September 10, 2004

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:	)	**NEV-01**
Pre-Application Matters)	)	

THE DEPARTMENT OF ENERGY'S BRIEF ON APPEAL FROM THE PAPO BOARD'S AUGUST 31, 2004 ORDER

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The Department of Energy (DOE) submits this brief in support of its appeal from that portion of the August 31, 2004 Order of the Pre-License Application Presiding Officer Board (PAPO Board) holding that DOE's documentary material must be indexed by the LSN Administrator before DOE can make an initial certification under 10 C.F.R. § 2.1009(b). That holding raises a question of law that is of substantial importance to the licensing proceeding for the Yucca Mountain high-level nuclear waste repository. The PAPO Board erroneously decided that issue, and its ruling should be reversed.

I. PRELIMINARY STATEMENT

On August 31, 2004, the PAPO Board entered its first substantive order addressing requirements for the production of documentary material in the Yucca Mountain licensing proceeding. LBP-04-20, 60 NRC ____ (Aug. 31, 2004) [August 31, 2004 Order]. The PAPO Board held as part of that order that the LSN Administrator must index a party's documentary material, after that party makes it electronically available to the LSN Administrator, *before* that party can make a certification under 10 C.F.R. § 2.1009(b). The PAPO Board imposed that requirement even though the PAPO Board conceded that § 2.1009(b) does not even allude to any such index. August 31, 2004 Order at 45.

In addition to unfairly tying a party's certification ability to conduct beyond the party's control, the PAPO Board's ruling misapplies the law. As discussed in more detail below, no provision of the Nuclear Waste Policy Act or the Commission's implementing regulations imposes the condition mandated by the PAPO Board. The PAPO Board's ruling also cannot be reconciled with the Commission's comments in its most recent rulemaking, in June 2004, in which the Commission expressly acknowledged that completion of the LSN Administrator's index of DOE's documentary material need not precede DOE's initial certification. The PAPO

Board's ruling, which contradicts that recent acknowledgment and imposes a condition the Commission declined to adopt, should be reversed and vacated.

The inequity inherent in the PAPO Board's ruling is demonstrated by the NRC Staff's certification under § 2.1009(b). *See* NRC Certification of Compliance (July 30, 2004); NRC Certification of Availability (July 30, 2004). According to its last public estimate, the NRC Staff was making available approximately 35,000 documents. *See* June 3, 2003 LSN Advisory Review Panel Transcript [DOE Answer Ex. 8] at 53. Also according to the NRC Staff, the LSN Administrator had not indexed 86 of those documents as of the date of the NRC Staff's certification due to unspecified "technical problems" with the indexing process. *See* NRC Certification of Availability at 2. Under the PAPO Board's holding, the LSN Administrator's failure to index those 86 documents invalidated the Staff's certification, despite the fact that the Staff seemingly was not at fault and even though the 86 documents were publicly available through the NRC's Agencywide Documents Access and Management System (ADAMS). *Id.* at 2-3.

DOE will continue to provide the LSN Administrator with documents on a rolling basis for indexing, as it has been doing since the beginning of May, with the expectation that the LSN Administrator will have indexed DOE's documentary material before DOE is ready to make a new certification. No one knows, however, what unexpected circumstances might arise or what technological challenges the LSN Administrator might encounter. So while DOE will cooperate with the LSN Administrator, tying the validity of DOE's certification to the LSN Administrator's ability to index documents is fundamentally unfair and is not supported by the text of the regulations or anything known to DOE in the administrative record of the various LSN rulemakings.

If the LSN Administrator is unable to complete his index before DOE makes a new certification, there are alternative means to address and prevent any potential prejudice. It is the use of those alternative means, and not invalidation of DOE's certification, that is appropriate.

II. BACKGROUND

On June 30, 2004, DOE submitted to the Secretary of the Commission its initial certification of documentary material pursuant to 10 C.F.R. § 2.1009(b). That production included some 1.1 million documents in full-text format and an additional million documents in header-only format. Answer of the Department of Energy to the State of Nevada's Motion to Strike (July 22, 2004) [DOE Answer] at 1-2; Affidavit of Colleen M. Lurwick [DOE Answer Ex. 3] at ¶ 5.

