UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	**)**	**Docket No. PAPO-00**
	)	
U.S. DEPARTMENT OF ENERGY	**)**	**ASLBP No. 04-829-01-PAPO**
	)	
(High Level Waste Repository:	**)**	
Pre-Application Matters	**)**	

THE STATE OF NEVADA'S NOTICE OF APPEAL
FROM THE PAPO BOARD'S JANUARY 4, 2008
AND DECEMBER 12, 2007 ORDERS

Pursuant to 10 C.F.R. § 2.1015(b) and the terms of the Orders themselves, the State of Nevada hereby gives notice of its appeal from the December 12, 2007 Order of the Pre-License Application Presiding Officer ("PAPO") Board, *U.S. Dep't of Energy (High Level Waste Repository: Pre-Application Matters)*, *Slip Op*. (PAPO Board, Dec. 12, 2007) (Order Denying Motion to Strike), as supplemented by its Memorandum of January 4, 2008 *U.S. Dep't of Energy (High Level Waste Repository: Pre-Application Matters)*, LBP-08-01, *Slip Op*. (PAPO Board, Jan. 4, 2008) (Memorandum (Setting Forth Full Reasoning for Denying Nevada's Motion to Strike)).

This appeal comes from a decision the PAPO Board issued in two stages. On December 12, 2007, the Board issued an Order stating that it would be denying a motion Nevada filed to strike the Licensing Support Network ("LSN") certification filed by the Department of Energy ("DOE"). The Board explained that it was "issuing this order quickly to provide maximum advance notice to the State of Nevada, and other potential parties, who are obliged to produce their own documentary material, and submit their own certifications, on January 17, 2008." *Slip Op*. at 2. The Board also advised that it would "issue a memorandum and order, more fully

articulating its ruling on this matter in due course." *Id*. at 2. Both the December 12 Order and the Board's subsequent January 4, 2008 Memorandum confirm that "[t]he time period for filing an appeal to the Commission under 10 C.F.R. § 2.1015 will not start until that memorandum and order is issued." *Id.* "Any appeal from the December 12, 2007 Order, as supplemented by this memorandum, should be filed within ten days of service hereof. See 10 C.F.R. § 2.1015." January 4, 2008 Memorandum at 20.

Dated: January 15, 2008

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(signed electronically)

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THE STATE OF NEVADA'S BRIEF ON APPEAL FROM THE PAPO BOARD'S JANUARY 4, 2008 AND DECEMBER 12, 2007 ORDERS

Dated: January 15, 2008

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INTRODUCTION

This appeal raises the question of whether the Department of Energy ("DOE") can effectively deprive its adversaries – the State of Nevada and others who oppose the planned nuclear waste repository at Yucca Mountain – and the Commission itself, of a six-month period of time to review DOE's Documentary Material that the Commission adopted in its regulations *at DOE's behest*. The Commission designed the six-month period to afford opponents like Nevada the opportunity to draft meaningful contentions in what may be the most far-reaching regulatory determination any agency has had to face. DOE seeks to take away the six months by certifying in advance as "complete" a submission of documentation that lacks documents DOE concedes are the most critical to its License Application ("LA") and the Commission's ultimate decision. DOE's rush to certify before it had these critical documents deprives Nevada of the six-month window that LSN regulations promise prior to DOE's filing its LA for formulating contentions.

The Pre-License Application Presiding Officer ("PAPO") Board found that "there is no dispute that DOE has not produced a number of important documents still in development. . . . [including] the TSPA-LA and PSA [Preclosure Safety Analysis], both of which appear to be large, complex, and of critical importance to DOE's license application." Memorandum of January 4, 2008 *U.S. Dep't of Energy* (*High Level Waste Repository: Pre-Application Matters*) ("*Slip Op*."), LBP-08-01, *Slip Op*. at 11 (PAPO Board, Jan. 4, 2008) (emphasis in opinion). The Board also found there to be "no dispute that DOE has 'knowingly' certified without completing all of its documentary material." *Id.* However, the Board found itself constrained to find as a matter of law that the regulations permit DOE to take this course, even though (1) the *only* reason DOE has for making the certification now is to meet its own arbitrary project deadline; (2) the effect of permitting this result is to allow DOE to deprive its adversaries of the six months provided in the regulations to study voluminous, complex documents and to prepare contentions;

and (3) the construction makes the Commission's certification requirement effectively meaningless – DOE could have made its certification at any time (even when it had no documents available).

As explained below, the PAPO Board's legal analysis is mistaken and it should be reversed.

I. PRELIMINARY STATEMENT

A. The Extraordinary Nature of the Yucca Mountain Licensing Proceeding Creates a Need for Special Document Production Rules

This appeal involves a unique rule adopted for a unique proceeding. This proceeding will call upon the Commission to decide whether to license the first nuclear waste repository in the world. The question of whether Yucca Mountain should be converted into a waste repository critically affects every American – especially the scores of millions of people along transportation routes, the State of Nevada where DOE hopes to locate this facility, and the portions of California that lie along the path of the ground water. This decision involves scores of billions of dollars; decades, if not a century of potential construction, operating and maintenance; and an assessment of safety for 1 million years.

It is also a decision that, based upon an arbitrary (and what seems to be politically motivated) project deadline, DOE is anxious to get to quickly. DOE has declared repeatedly, publicly, privately and absolutely that there is a June 30, 2008 "deadline" on its plans to file a LA with the Commission. An August 2007 Government Accountability Office report confirms that DOE's Yucca project director had long made submission of the LA by June 2008 the project's top strategic objective and management priority (Nevada Ex. 2 at 13).[1] DOE has told those

[1] "Nevada Ex." refers to exhibits filed by Nevada on October 29, 2007, with its Motion to Strike DOE's October 19, 2007 Certification, as supplemented on November 27, 2007. "DOE

working on determining whether Yucca Mountain will be safe that they will "***all***" be "***out of a job***" if they do not meet this deadline; that "***any slips in schedule will be recovered by cutting scope***," that "***[t]here is no allowance for not meeting schedule***," and that the three priorities Yucca workers must satisfy are "schedule, defensibility, credibility ***in that order***." (Nevada Ex. 1, LSN DN2002319598) (emphasis added).

DOE's June 30, 2008 drop-dead deadline is not based upon any legal requirement. Section 114(b) of the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. § 10134(b), did require DOE to file an LA within 90 days after its Yucca site recommendation to the President and Congress became final on July 23, 2002. But DOE ignored that date long ago, while the project Congress approved has dramatically changed.

DOE has never articulated any particular reason why an LA that did not need to be filed in 2002, 2003 or any of the other years since, has become so critical to file by June 30, 2008. The only apparent reason for this deadline is that there is a Presidential election this November. Some prominent candidates oppose the project. DOE apparently hopes to get the Commission to docket the LA before a plug is pulled.

