September 20, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

STATE OF NEVADA'S BRIEF IN OPPOSITION TO THE DEPARTMENT OF ENERGY'S APPEAL

In accordance with 10 C.F.R. § 2.1015(b), the State of Nevada respectfully submits this brief in opposition to the appeal of the Department of Energy ("DOE") from the Pre-License Application Presiding Officer's ("PAPO Board's") August 31, 2004 Memorandum and Order ("Order"). As explained and documented fully below, DOE's appeal is devoid of merit. Among other shortcomings, it relies on misstatements, ignores relevant regulatory language, mischaracterizes prior Commission actions, and fails to address (let alone rebut) critical elements of the PAPO Board's reasoning, ignoring both the history and the purpose of the Licensing Support Network ("LSN"). If DOE's arguments were to be accepted, the very purpose and function of the LSN would be undermined. Moreover, an essential part of the Commission's regulatory design for conducting the Yucca Mountain licensing proceeding would be replaced by an unworkable scheme that aids and abets requests for extensions of time for filing critical

pleadings and provokes needless controversy. The carefully reasoned decision of the PAPO Board should be affirmed.[1]

I. PRELIMINARY STATEMENT

DOE's appeal does not take issue with the PAPO Board's "tragic" (but fully supported) account of how a Federal agency so lost its way that meeting artificial, self-imposed deadlines became more important than good faith compliance with the Commission's regulations. The Board held that DOE did not meet its obligation, in good faith, to exert reasonable efforts to make "all" documentary materials "available," and it struck DOE's purported certification under 10 C.F.R. § 2.1009(b). *See e.g.*, Order at 52, 53. Here, DOE takes issue with only one aspect of the Board's 54-page Order – the single conclusion that a proper LSN certification cannot be made unless the relevant documentary materials are actually available and indexed on the central LSN site.[2] Thus, even were DOE to prevail in the instant appeal, the Board's ultimate finding that DOE failed to meet its obligation, in good faith, to make documentary materials available, and the Board's striking of DOE's purported certification, will remain in effect, for as the rest of the Order makes clear, DOE's production on its own web site was also grossly deficient. Thus, DOE's certification will remain invalid even under DOE's defective theory here of what NRC's regulations require on the one issue it did appeal.

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[1] In a separate but related action, Nevada moves to strike parts of DOE's brief on appeal as containing irrelevant material apparently calculated to induce some *sua sponte* action by the Commission on other aspects of the Board's Order.

[2] DOE inflates the importance of its appeal by saying it addresses one of the two main arguments pressed by Nevada in its motion before the Board. Brief at 3. In fact, as the Order makes clear, Nevada made numerous other "main" challenges to DOE's certification that were fully sustained, including multiple well-founded challenges to the sufficiency of DOE's document production on DOE's own web site, and challenges to the facial validity of DOE's official "certification."

II. ARGUMENT

A. DOE's Interpretation is Unworkable and Will Cause Needless Controversy and Delay

Under the interpretation of the Commission's LSN regulations adopted by the PAPO Board in its Order, and supported originally by the NRC Staff, PAPO Hearing Tr. at 156-159; Reg. Guide 3.69 at 3.69-1 to 3.69-7, neither DOE nor any other party may certify under 10 C.F.R. § 2.1009(b) until informed by the LSN Administrator that all documentary materials have been loaded on and indexed in the central LSN site maintained independently by NRC. This is a simple matter of checking with the LSN Administrator. Once the LSN Administrator so advises, and the party reasonably and in good faith certifies the relevant documents, then it may be presumed the relevant documents (or headers in the case of privileged materials) are actually available for searching and are accountable under the law. Since actual availability for searching and accountability is the relevant consideration in setting time frames for submitting an application and for filing contentions, the certification therefore stands as the logical and key event in the initiation of the repository licensing proceeding. By placing control over important documents in the hands of NRC's independent LSN Administrator, the LSN system ensures that documents can always be tracked, that they are properly managed and indexed, that they are searchable in a useful manner, and that they are not added to or subtracted from without the knowledge of opposing parties. And the certification requirement ensures that opposing parties are given at least six months in advance of DOE's submission of a license application, 10 C.F.R. § 2.1003(a), in which to review a viable, accountable document collection for purposes of framing proper contentions.