The State of Nevada filed a motion to strike DOE's initial certification on July 12, 2004, raising two main objections. One challenged the wording of DOE's certification, contending that it was facially deficient because it did not state that DOE had made available all its documentary material. Motion to Strike the Department of Energy's LSN Certification and for Related Relief (July 12, 2004) [Nevada Motion] at 8-14. The other objection, which is the subject of this appeal, contended that DOE's certification was invalid because the LSN Administrator had not completed an index of DOE's documentary material prior to DOE's certification. Nevada Motion at 14-17. As of the date of DOE's certification, the LSN Administrator had indexed about 500,000 (or one-half) of the documents that DOE had identified for full-text production. Affidavit of Harry E. Leake [DOE Answer Ex. 1] at ¶ 13.

DOE opposed Nevada's motion, contending with respect to the second objection that the requirement advocated by Nevada was not required by regulation and was contrary to the Commission's recent rulemaking. DOE Answer at 3-7. The NRC Staff filed a brief supporting DOE on this point, *see* Answer of the NRC Staff to the State of Nevada's Motion to Strike (July

22, 2004) at 4-10, as did the Nuclear Energy Institute. Answer of NEI to the State of Nevada's Motion to Strike (July 22, 2004) at 2-3.

Following oral argument, the PAPO Board issued the August 31, 2004 Order granting Nevada's motion and striking DOE's initial certification. The PAPO Board held, in the first instance, that DOE's certification was improper because DOE had not undertaken certain document reviews before certifying. August 31, 2004 Order at 19-36. In mandating that additional reviews were necessary, the PAPO Board disregarded the cost to perform those reviews, assuming contrary to law and fact, that DOE "has the resources of the Nuclear Waste Fund at its disposal in assembling its documentary material and complying with 10 C.F.R. § 2.1003." August 31, 2004 Order at 18.[1]

The PAPO Board also erroneously implied as part of its ruling on the sufficiency of DOE's production that DOE did not have procedures before this summer to identify potential documentary material. August 31, 2004 Order at 50. The undisputed record is that DOE has had in place since 1987 a records management system to identify and preserve pertinent project documents. *See* Office of Civilian Radioactive Waste Management Licensing Support Network Certification Plan for Initial Certification [DOE Answer Ex. 4] at 2. This records system was supplemented by a comprehensive effort, begun more than two years ago, to identify, segregate, maintain and produce paper and electronic files that project personnel may have maintained

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[1] In actuality, DOE does *not* have control over the funds in the Nuclear Waste Fund. DOE does not have direct access to the Waste Fund, but is limited to annual appropriations made by Congress. Nuclear Waste Policy Act, § 302(e)(2), 42 U.S.C. § 10222(e)(2). *See also* H.R. Rep. No. 108-594 at 3 (2004) ("Due to budgetary rules enacted after the NWPA, there is currently no direct link between fees collected annually, and what is appropriated for the development of Yucca Mountain."). Over the past 10 years, Congress has appropriated approximately $720 million less than DOE has requested from the Waste Fund. *Id.* The Administration's FY 2005 budget proposed statutory language to improve DOE's access to a portion of the Waste Fund, but neither house of Congress has approved that proposal.

outside the records management system. *See id.* at 2-3; List of Call Memo Recipients [DOE Answer Ex. 10].

DOE believes that it made a good faith, substantial production. DOE's production encompassed the pertinent documents from the records management system and from the paper and electronic documents identified through its supplemental collection process. DOE also reviewed over 6 million emails from back-up tapes to identify potential documentary material. DOE believes in good faith that the documents it produced encompass its required documentary material. Nevertheless, DOE is not appealing the portion of the August 31, 2004 Order regarding the completeness of its document review.

With respect to Nevada's second contention, the PAPO Board conceded that the Commission's regulations do not expressly condition DOE's ability to certify under § 2.1009(b) on the completion of an index by the LSN Administrator. August 31, 2004 Order at 38. The undisputed record also showed that (i) DOE had placed all its identified documentary material in the proper electronic format onto its LSN participant server by the date of its certification; (ii) DOE has made publicly available all of those files, including those that the LSN Administrator has not indexed, through DOE's website that connects to DOE's participant server; and (iii) DOE's website includes a search engine that allows searches of both headers and text of documents in a manner similar to the LSN Administrator's website. DOE Answer Ex. 1 at ¶¶ 6-9. Nevertheless, the PAPO Board adopted Nevada's contention and held that DOE cannot make a valid certification under § 2.1009(b) unless and until the LSN Administrator completes an index of DOE's documentary material.