But regardless of DOE's motives, DOE's decision to place deadline above every other consideration serves no good purpose and disserves the real goals of safety, quality and a fair and efficient license and hearing process. In fact, as recently as August 21, 2007, the director of Yucca's Office of Quality Assurance reported to his boss that a scheduled QA surveillance "to evaluate the status and processes for the [Licensing Support Network] submittal was *cancelled,* due to LSN time constraints to complete the LSN submittal on schedule" (Nevada Ex. 3 at 1) (emphasis in original).

Ex." refers to exhibits filed by DOE with its November 9, 2007 Response to Nevada's Motion, as supplemented on November 27, 2007.

DOE's arbitrary deadline also impedes the Commission's and Nevada's ability to evaluate the LA DOE plans to file. Unlike DOE, the Commission faces a real deadline in which to make its critical decision in this unique proceeding. Section 114(d) of the NWPA, 42 U.S.C. § 10134(d), prescribes in relevant part that, subject to a maximum extension of 12 months:

> [T]he Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of the submission of such application.

The Commission's deadline creates significant practical problems. DOE's LA will rely on models so complex that even in this day and age it requires multiple specialized computers to run them. The documents relevant to evaluating these models run into millions upon millions of pages, and the electronic data is measured not in mega- or gigabytes, but terabytes.

If the three or four years becomes consumed with protracted fights over the submission of multiple rounds of contentions and discovery into the almost unimaginably complex technical background behind DOE's models, two things will happen: (1) the clock will run on the Commission's own time to hear the evidence it needs to make its determination; and (2) the burden of delay in a compressed schedule will be shifted from DOE (which has been working on these models for 18 *years*), to Nevada and others opposing the project (who cannot fairly begin their work of responding to DOE's LA until they know what it is based upon). If DOE moves the production of information concerning this project into the licensing proceeding, it can limit its adversaries' time to respond. This is obviously unfair, and undermines the legitimacy of the process by which the Commission is to make its determination.

B. **Subpart J Rules Satisfy this Need by Requiring DOE to Place Documentary Material on a Licensing Support Network ("LSN") Six Months in Advance of Submitting Its License Application**

To avoid this unfair result, the Commission adopted a unique set of rules for this proceeding designed to ensure that all relevant documents would be made available to Nevada

and other interested parties *before* DOE submitted its LA. "Recognizing the enormous amount of documentary material related to the site, and the substantial national, state, and local interest in this matter, [10 C.F.R. Part 2] Subpart J includes several provisions designed to expedite and to assist the Commission in achieving the three-year deadline for the Yucca Mountain licensing proceeding. These include the creation of the Licensing Support Network (LSN), a web-based system for making documents electronically available to all participants, *see* 10 C.F.R. § § 2.1001 and 2.1011, and the establishment of a detailed sequence of events that must occur within the three-year period, *see* 10 C.F.R. Part 2, Appendix D." *In the Matter of U.S. Dep't of Energy (High-Level Waste Repository)*, 60 N.R.C. 300, 304 (Aug. 31, 2004) (PAPO Board) ("*2004 Decision to Strike*"), *appeal on other issues held in abeyance*, Docket No. PAPO-00, CLI-04-32, 2004 NRC LEXIS 253 (NRC Nov. 10, 2004).

The fundamental purpose of the LSN is to "[e]nabl[e] the comprehensive and early review of the millions of pages of relevant licensing material by the potential parties to the proceeding, so as to permit the earlier submission of better focused contentions resulting in a substantial saving of time during the proceeding." 54 Fed. Reg. 14,925, 14,926 (1989). Indeed, the words "fundamental purpose," come from DOE itself. *See 2004 Decision to Strike*, 60 N.R.C. at 306 n.7 (quoting DOE Rule Comments at 2) ("[I]t is important to recall that the fundamental purpose of the LSN, as well as the predecessor Licensing Support System (LSS), is to ensure that potential parties have timely access to documentary material sufficiently in advance of the NRC's formal licensing proceeding so as to permit the earlier submission of better focused contentions, resulting in a substantial saving of time during the proceeding"). And to make this system work, the Commission required a certification of compliance. *See* 10 C.F.R. § 2.1009(b).

In 2001, the Commission proposed amendments to clarify the timing of participant compliance certifications. The most prominent commenter on these amendments was DOE (Nevada Ex. 4), which, as the Commission noted, urged the Commission *not* to follow its plan to use DOE's Site Recommendation as the trigger for DOE's obligation to certify its LSN document collection: "While we support early access to information," said DOE, "we believe that there is a more effective way to facilitate preparation of focused contentions [for the licensing proceeding] and ensure an efficient licensing process than by tying the Department's certification of its documentary material to the Site Recommendation process." *Id*. at 1. DOE recommended that the initial certification of compliance be required no later than six months before the submission of the LA. *Id*. at 1-2.

The Commission's amendments focused on DOE's stated purpose: "ensuring that interested members of the public have a ***full six months*** in advance of submission of the License Application to review the Department's documentary material." *Id*. at 2 (emphasis added). Paraphrasing DOE's words, the Commission stated, "if certification were tied to the Site Recommendation, as it is in the proposed rule, it would be 'virtually impossible' to predict how much time would be available for review of the documentary material before the license application is submitted. In contrast, tying the certification to the license application would ***ensure a defined period of time for review***." 66 Fed. Reg. 29,453, 29,459 (May 31, 2001) (emphasis added).

The Commission adopted DOE's proposal *in toto*, both the trigger that would prompt DOE's obligation to certify its LSN and its six-month proposed lead time. On the trigger, the Commission said it "agrees that tying availability and certification to the date DOE submits (tenders) the license application is a relatively simple and straightforward approach to this issue." *Id*. On the lead time, the Commission ruled, "The Commission believes that providing for a six-

month period of DOE documentary material availability before DOE submits (tenders) the license application reflects an appropriate amount of pre-license application review time for participants to prepare for the licensing proceeding." *Id*.

To ensure this "six-month period of DOE Documentary Material availability before DOE submits" its LA, *id.*, the Commission defined the term "Documentary Material" to include three categories of information:

> Documentary material means:
>
> (1) ***Any*** information upon which a party, potential party, or interested governmental participant ***intends to rely and/or to cite in support of its position in the proceeding*** for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area pursuant to parts 60 or 63 of this chapter, a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to parts 60 or 63 of this chapter;
>
> (2) Any information that is known to, and in the possession of, or developed by the party that is relevant to, but does not support, that information or that party's position; and
>
> (3) All reports and studies, prepared by or on behalf of the potential party, interested governmental participant, or party, including all related "circulated drafts," relevant to both the license application and the issues set forth in the Topical Guidelines in Regulatory Guide 3.69, regardless of whether they will be relied upon and/or cited by a party. The scope of documentary material shall be guided by the topical guidelines in the applicable NRC Regulatory Guide.

