to the conduct of a dialog between privilege challenger and privilege claimant, such as that which took place in *Vermont Yankee*, is something which Staff adamantly refused in this case: the disclosure of its position and discussion of the possible resolution of differences.

14. Finally, Staff admits in its Answer to the Motion to Compel (at 11-12) that the disclosure of the pre-License Application discussions (identified in 17 of 29 privilege log entries) "may lead to the mistaken belief that the Staff has already reached its regulatory decision." That,
while true, is not a ground for privilege, nor is it a justification to withhold unprivileged documents.

III. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Nevada respectfully prays that, upon hearing, the Board deny NRC Staff's Motion for Leave to Amend its Privilege Log.

Respectfully submitted,

(signed electronically)
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Dated:  August 26, 2009
Exhibit A
Dear Counsel:

In preparing our response to Nevada's Motion to Compel, the NRC staff noticed some potentially ambiguous entries in our most recent privilege log that may benefit from correction. Therefore, tomorrow, in accordance with the Fifth Case Management Order, the Staff intends to file a motion for leave to file a correction to the privilege log. Pursuant to 10 C.F.R. 2.323, we are requesting whether the other parties to the proceeding would object to such a motion. I will be out of the office in training most of the day tomorrow and unavailable by phone. However, if you have questions, please contact Adam Gendelman at 301-415-8445.

By the way, the Staff intends to file its response to Nevada's Motion this evening, after the EIE maintenance has concluded.

Thank you,

Molly

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing State of Nevada's Answer in Opposition to NRC Staff's Motion for Leave to Correct Its July 30, 2009 Deliberative-Process Privilege Log Supplement has been served upon the following persons by the Electronic Information Exchange:

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