This timely appeal followed pursuant to 10 C.F.R. § 2.1015(b), which permits an appeal of PAPO Board orders issued under 10 C.F.R. § 2.1010. *See* August 31, 2004 Order at 9-11 (stating that PAPO Board's order is a ruling on disputes over the electronic availability of

documents within the meaning of § 2.1010). DOE seeks in this appeal to reverse and vacate that portion of the August 31, 2004 Order that holds that DOE cannot make a new certification until the LSN Administrator has indexed DOE's documentary material. That holding is contrary to law and is particularly prejudicial to DOE.

III. STANDARD OF REVIEW

The PAPO Board's ruling that is the subject of this appeal raises a question of law that is reviewed de novo. *Sequoyah Fuels Corporation and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-97-13, 46 N.R.C. 195, 206 (1997).

IV. ARGUMENT

A. Section 2.1009(b) Properly Requires DOE To Certify Only As To Its Own Actions

DOE does not dispute that one of the purposes of the LSN regulations is to make DOE's documentary material accessible "via the LSN." DOE also does not dispute that the LSN regulations seek to ensure the integrity of all participants' documentary material in the LSN. DOE's certification that it has made documentary material available, however, is only the first step toward, and not the sole provision that attains, those objectives.

DOE's certification is governed by § 2.1009(b). That regulation provides in relevant part, as applied to DOE, that a responsible official of DOE shall certify that the procedures specified in § 2.1009(a)(2) have been implemented and that, to the best of the official's knowledge, "the documentary material specified in § 2.1003 has been identified and made electronically available." That language is silent about any indexing requirement as a condition to DOE's certification. Indeed, the PAPO Board itself acknowledged that § 2.1009(b) does not even "allude" to any indexing requirement. August 31, 2004 Order at 45.

What is meant, then, by the requirement in § 2.1009(b) for DOE to make its documentary material "electronically available"? DOE makes its documentary material electronically

available when it places those materials on its participant web server -- the only component of the LSN system over which DOE has any control -- in the proper electronic format that is capable of being indexed by the LSN Administrator's software. That is all DOE can control, and that is all that DOE can fairly be asked to certify.

In requiring more, the PAPO Board focused on "accessibility" rather than "availability." Those are different concepts. The regulations mandate electronic access through the NRC's website, 10 C.F.R. § 2.1007(2), and it is the LSN Administrator, not DOE, who is "responsible for coordinating access to and the integrity of data available on the [LSN]." 10 C.F.R. § 2.1001. DOE is charged only with certifying the *availability* of documentary material on its server; the LSN Administrator is charged with making those materials *accessible* via the LSN.

In failing to recognize these distinctions, the PAPO Board took the language of § 2.1009(b) two steps beyond the actual text of that regulation. First, the PAPO Board posited that § 2.1009(b) should be read as if it included a specification that DOE certify that it made its documentary material available "in the LSN" or "via the LSN" -- a phrase conspicuously absent from § 2.1009(b). Second, having injected a new phrase into the regulation, the PAPO Board then ventured even further astray from the language of the regulation to "determine what is required in order for a document to be 'in the LSN' or available 'via the LSN.'" August 31, 2004 Order at 39. According to the PAPO Board, documents must be indexed by the LSN Administrator in order to be available "in the LSN" or "via the LSN."

This double bootstrapping approach ascribes meaning to a phrase that is not present in the regulation purportedly interpreted. Section § 2.1009(b) does not require DOE to certify that its documentary material is available "in the LSN" or available "via the LSN," or that its documentary material is electronically accessible. The PAPO Board's approach expands DOE's obligation to make its documentary material "available" to include the LSN Administrator's

separate obligation to make the participants' documentary material electronically "accessible" via the NRC's website.