10 C.F.R. § 2.1001 (emphasis added).

Then, the regulations require parties to make "***all*** documentary material" available – in DOE's case six months in advance of submitting its licensing application:

> Subject to the exclusions in § 2.1005 and paragraphs (b), (c), and (e) of this section, DOE shall make available, no later than six months in advance of submitting its license application for a geologic repository, the NRC shall make available no later than thirty days after the DOE certification of compliance under § 2.1009(b), and each other potential party, interested governmental participant or party shall make available no later than ninety days after the DOE certification of compliance under § 2.1009(b) --

> (1) An electronic file including bibliographic header for ***all documentary material*** (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, a potential party, interested governmental participant or party; provided, however, that an electronic file need not be provided for acquired documentary material that has already been made available by the potential party, interested governmental participant or party that originally created the documentary material. Concurrent with the production of the electronic files will be an authentication statement for posting on the LSN Web site that indicates where an authenticated image copy of the documents can be obtained.
>
> (2) In electronic image format, subject to the claims of privilege in § 2.1006, ***graphic-oriented documentary material*** that includes raw data, computer runs, computer programs and codes, field notes, laboratory notes, maps, diagrams and photographs, which have been printed, scripted, or hand written. Text embedded within these documents need not be separately entered in searchable full text. A bibliographic header must be provided for all graphic-oriented documentary material....

Id. § 2.1003(a) (emphasis added).

The Section 2.1005 "exclusions" that Section 2.1003(a) references include a number of specified items such as certain classified material, journal articles, reference books and official notices. *See* 10 C.F.R. § 2.1005(a)-(i). Paragraphs (b) and (c) of § 2.1003 refer respectively to "basic licensing documents generated by" particular agencies being produced in electronic form "by the respective agency that generated that document," and specify that the participation of the host state (Nevada) "shall not affect the State's ability to exercise its disapproval rights" under provisions of the NWPA. Section 2.1003(e) states that:

> Each potential party, interested governmental participant or party shall continue to supplement its documentary material made available to other participants via the LSN with any additional material created after the time of its initial certification in accordance with paragraph (a)(1) through (a)(4) of this section until the discovery period in the proceeding has concluded.

Then, the Commission required responsible officials of the parties to "***certify*** to the Pre-License Application Presiding Officer that . . . to the best of his or her knowledge, the

documentary material specified in § 2.1003 has been identified and made electronically available. . . ." 10 C.F.R. § 2.1009 (emphasis added).

C. At the Time, and for Years Afterwards, Everyone Involved in this Process Agreed that These Rules Require DOE to Provide All of Its Critical Materials in Advance for Nevada to Evaluate

1. DOE said so

"From the outset, DOE fully endorsed and supported the six-month document discovery phase in its comments on the Commission's proposed rule." *2004 Decision to Strike*, 60 N.R.C. at 305 (*quoting from* DOE letter excerpted at 66 Fed. Reg. 29,453, 29,459 (May 31, 2001)). DOE informed the Commission that it was "committed to ensuring that interested members of the public have a full six months in advance of its submission of the license application to review the Department's documentary material." *Id.* Thereafter, in schedule after schedule, and statement after statement, both public and in private, DOE acknowledged its understanding that the regulation required it to make publicly available ***all*** of its key licensing documents at least six months before it tendered its LA to NRC. For example:

- On October 18, 2000, DOE wrote in a draft LSN Strategic Approach ("LSNSA") (Nevada Ex. 7) that "[e]arly provision of these documents in an easily searchable form would allow for a thorough and comprehensive technical review of the LA by all parties/potential parties to the licensing proceeding, resulting in better-focused contentions." *Id*. at 4-5. As a result, DOE's initial certification would include ***all*** "those documents that are known to directly support the LA." *Id*. at 11 (emphasis added).

- On December 10, 2001, DOE issued draft "Technical Guidance for License Application Planning" (Nevada Ex. 11) explained that "***The technical basis for the LA***, which will support LA preparation and any eventual NRC review, must be ***essentially complete*** eight months prior to LA submittal to support BSC's initial LSN certification process. BSC will complete the initial certification of the LSN to the DOE seven months prior to LA submittal *so that DOE has one month to prepare their initial certification to the NRC six months prior to LA submittal* ***as required by 10 C.F.R. Part 2, Subpart J***." *Id*. at 3 (emphasis added).

- Later DOE reiterated, "Documentation supporting the [LA] should be completed in time to support the initial certification process for the LSN. LSN certification

will occur six months prior to [LA] submittal. This means ***technical products should be completed eight months prior to the scheduled LA date***." *Id*. at 21 (emphasis added).

- DOE said that "[t]he review of draft sections must be sufficiently complete ***along with the essential supporting technical basis documents*** before the initial BSC LSN certification process begins, eight months prior to LA submittal." *Id.* at 6 (emphasis added).

- As DOE explained, during the six-month "hiatus" between its LSN certification and LA filing, DOE would not be creating the critical technical documents Nevada needed in order to formulate contentions; instead:

> DOE management review of and concurrence on the integrated LA, and production of the final document, will take place during the six months following initial LSN certification. Changes and additional information developed during the DOE management review will be included in the LSN with a supplementary certification at the time of LA submittal. [*Id.* at 6].

- In early 2002, DOE produced a strategy document entitled "Strategic Basis for License Application Planning for a Potential Yucca Mountain Repository" (Nevada Ex. 13). Focusing on the content of the initial LSN certification, DOE explained, "***The technical basis for the LA,*** which will support LA preparation and any eventual NRC review, must be essentially complete at the time of initial certification of the LSN, six months prior to LA submittal as required by 10 C.F.R. Part 2, Subpart J(3)." *Id*. at 2 (emphasis added).

- Speaking to the necessity to prepare and review draft chapters of the LA, DOE added, "The review of draft [LA] chapters must be complete along with the essential supporting technical basis documents before initial LSN certification, six months prior to LA submittal." Id. at 8 (emphasis added). *See also*, Exs. 14, 15, and 16, all of which confirm DOE's intent to adhere to the Six-Month Rule.

- In June 2004, DOE published on its website a "Frequently Asked Questions" list (Nevada Ex. 22). There, DOE explained that 10 C.F.R. 2, Subpart J requires DOE "to provide the general public and parties to the licensing hearing with electronic access to all documentar***y material relevant to the licensing proceeding***." *Id*. at 1 (emphasis added).

- DOE added, "The Nuclear Waste Policy Act directs the NRC to issue its licensing decision within 3 years after the DOE license application is submitted. Given this short period of time, the LSN will provide access to ***all documents that are relevant to the Yucca Mountain license proceeding in advance of the license application submittal*** and will be used instead of the traditional NRC document discovery process." *Id*. at 3 (emphasis added). Addressing in detail the type of documents which meet the description of "all documents that are relevant to the

Yucca Mountain license proceeding" and which must, therefore, be on the LSN in advance, DOE explained:

> The two main reports that DOE must produce to demonstrate compliance with NRC performance objectives are a pre-closure safety analysis and a post-closure performance assessment. Any document bearing on information contained in these reports – including description and technical basis of the repository design; identification of structures, systems, and components, equipment, and process activities; description of the geologic setting and natural features, events, and processes; technical basis for including or excluding degradation, deterioration, and alteration processes of engineered barriers; technical basis for the identification of hazards, event sequences, and consequences; and choice of supporting data, analytical methods, models, treatment of uncertainties, and assignment of probabilities . . . must be included in the LSN. [*Id*. at 33.]

2. <u>Nevada said so</u>

Although DOE represented to the PAPO Board that Nevada had never suggested during rulemaking that critical documents needed actually to be on the LSN at the time of certification, this is not correct. In making comments on the Commission's rules, Nevada expressly noted:

> It is clear from the preamble of NRC's Proposed Rule that the ... step-wise [LSN submission] approach was carefully calculated to (1) enable the parties to the anticipated proceeding other than DOE to have a reasonable time to review the DOE LSN database before preparing and filing their own and (2) make sure that the filing of the ***all the respective databases was complete substantially prior to the docketing of DOE's license application***. Thus, NRC emphasizes in its preamble that the provisions of 10 C.F.R. 2.1003(a) 'require the DOE to make its documentary material available to other potential parties and the public in electr[on]ic form via the LSN no later than six months in advance of DOE's submission of its License Application to the NRC.'

DOE Ex. C at 2 (quoting 68 Fed. Reg. at 66,373) (emphasis added). As Nevada explained, the Commission had "made clear its intention that the entire sequence of LSN database filings was ... intended to be complete well before the time of DOE's License Application," because complete databases were essential to permit "a thorough and comprehensive technical review of the license application by all parties and potential parties to the [high level waste] licensing proceeding, resulting in better focused contentions in the proceeding." *Id*.

At the time, DOE never took issue with Nevada's statements that "*all* the respective databases" needed to be "complete substantially prior to the docketing of DOE's license application," or that this would be essential to framing "focused contentions in the proceeding." At the time, and for many years afterwards, DOE *agreed* with and *advocated* these points.

3. Most importantly, the Commission said so

The fundamental concept – that Nevada and others needed meaningful documentary material six full months before DOE submitted its licensing application so they could draft meaningful contentions is not something the Commission said only during the 1989 and 2001 rulemaking proceeding. While advising state and local governments concerning a seemingly short 30-day window for them to act after the Commission's notice of receipt of DOE's repository application and publication of the notice of hearing, the Commission explained:

> And while 30 days is short, remember what we talked about a little while ago, ***DOE has to have all of their documents online six months before they submit the application***, and that would be three months before – there would be an additional three months before it's docketed. So, really nine months before this notice would come out DOE's material should be online and available to anybody.

Nevada Ex. 5 at 90-91 (emphasis added).

In 2004, the Commission fine-tuned 10 C.F.R. Part 2 with a further amendment reaffirming the basic obligation adopted by the Commission in 2001: "The Commission also notes that the history of the LSN and its predecessor, the Licensing Support System, makes it apparent it was the Commission's expectation that the LSN, among other things, would provide potential participants with the **opportunity to frame focused and meaningful contentions** and to avoid the delay potentially associated with document discovery, by requiring parties and potential parties to the proceeding **to make *all* their Subpart J-defined documentary material available through the LSN prior to** the submission of the DOE application." 69 Fed. Reg. 32,836, 32,843 (June 14, 2004) (emphasis added).

In fact, in August 2007, the NRC Staff agreed that: "there is a clear expectation that the majority of documents supporting DOE's license application will be available on the LSN at the time of DOE's initial certification. It is well established that one of the purposes of the LSN is to facilitate the timely review of DOE's application by providing access to relevant documents before the application is submitted, rather than through the traditional discovery process." NRC Staff Response to Nevada's Motion for a Declaratory Ruling, filed Aug. 3, 2007, at 4. *See also id.* at 6 n.5 (the purpose of the LSN rule would be defeated if the DOE were to certify a "substantially incomplete" document collection).

D. 2004: DOE is Found to Have Acted in Bad Faith After It Certifies Its Production as "Complete" While Withholding Key Documents

On June 30, 2004, DOE certified to the Secretary of the Commission that it had made its documentary material electronically available as specified under the Commission's Subpart J rules. On July 12, 2004, Nevada moved to strike DOE's certification, in part, because Nevada had discovered that DOE's web site had ***both*** "failed to provide the 30 million pages of documents that had been projected by DOE four months earlier," and "excluded 3.4 million DOE e-mails, and failed to provide the text for 'innumerable documents.'" *See 2004 Decision to Strike*, 60 N.R.C. at 307. The PAPO Board granted Nevada's Motion to Strike, finding that "[i]t is clear from DOE's answer, as well as its representations during oral argument, that DOE has not completed its duty of producing all known and reasonably available documents." *Id.* at 310. The Board also found that "[t]he incompleteness and ongoing status of DOE's review of its documents for potential claims of privilege and the fact that DOE purported to make all of its documents available, while still withholding the text of many of them because it had not decided whether they were privileged or not, makes it clear that DOE has not met its duty, in good faith, to produce all documents." *Id.* at 319.

Having found that DOE knowingly failed to produce documents in its possession, the PAPO Board did not specifically address Nevada's claim that DOE had failed to provide documents that it had "projected." *Id.* at 307. However, the Board did have occasion to comment on the question of whether internal DOE deadlines should take precedence over the need to produce, in good faith, information essential for DOE's adversaries to develop well-articulated contentions. As the Board explained:

> DOE knew from the start that millions of documents were involved. While we applaud DOE's attempt to manage its work by establishing its own document production schedules and internal deadlines, if, on the day of DOE's self-imposed document production deadline, DOE was not quite finished, that deadline, not compliance with 10 C.F.R. § 2.1003, is what now must yield.

60 N.R.C. at 314-15. As the Board explained, any rule that exalted internal deadlines over providing a full and fair discovery period would defeat the process:

> The Yucca Mountain licensing proceeding is of critical importance. As the Applicant, DOE bears the burden to support all points required for a license, and DOE's certification initiates the entire licensing process. ***A full and fair 6-month document discovery period, where all of DOE's documents are to be available to the potential parties and the public, is a necessary precondition to the development of well-articulated contentions and to the Commission's ability to meet the statutory mandate to issue a final decision within 3 years.*** These important objectives cannot be met unless we require DOE to make every reasonable effort to make all of its documentary material available at the start.