Further, the PAPO Board failed to give proper weight to the absence in § 2.1009(b) of the phrases "in the LSN" and "via the LSN," in contrast to their presence in other LSN regulations. It is a standard rule of interpretation that where a term appears in one provision of a set of related regulations but not in another provision, its omission from the latter provision is presumed intentional and is intended to signify a different meaning. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452-53 (2002) (when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted); *Bluewater Network v. EPA*, 370 F.3d 1, 14 (D.C. Cir. 2004) (citing *Barnhart*, 534 U.S. 438, 452); 2A N. Singer, *Sutherland on Statutes and Statutory Construction* § 46:06, pp. 192, 194 (6th ed. 2000) ("every word excluded from a statute must be presumed to have been excluded for a purpose," and when the "legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded."); *see also* 1A N. Singer, *Sutherland on Statutes and Statutory Construction* § 31:6 (6th ed. 2000) (principles of statutory construction should apply to construing regulations when they are legislative in nature). It is thus inappropriate for the PAPO Board to add the phrases "in the LSN" and "via the LSN" into § 2.1009(b) when the Commission elected not to do so.

Adding those terms, moreover, would not support the PAPO Board's conclusion, because those terms do not themselves dictate that DOE's certification is contingent on indexing. As the PAPO Board itself acknowledges, the terms "in the LSN" and "via the LSN" are ambiguous. August 31, 2004 Order at 39-40. Those terms do not speak in any way to the deadline for

completion of the LSN Administrator's index or its relation to DOE's ability to certify, and thus ultimately do not compel the answer mandated by the PAPO Board.

And were there any doubt as to whether the LSN Administrator's index had to be complete before DOE's certification, the Commission dispelled that in its recent rulemaking in June 2004. In connection with proposed amendments to other portions of the Commission's LSN regulations, Nevada asked the Commission to amend § 2.1009(b) to add a requirement that DOE's certification would not be effective until the LSN Administrator had separately certified that he had indexed and audited DOE's documentary material. 69 Fed. Reg. 32836, 32840 (June 14, 2004). Such a requirement, Nevada's counsel conceded in oral argument, was something Nevada had unsuccessfully sought from the Commission for fifteen years. July 27, 2004 Transcript at 36.

The Commission declined this latest request from Nevada as well. After noting that the request was outside the scope of the rulemaking, the Commission additionally stated that it was "pursuing an approach with DOE to ensure that the DOE collection has been indexed and audited by the LSN Administrator *in approximately the same time frame* as the DOE certification." 69 Fed. Reg. 32836, 32840 (June 14, 2004) (emphasis added).

The significance of this recent history cannot be gainsaid. It confirms that the Commission's regulations do not contain the requirement the PAPO Board imposed, because otherwise there would have been no need for Nevada to seek to amend § 2.1009(b) to add it. It additionally confirms that the Commission did not intend § 2.1009(b) to mandate completion of the LSN Administrator's index before DOE's certification. After all, the phrase "in approximately the same time frame" does not mean "before." This is important because if § 2.1009(b) is ambiguous, as the PAPO Board believed, the Commission's views should be given controlling weight. *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994)

("substantial deference [must be given] to an agency's interpretation of its own regulations" unless it is plainly erroneous or inconsistent with the regulation's plain language).

The PAPO Board's attempt to deflect the force of this recent expression of the Commission's intent is unavailing. The PAPO Board maintained that the Commission "merely" intended by its statement to refer to a joint effort between DOE and the LSN Administrator that was underway to begin the indexing of DOE's document collection prior to DOE's certification, August 31, 2004 Order at 46, and that the Commission was "under the impression that the timing issue would be moot" because the LSN Administrator's index would be finalized "essentially simultaneously" with DOE's certification. August 31, 2004 Order at 46-47. In reaching this conclusion, the PAPO Board relied on speculation it elicited from the LSN Administrator in a telephone call that the PAPO Board initiated during the hearing on Nevada's motion, speculation that was not subject to cross-examination. August 31, 2004 Order at 46; July 27, 2004 Transcript at 91-111.