60 N.R.C. at 315. *See also id.* ("In this context, the good faith standard as applied to DOE's duty to produce all documents is a rigorous one, requiring DOE to make every reasonable effort to gather, to assess for privilege, and to produce all documentary material at the outset, without regard to artificial or self-imposed deadlines").

E. **2007: Facing a New Arbitrary Deadline, DOE Rewrites Its Position and Certifies Its Production as "Complete" Before It Finishes Critical Documents It Knows Nevada Will Need to Formulate Contentions**

Having initially certified – in 2004 – that it had completed its LSN document production, DOE then spent another 3-1/2 years adding millions of (mostly archival) documents to the LSN.

And, as it entered 2007, it was clear that if DOE's June 30, 2008 deadline actually meant giving Nevada a "full and fair" 6-month period to review the materials necessary to formulate "well-articulated" contentions, DOE was not going to be even close to making it. To begin with, as of October 19, 2007, *and now*, there is no final Environmental Protection Agency standard or NRC rule to govern what DOE's LA will need to show. *See* 72 Fed. Reg. 69,947 (Dec. 10, 2007).

But the fact DOE does not even have a standard is not the only problem. As DOE has explained "The two main reports that DOE must produce to demonstrate compliance with NRC performance objectives are a pre-closure safety analysis" (which deals with, among other things, preserving safety for the 50 or 100 or more years that nuclear waste will sit outside as the repository is built), "and a post-closure performance assessment" (the critical analysis of whether this repository will remain safe for 1 million years). Nevada Ex. 22 at 33. As of October 19, 2007, and today, DOE has not made available on the LSN:

- *Any* of the preclosure safety analysis.
- The Total System Performance Assessment for the license application ("TSPA-LA") upon which DOE is going to base its entire Postclosure Performance assessment.
- The features, events and processes ("FEPs") that identify what the scenarios are that the TSPA is going to attempt to analyze in order to determine the safety risk.
- The outputs to the TSPA-LA that allow Nevada to determine what the TSPA-LA will have to say about the risks associated with those scenarios DOE analyzed.
- Any plan, *at all*, for meeting the statutory requirement that DOE be able safely and successfully for 100 or more years to go back into tunnels filled with canisters of radioactive waste at high temperatures, and retrieve the canisters. *See* 42 U.S.C. § 10161(b)(1)(C).

Rather than providing this critical material and affording Nevada time to analyze it, DOE decided to stick to its arbitrary deadline. This required DOE to change its interpretation of the Commission's regulations. Where DOE in 2004 responded to Frequently Asked Questions on its website by representation that the regulations in 10 C.F.R. Part 2 "includes provisions that

require DOE to provide the general public and parties to the licensing hearing with electronic access to ***all*** documentary material relevant to the licensing proceeding" (Nevada Ex. 22 at 1) (emphasis added), it revised its answers to state merely that "This regulation includes provisions that require DOE to make electronically available documentary material relevant to the licensing proceeding" (Nevada Ex. 23 at 1). And DOE simply deleted its representation to the public that: "The NRC regulations require that the relevant documents be loaded in the LSN and be available electronically six months prior to DOE's submittal of the Yucca Mountain license application" (Nevada Ex. 22 at 1). *See* 2006 FAQs (Nevada Ex. 23 at 1).

Then, on October 19, 2007, DOE claimed to have collected all the materials it had *on hand*, and purported to certify the "completeness" of this LSN submission. Repudiating the position it had taken repeatedly for years, DOE declared that it could call its submission "complete" just so long as DOE had produced whatever it had on hand *so far* – even if that excluded the most critical licensing documents, or included no documents at all.[2]

F. Now: It is Undisputed that DOE's Premature Certification has Made It ***Impossible*** for Nevada to Frame Contentions, Let Alone Meaningful Ones

Nevada submitted to the PAPO Board a declaration from a renowned expert – Dr. Michael Thorne – to describe the problem Nevada faces. Dr. Thorne explained why several of the missing technical documents like the TSPA-LA are essential for Nevada to evaluate repository safety and to formulate meaningful contentions. He explained that the current LSN not only omits several of the most critical technical analyses, it lumps together presumably

[2] Nevada does not concede that DOE had, in fact, produced all of the Documentary Material it had its possession, but in filing its motion to strike it faced a practical difficulty; with only 10 days to file a motion, and an LSN with millions upon millions of documents, it was not possible for Nevada to determine which documents DOE had available but had left out. Accordingly, Nevada only "conceded for the sake of argument" that existing documents were not at issue in its motion, and the focus of its motion was on documents not yet complete.

important material with material that is obsolete, irrelevant, or unimportant, leaving Nevada with no practical ability to draft well-focused or meaningful contentions. In Dr. Thorne's words:

> Millions of DOE documents are on the LSN. It is likely that some of these documents will be relied on in the TSPA-LA. However, using the LSN data base in its current form to predict what the TSPA-LA will look like, and to draft a reasonably complete set of TSPA contentions, would be analogous to trying to put a one thousand piece jigsaw puzzle together from a box of several million pieces, some from different puzzles or prior versions of the same puzzle, and with several important pieces known to be missing. [Dec. ¶10].

There are scores of scientists and engineers who work for DOE or its contractors. Many of them, unlike Dr. Thorne, have been afforded the opportunity to work on DOE's actual TSPA-LA, and to know which documents explain how it would work. Yet, DOE offered ***no evidence*** to contradict Dr. Thorne's sworn statements or to suggest that it is ***possible*** for Nevada to draft meaningful contentions from what DOE has certified. Dr. Thorne's testimony is unrebutted.

G. **The PAPO Board Construes the Commission's Regulations to Permit DOE to Make a Certification that Serves No Purpose**

The PAPO Board found that "there is no dispute that DOE has not produced a number of important documents that are still in development," including "the TSPA-LA and PSA, both of which appear to be large, complex, and of critical importance to the DOE's license application." *Slip Op*. at 11 (emphasis in opinion). The Board also found that there to be "no dispute that DOE has 'knowingly' certified without completing all of its documentary material." *Id.*

Yet, the Board concluded that it was constrained by the Commission's regulations to find that DOE had, nonetheless, produced "all documentary material" required by § 2.1003(a) and defined in § 2.1001. The Board concluded that:

(1) the regulations unambiguously limit DOE's obligation to producing whatever documentary material it happens to have created, and does not require or imply that DOE has to have created any document at all, *Slip Op*. at 11-12;

(2) the obligation in § § 2.1001(1) and 2.1003 to produce all documents upon which DOE "intends to rely," does not mean that DOE must produce the documents upon which it "intends to rely"; it merely uses the future tense as a "natural result of the fact that the 'reliance' in question will necessarily occur in the future, when DOE submits its license application." *id.* at 12-13;

(3) any contrary conclusion leads to "unreasonable results," *id.* at 14;

(4) because the "regulatory structure" also requires parties to supplement their productions, DOE cannot be required to make a meaningful production in the first place, *id.* at 14-15;

(5) there is "no statement by the Commission, Nevada, or any other commenter" to effect that Nevada was actually supposed to have material sufficient to formulate contentions at the time the six-month period begins to run, *id.* at 15;

(6) there is no "practical problem" with depriving Nevada of what the Commission had called "comprehensive and *early* review of" the materials that Nevada needs to analyze in order to submit "better focused contentions," 54 Fed. Reg. at 14,926 (emphasis added), or with depriving the Commission of "a substantial saving of time during the proceeding," *id.*, because DOE will provide documents piecemeal as they are created, and Nevada may be able to argue during the statutorily compressed 3-year period for extra time to draft contentions. *Id.* at 15-17.

Nevada appeals from this ruling.

II. ARGUMENT

A. The Standard of Review is *De Novo*

The PAPO Board's interpretation of the Commission's regulations and their application to DOE's certification are questions of law that are reviewed *de novo*. *See In the Matter of Tennessee Valley Authority (Watts Bar Nuclear Plan, Unit 1: Sequouah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plan, Units 1, 2 and 3)*, CLI-04-124, 60 N.R.C. 160, 164 (2004).

B. The Board's Decision Misreads the Commission's Rule in a Way that Defeats the Rule's Central Purpose

At issue in this appeal is a construction that nullifies the effect of the Commission's regulations. At DOE's urging, the PAPO Board concludes that DOE's "duty to produce documentary material only applies to extant documents." *Slip Op*. at 10. Under this construction, DOE's LSN certification is meaningless. DOE could have certified its LSN submission as "complete" at a time when it had available ***no documents***. The only limitation is that, if DOE were to make the mistake of actually drafting an LSN-relevant document before it made its certification, thereby making it "extant," it would need to have placed that document on the LSN before making the certification.

That DOE did not do exactly that here is not actually better. It is worse. What DOE did was decide what it would rely upon in the LA, have its scientists and engineers work on developing those materials for *years*, and then make its LSN certification at a time when DOE knows what it is going to say, yet, in a way that guarantees that Nevada does not. The effect is undisputed; what is missing is critical; Nevada cannot draft meaningful contentions; DOE will be able to use an entirely arbitrary filing to effectively take away the six months that Section 2.1003 affords to both to the Commission and to DOE's adversaries.

This construction would also mean that the Commission promulgated all these regulations only to "*ensure a defined period of time for review*," 66 Fed. Reg. at 29,459, of information that provides no assistance in drafting contentions. Where, even according to DOE (*2004 Decision to Strike*, 60 N.R.C. at 306 (quoting from DOE)), the "fundamental purpose" of the LSN is to "[e]nabl[e] the comprehensive and early review of the millions of pages of relevant licensing material by the potential parties to the proceeding, so as to permit the earlier submission of better focused contentions resulting in a substantial saving of time during the

proceeding," 54 Fed. Reg. at 14,926, the LSN will, in fact, achieve none of those ends. Instead, the only real effect of DOE's solemn LSN certification will be as a sort of press release – an announcement to everyone that DOE has produced what it has "so far," and may be filing an LA in six months that may or may not by that time include the most critical documents upon which it intends to rely.[3]

This construction violates the black letter rule that, "[a] 'regulation should be construed to effectuate the intent of the enacting body.'" *In the Matter of Hydro Resources, Inc.*, No. 40-8968-ML, 2006 WL 895042, at *4 (NRC Apr. 3, 2006) (citing *United States v. Christensen*, 419 F.2d 1401, 1403-04 (9th Cir. 1969) (citation omitted). As the Commission has recognized, "[s]uch intent may be ascertained by considering the language used and the overall purpose of the regulation, and by reflecting on the practical effect of the possible interpretations." *See also, e.g.*, *In the Matter of Duke Energy Corp.*, 61 N.R.C. 241, 301-02 (2005) (rejecting a literal interpretation of the phrase "two or more" where, in context, that would be "contrary ... to the obvious intent and purpose of the rule"). *Cf., e.g.*, *Arizona State Bd. For Charter Schools v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006) ("well-accepted rules of statutory construction caution us that 'statutory interpretations which would produce absurd results are to be avoided'") (citation omitted).

In fact, although the PAPO Board found itself constrained to construe the regulations in this way, its reading is not the natural analysis of the Commission's words. The most natural

[3] Actually, according to DOE, its certification does not even say that much. During argument, DOE pointed to the sanction in 10 C.F.R. § 2.1012(a) that "[i]f [DOE] fails to make its initial certification at least six months prior to tendering the application ... the [NRC] will not docket the application until at least six months have elapsed from the time of certification." From this, DOE argued that the fact that the NRC could *sanction* DOE for failing to make its certification six months in advance by refusing to docket the LA somehow means that DOE has ***no*** obligation to make the certification the advance, and is "reserving the right" to file its LA at any time, including this afternoon. *See* Transcript of Dec. 5, 2007 Hearing at 55-57.

interpretation of a requirement that a party provide "[a]ny information upon which a party ... intends to rely and/or cite in support of its position," is that it is supposed to produce what it intends to rely upon and/or cite, not that it should rush to make a certification to meet an arbitrary schedule at a time when it ***knows*** what it intends to rely upon and/or cite, but still has a "draft" stamp on it so it can withhold it from an adversary.

Nor do the Board's other arguments for adopting DOE's new-found reading withstand analysis.

C. The Board's Construction Effectively Eliminates the Requirement that DOE Produce the Material upon Which It "Intends to Rely"

As its first point, the Board says that "Nevada's heavy reliance on the future-tense word 'intends,'" in Section 2.1001's definition of "documentary material" is not enough "standing alone" to "sustain the weight of Nevada's position – that DOE must have completed all the core technical documents it plans to rely upon before it can certify." *Slip Op*. at 13. The Board declares that "the use of 'intends,' in this context, is simply the natural result of the fact that the 'reliance' in question will necessarily occur in the future, when DOE submits the license application." The Board adds that "[t]here is no good reason to construe it as a broad mandate that all core technical documents that DOE intends to rely on must be finished and frozen six months prior to the license application," *id.,* and concludes by saying the Commission cannot be assumed to "hide elephants in mouseholes," by articulating its intent in an "obscure and incidental way." *Id.* at 13-14. None of these statements, however, withstand analysis:

1. The Board's criticism about putting too much reliance on the tense of the words used applies to the construction it adopts, not the one it rejects

DOE and the Board rely heavily on reading meaning into the *past* tense. DOE's central argument is that because Section 2.1003(b) uses the past tense to refer to "all documentary

material ... generated by ... or acquired by" the potential party, it must mean that LSN can be certified based entirely on "extant" documents generated in the past, without regard to whether those documents are meaningful. The Board effectively reads the clause that way by declaring that it "conveys that possession or control of the documentary material is a pre-requisite of the duty to produce it," *Slip Op*. at 12. *See also id.* at 12-13 (citing the use of the past tense in subparts (2) and (3) of the definition of "Documentary Material" in § 2.1001, as a reason for placing no weight on the fact that subpart (1) uses the future tense).