The Commission's statement and conduct cannot be plausibly reconciled with the PAPO Board's view that the rules require the LSN Administrator's index to be complete before DOE can make a valid initial certification under § 2.1009(b). Notwithstanding the Commission's expectation that the LSN Administrator's index would be completed "essentially simultaneously" with DOE's certification, as the PAPO Board phrased it, the Commission declined to amend its regulations to account for the distinct possibility, as Nevada cautioned, that the Commission's expectation may not be met.

The PAPO Board is also incorrect that questions about the validity of DOE's certification would be "moot" as long as the LSN Administrator completed an index "essentially simultaneously" but after DOE's certification. DOE's certification triggers the deadlines for the NRC Staff's, Nevada's and the other participants' certifications. 10 C.F.R. § 2.1003(a). So if

completion of the LSN Administrator's index were a prerequisite to a valid DOE certification, a certification made even one day before completion of that index would be invalid and presumably not trigger the other participants' certification obligations.

The requirement that a 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 . . . until the discovery period in the proceeding has concluded," 10 C.F.R. § 2.1003(e), likewise does not evince an intent to condition DOE's certification on the LSN Administrator's index, contrary to the PAPO Board's reasoning. August 31, 2004 Order at 35. That regulation was promulgated as part of the Commission's June 2004 rulemaking. It would be curious indeed for the Commission, in that rulemaking, to have rejected Nevada's request to directly condition the efficacy of DOE's certification under § 2.1009(b) on completion of the LSN Administrator's index, while simultaneously adding such a requirement indirectly through an amendment to another provision.

The Commission's commentary on § 2.1003(e) bears that out as well. The Commission's explanation when it proposed the amendment makes plain that the amendment had nothing to do with the timing of a party's certification. Its purpose was to fill an omission in the LSN regulations that seemingly did not impose a continuing duty on participants to produce documentary material identified or created after their certifications. *See* 68 Fed. Reg. 66372, 66375-76 (Nov. 26, 2003).

If anything, a more telling amendment, adopted as part of the June 2004 rulemaking, is the amendment to 10 C.F.R. § 2.1012(a). That regulation, as previously promulgated, provided that DOE's license application could not be docketed until the Secretary of the Commission determined that the license application can be effectively accessed through ADAMS. As noted in the Commission's June 2004 rulemaking, DOE sought to amend that regulation for exactly the

same reason it has appealed the PAPO Board's decision -- it imposed a requirement that unfairly tied docketing to electronic processing that was outside DOE's control:

> DOE is concerned that this establishes a requirement on DOE that is beyond its control. Entering documents into ADAMS is strictly a NRC function and ADAMS is under the sole control of the NRC. Any accessibility problems resulting from entering the license application into ADAMS would be the responsibility of the NRC. DOE notes that, in preparing its electronic license application, the DOE is responsible for meeting the NRC requirements, as well as addressing any guidance that has been issued by the NRC, and transmitting the license application to the proper address and in the proper format(s) specified by the NRC for these actions. If the DOE meets clearly defined specifications for such transmittals, the NRC should be able to make the document available through ADAMS.

69 Fed. Reg. 32836, 32839 (June 14, 2004).

The Commission agreed with DOE and revised § 2.1012(a) accordingly. That regulation now no longer allows the Secretary to delay docketing if the license application is not accessible through ADAMS. The Secretary's determination under that regulation is limited to determining whether DOE submitted the application in the proper electronic format. Against that backdrop, it seems implausible that the Commission simultaneously adopted through § 2.1003(e) a provision that constrains DOE's ability to certify in a way that the Commission agreed was unfair to apply to the license application.

In short, the PAPO Board's attempt to explain away the Commission's statements in the June 2004 rulemaking is unpersuasive. The PAPO Board failed to give due weight to the Commission's plain commentary and added a requirement to § 2.1009(b) that simply does not exist.

B. The Absence Of An Indexing Requirement Does Not Cause Prejudice

The PAPO Board is incorrect that absence of a completed index at the time of DOE's certification will "completely frustrate" the objectives of the LSN. August 31, 2004 Order at 42.

In fact, the absence of a completed index may cause no prejudice whatever depending on such circumstances as (i) the number and nature of the documents made available to the LSN Administrator but not indexed at the time of certification; (ii) the time it takes the LSN Administrator to complete his index; (iii) the availability of the un-indexed documents in the interim through other means; and ultimately (iv) how much time elapses between the certification and the date DOE's license application is otherwise ready for docketing.