The problem with the Board's and DOE's heavy reliance on past tense is exactly the one the Board identifies – in context, the tense does not indicate the intent. To place dispositive significance on the tense the Commission used in writing § 2.1003 requires imagining that the Commission specifically chose to refer to documents "generate*d*" or "acquire*d*" because it had a pressing concern that parties would otherwise fear that they were being required to produce things they did not have. That makes no sense. No one expects parties to certify that they have produced documents they have not created or do not have.

The sensible reason why the rule refers to "documentary material ... generated *or acquired*" is that, otherwise, a party would be able to *limit* its LSN production to documents it "generated" and would *not* need to include documents it "acquired" from other sources. To use the Board's wording, this reliance on the past tense "cannot sustain the weight" of its argument, because the fact that DOE is not expected to produce documents it does not yet have does not mean that DOE can (in good faith or consistent with these regulations) certify at a time when it has no documents or, worse, is yet to finalize critical ones that it knows it intends to rely upon.

2. There is a very "good reason to construe [§ 2.1001] as a broad mandate that all core technical documents that DOE intends to rely on must be finished ... six months prior to the license application"

Unless DOE produces the documents it "intends to rely upon," the central purpose of the regulation fails and the certification is pointless. There is no especial advantage to hearing from DOE that it has produced everything it has "so far." The core of this regulation comes from knowing that DOE has produced in good faith what it "intends to rely upon."

3. The Board's reference to core documents not only being "furnished" but "frozen," only confuses the issue rather than explains it

The Board's discussion of production being somehow "frozen" is a straw man. The word "frozen" does not come from Nevada. From 2001 through 2004 – *before* DOE changed its position to maintain that Nevada need not have *any* critical documents while its six-month review period ran – *DOE* had repeatedly represented that to *ensure compliance*, it *would* treat its production as "frozen" six months in advance of licensing. *See, e.g.*, Nevada Ex. 8 at 3 (2001 DOE document stating *its* understanding that work would be "frozen" at the time of LSN certification; Nevada Ex. 20 at 10 (same statements in 2004).

More importantly, although DOE *did* interpret its obligations under this regulation to ensure that its work be "frozen" six months in advance, Nevada does not have to show (and does not claim) that the intent of this regulation was somehow to *prevent* DOE from learning about documents, deciding to rely on new ones, or refining its analysis. It merely urges that where as here, DOE *knows* that it is yet to complete documents "of critical importance to DOE's license application," on which it full well "intends to rely," *Slip Op*. at 11-12, it cannot defeat the purpose of the regulation by certifying in advance.

4. The Commission "did not hide any elephants in mouseholes"

Next, the Board asserts that if the Commission had really wanted to have *any* documents on the LSN at the time DOE made its certification of "completeness," it would have said so. But this argument again undercuts the Board's conclusion: requiring parties to certify they completed something assumes that they have done something meaningful. If, in fact, the certification was nothing but an interim progress report, that is what the Commission would be expected to explain clearly in its regulations.

Instead, the Commission told DOE to produce documents upon which it "intends to rely and/or cite," § 2.1001, and not merely "documents it has." This does not hide an elephant in a mousehole. It is out in the open. Indeed, as noted above (at pp. 11-13), it took DOE years *even to come up with* the position that it did *not* have to place its critical documents on the LSN before it certified it as complete.

D. Reading "Intends" to Mean "Intends" Does Not Lead to "Unreasonable Results"

The Board urges next (at 14), that reading "intends" to mean "intends," leads to "unreasonable results." It argues that "[i]f as Nevada argues, DOE must have completed all of the documents it plans to rely upon before it can certify, then 'what's sauce for the goose is sauce for the gander," ... and the same rule applies to all other potential parties," who, as the Board points out, cannot possibly "finish and freeze their core technical documents 90 days after a date chosen by someone else (*i.e.*, DOE's certification date)." *Id.* Again, the logic for this argument applies with much greater force *against* the conclusion the Board reaches than in favor of it. It is obviously an "unreasonable result," to have the entire regulation serve no purpose or to allow certification when there are no documents on the LSN. Neither the Board, nor DOE has ever explained how this could make sense practically or legally.

In any event, Nevada's reading does not lead to the result the Board fears. Nevada is not arguing that the regulation imposed upon DOE (or Nevada or anyone else) the obligation to *know* at any point in time what documents that party is going to rely upon. The Board is correct in the sense that Nevada, who has not been working for years on a license application, cannot possibly know for the most part what it will cite or intend to rely upon. Nevada's certification, which must be made 90 days after DOE's, can only attest to its then-current intent, which itself is entirely dependent on what DOE has certified. And Nevada will not advance its certification in an effort to prevent DOE from finding out information.

But the Board has found that DOE *does* know what it "intends" to rely upon. *Slip Op*. at 11. DOE *is* advancing its certification to prevent Nevada from finding out about what DOE intends to rely upon. Preventing DOE from concealing what it *does* know and intend to rely upon would not require Nevada to "reveal" what it does *not* know and has not decided to rely upon.

As the Commission recognized in adopting this rule – when a party makes a certification, it need not be perfect, but it must act in good faith:

> The Commission expects all LSS participants to make a good faith effort to identify the documentary material within the scope of § 2.1003. However, a rule of reason must be applied to an LSS participant's obligation to identify all documentary material within the scope of the topical guidelines. For example, DOE will not be expected to make an exhaustive search of its archival material that conceivabl[y] might be within the topical guidelines but has not been reviewed or consulted in any way in connection with DOE's work on its license application.

54 Fed. Reg. at 14,934. As the Board has previously put it:

> We agree that a good faith standard must be applied to each participant's document production. Thus, on the date it chose to certify its document production, DOE must have made, in good faith, every reasonable effort to make all of its documentary material available.

60 N.R.C. at 314.

Saying honestly, as Nevada will, that it has not even seen critical documents upon which DOE will rely and so cannot possibly identify what it will rely upon, is entirely in good faith. Saying, as DOE has, that it knows what it will rely upon, but is timing its certification to ensure that Nevada does not have it, is not.