Furthermore, the fashioning of any relief should not be based on hypothecated fears and speculation at the time of DOE's certification. Rather, it should be based on a showing that a party's ability to formulate contentions has been actually prejudiced, which generally will be best done further in the pre-license application phase. And, if appropriate, there are various means to forestall any prejudice. Most obviously, DOE can make the documentary material on its LSN participant server publicly accessible, in full-text searchable format, through its website pending completion of the LSN Administrator's index, just as DOE has done. That gives participants access to the same electronic files and images that they would access through the LSN Administrator's index.

In dismissing any reliance on such measures, the PAPO Board singled out three factors that it contended militated against such an approach. None of those factors is legitimate.

First, the PAPO Board suggested that DOE's website was unreliable because it had been taken off-line three times. August 31, 2004 Order at 43-44. DOE first took its website off-line over the July 4 holiday weekend, just after it certified, to protect documents with sensitive privacy information, such as the Social Security numbers of project personnel, that had been inadvertently exposed on its website. That situation was promptly corrected. DOE Answer at 14. Since then, DOE's website was taken off-line *for ten minutes* from *2:50 a.m. to 3:00 am* on July 7 and *less than one minute* on July 15. DOE Answer at 15. All websites, include the LSN

Administrator's website, require brief maintenance periods from time to time, and DOE's website has actually performed well.

Second, the PAPO Board pointed to pages 16 and 17 of the LSN Administrator's answer for the supposition that DOE had improperly removed documents. August 31, 2004 Order at 43-44. The PAPO Board, however, misconstrued the LSN Administrator's pleading. The LSN Administrator's answer refers to a process permitted by LSN Guideline 14 by which any participant, following its certification, can convert to header-only status a privileged document that it inadvertently produced in full-text format. Under Guideline 14, a participant notifies the LSN Administrator of a document that it wishes to convert to header-only status, and the LSN Administrator processes the request by the removing the original header and text of the document *from his index* and adding back a new header for the document *on his index*. The LSN Administrator is then to post a list of the converted documents on his website.

The LSN Administrator's reference to the "deletion of text and headers" in his answer refers to that authorized conversion process, and not to any surreptitious deletion of documents by DOE on its participant server. The conversion of a document's status pursuant to that process also provides no fair basis to mandate the advance indexing of DOE's documentary material, because LSN Guideline 14 authorizes such conversions *even after the LSN Administrator has completed an index.*

It also should be noted that the LSN Administrator notified the PAPO Board in advance of DOE's conversion request and solicited the PAPO Board's input. The PAPO Board declined to act on the LSN Administrator's request. *See* July 9, 2004 PAPO Board Order. It is thus entirely unfair for the PAPO Board to suggest now that this conversion process was a serious threat to the integrity of the LSN.

Finally, the PAPO Board noted that the Commission elected not to design the LSN using separate search engines on individual participant servers, and opted instead for a central search function on the LSN Administrator's website. August 31, 2004 Order at 44-45. The proposal that the Commission declined was for search engines maintained by the participants to serve as the "*sole* search and retrieval tools to access" documents. 65 Fed. Reg. 50937, 50943 (Aug. 22, 2000) (quoted in August 31, 2004 Order at 44 n.54) (emphasis added). DOE is not advocating that its website replace the LSN Administrator's index and permanently serve as the *sole* method of access to DOE's documents. Rather, DOE's website can act as a supplement to the LSN Administrator's index to offset any perceived prejudice until the LSN Administrator completes his indexing.

V. CONCLUSION

DOE's ability to certify under 10 C.F.R. § 2.1009(b) should not be conditioned on the LSN Administrator's index. The Commission's regulations do not impose that condition, and there are alternative means that can fairly address the concerns that the PAPO Board identified without invalidation of DOE's certification. For these reasons and those stated above, the portion of the August 31, 2004 Order that requires completion of the LSN Administrator's index before DOE can make its certification under 10 C.F.R. § 2.1009(b) should be reversed and vacated.

Respectfully submitted,

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