E. The "Structure" of the Rule Does Not Require Eviscerating Nevada's Right to a Meaningful Six-Month Review

Next, the Board asserts that its conclusion "is supported by the regulatory structure," because 10 C.F.R. § 2.1003(e) requires potential parties "to 'continue to supplement its documentary material ... with any additional material created after the time of its initial certification.'" *Slip Op*. at 14 (emphasis in opinion). But nothing in the obligation to supplement documentary material means that DOE can time its certification to prevent Nevada from having what it needs to draft contentions. A party can learn of new documents, make technical corrections or improvements it did not anticipate, and run quality control studies it wishes to add. The fact that the regulations, in that instance, *require* the party to *supplement* its certification, does not authorize the party to advance its initial certification in bad faith.

In fact, DOE itself explained the numerous documents it would expect to produce during the six-month "hiatus" between producing the documents that DOE "intends to rely," and completing the actual licensing application:

> DOE management review of and concurrence on the integrated LA, and production of the final document, will take place during the six months following initial LSN certification. Changes and additional information developed during the DOE management review will be included in the LSN with a supplementary certification at the time of LA submittal.

Nevada Ex. 11 at 6.

F. **The Board's Decision Overlooks the Regulatory History**

Next, the Board states that "Nevada has provided us with no statement by the Commission, Nevada, or any other commenter, to the effect that all core technical documentary material that each party intends to cite or rely upon must be finished and available on the LSN when it makes its initial certification." *Slip Op*. at 15. It is very difficult to understand this statement. As Nevada has detailed, *see* pp. 11-15, above, there are repeated statements, by the Commission, by DOE, by Nevada, and others that establish that the whole point of the process is to afford a six-month period in order to draft meaningful contentions.

Thus, in its *2004 Decision to Strike*, the PAPO Board itself said:

> From the outset, ***DOE*** fully endorsed and supported the 6-month document discovery phase in its comments on the Commission's proposed rule: "'[DOE is] committed to ensuring that interested members of the public have a full six months in advance of its submission of the license application to review the Department's documentary material.'"

60 N.R.C. at 305 (quoting 66 Fed. Reg. 29,453, 29,459 (May 31, 2001) (emphasis added), and that: "**All parties before us supported the 6-month period.**" *Id.* (emphasis added) (citing 66 Fed. Reg. at 29,458, which discusses comments on the timing of participant compliance and noting that all commenters, including the State and the Nuclear Energy Institute ("NEI"), recommended that the timing of DOE's initial certification be specified as six months in advance of the application submission).

Surely, these many conflicting interests did not coalesce on a rule that afforded parties a "full six months" to review nothing more than whatever DOE happened to have on hand at the time it certified, regardless of whether there were any documents to review. In fact, until DOE changed its mind about what the regulation required and its website's answers to FAQs, no participant in this process had *ever* taken the position that all DOE had to do was certify whatever it had at hand regardless of whether Nevada could make any use of it.

The history is actually so clear that to adopt DOE's new construction requires concluding that the Commission ***misled*** state and local governments about this proceeding. The Commission told state and local governments: "DOE ***has*** to have all of their documents online six months ***before*** they submit the application, and ... there would be an additional three months before it's docketed. So, really nine months before this notice would come out DOE's material should be online and available to anybody." Nevada Ex. 5 at 90-91 (emphasis added). The Board's new construction makes this untrue.

G. The "Practical Consequences" of the Board's Ruling is to Defeat the Purpose that the Regulations are Supposed to Serve

The Board's suggestion (at 15-17) that there is no "practical problem" from depriving Nevada of what the Commission had called "***comprehensive*** and ***early*** review of" the materials it needs to analyze in order to submit "***better focused contentions***," 54 Fed. Reg. at 14,926 (emphasis added), is exactly the opposite of what the Commission said when it adopted its regulation at DOE's urging. The Commission did not consider the opportunity ***eventually*** to receive documents, with the expectation that parties would file new rounds of contentions based on newly-discovered documents, to be just as good as "comprehensive and early review," 54 Fed. Reg. at 14,926. And it obviously is not.

To begin with, DOE has not agreed to stipulate to anyone's extension of time to file new contentions. To the contrary, at oral argument DOE's counsel said, that whether, in fact, Nevada would get any extension of time to draft contentions is a question of "facts and circumstances." Transcript of December 5, 2007 Hearing at 76. Thus, Nevada faces the serious risk of being whipsawed: The PAPO Board will say that Nevada will not get the six-months promised in advance of the hearing because it may get that time later; and then a *post*-filing Board will say

that Nevada does not get the time then because there is a three-year deadline to meet. And DOE apparently plans to argue it both ways.

But even if DOE were guaranteeing Nevada the right to obtain extensions of time to file contentions in the licensing proceeding, that still would not make the process fair. There are few advocates who would not take advantage of an opportunity to expand their own time to develop their position while contracting their adversary's time. In this case, DOE has budgeted over *$125 million* for the law firms that will represent it in licensing proceeding. There is no assurance that Nevada will have a budget *that even is within an order of magnitude of this figure.* DOE has had had over *18 years* to conduct the work developing its side of this project and has yet to reveal to Nevada what it is going to contend. If DOE can continue to produce material piecemeal into the proceeding, it can take advantage of the fact that while DOE's deadline is artificial, Nevada's deadline will be real.

A Commission faced with the requirement to make a decision within three years cannot grant infinite extensions to draft contentions. And even if the Commission could, it would still be unfair to force Nevada during the hearing process to waste its time figuring out what DOE is arguing and drafting new rounds of contentions, instead of taking discovery, preparing witnesses for hearing and otherwise litigating this massive case.

The upshot of this is neither a fair proceeding, nor a good one. It is not fair to afford DOE an unlimited time stretching into a second generation to formulate its own case, but then to compress Nevada's to respond. It denies Nevada the basic fairness of due process. And it is not good public policy to truncate the time available to the parties who have the greatest incentive to test the safety of a decision that will affect every American today, and an unfathomable number of people to come, for many times recorded human history to date. Every participant in this

process – even DOE – should recognize that everyone benefits from having this massive projected tested thoroughly. Taking away the six months promised defeats that purpose.

III. CONCLUSION

For these reasons, the Commission should reverse the PAPO Board's decision, strike DOE's certification and require that DOE may certify only when it has provided all of the core technical documents necessary to permit "**focused and meaningful contentions.**" 69 Fed. Reg. 32,836, 32,843 (June 14, 2004) (emphasis added).

Dated: January 15, 2008

Respectfully submitted,

(signed electronically)

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
U.S. DEPARTMENT OF ENERGY	)	Docket No. PAPO-00
	)	
(High-Level Waste Repository:	)	
Pre-Application Matters)	)	

CERTIFICATE OF SERVICE

I hereby certify that the foregoing State of Nevada's Notice of Appeal and Brief on Appeal from the PAPO Board's January 4, 2008 and December 12, 2007 Orders has been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (*)).

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