In contrast, under DOE's interpretation, a party may certify when it places its documentary material in the proper electronic format that is capable of being indexed by the

LSN Administrator's software, but before the LSN Administrator actually indexes the documentary material and places the documents on the central LSN site. DOE Brief at 7. This invites needless disputes over whether the materials are in fact capable of being indexed at the time of certification, a matter only the LSN Administrator can resolve in the ordinary course. Furthermore, the most definitive evidence that materials are capable of being indexed is the successful indexing itself. And whether the main purpose of the LSN – affording all parties timely discovery for at least six months prior to submission of a license application – has in fact been met would, under DOE's theory, be in doubt for at least some unknown period, or even the entire six months.

Under DOE's interpretation the certification has no practical significance in setting time frames for submitting an application and filing contentions. It has no relationship to the six-month time period the Commission insisted all parties must have for discovery. These time frames were necessarily established based on when documents in fact first become available and accountable for reviewers. However, neither the regulations nor the design standards for participants' servers require the *participant* servers to have search and retrieval capabilities. *See* Order at 43, note 53.[3] So, under DOE's interpretation, a certification would say nothing about whether any documents are actually available for review. And despite what the regulations suggest, the NRC's time frames for submission of the application and filing of contentions would

[3] DOE claims its site has comparable search and retrievable capability, but even were that the case, this feature is entirely voluntary and cannot be enforced against DOE. Because the drafters of the LSN regulations cannot have presumed any of the participants' web sites would have such capability, the regulations must be construed so as to effectuate their essential purposes without such capacity. In any event, unlike the LSN, DOE's search program does not present findings in a hierarchy of relevance (as Google does, for example), and it does not indicate how many documents have been found in each search. The lack of these features makes DOE's site less practically searchable, and substantially less useful to reviewers, than the LSN.

bear no rational relationship to the certification itself.[4] DOE's theory is that the Commission established its time frames for submitting the application and filing contentions in the Yucca proceeding based on the parties' ability to find needles in an opposing party's haystack, with the opposing party controlling access to the farm.

It is no answer to argue, Brief at 13, that at some later point in the proceeding a party could ask for more time to file contentions based on a showing that its ability to file has been prejudiced by the practical unavailability of documents. This is precisely the kind of motion practice and delay NRC had hoped to avoid or minimize through use of LSN.[5] Moreover, since under DOE's theory an application could be docketed and contentions could be admitted based solely on the availability of documents on DOE's web site, disputes would inevitably later arise over whether DOE's documents were actually available for six months for review by experts and attorneys, since DOE would have had unilateral control over its server, with no real accountability. Unlike the case with the LSN, no party would have the ability to know whether DOE had added or deleted documents, or changed a document's status from full text to header-only.

In this regard, DOE's argument (Brief at 12-13) that its interpretation will cause no prejudice to any party is wrong, and most revealing. DOE says there will be no prejudice as to (1) the number of documents not indexed, (2) the time required to index, (3) the availability of documentary materials though other means, and (4) the time between certification and docketing

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[4] DOE concedes that one of the purposes of the LSN regulations is to make documentary material accessible "via the LSN" and does not dispute that the LSN regulations seek to ensure the integrity of all participants' documentary material. Brief at 6. Under DOE's interpretation now, however, the certification bears no logical relationship to these purposes.

[5] Of course, disputes over the time for filing of contentions cannot be eliminated entirely under the PAPO Board's interpretation, since issues may still arise with respect to header-only or missing documents.

of the application. But this multi-faceted list itself confirms the difficult and time-consuming nature of the disputes that can be expected to arise under DOE's interpretation, since every category listed virtually invites controversy of the very type that LSN was designed to eliminate.

As for DOE's contention, Brief at 13, that the instant appeal should not depend on "hypothecated fears and speculation," Nevada observes that its concerns about DOE's bad faith and withholding of safety information on its web site are hardly hypothetical and speculative. The PAPO Board found, *and DOE does not dispute on appeal,* that DOE's document production was grossly deficient and was not in good faith. Order at 19-35. Among other things: (1) critical safety information was not searchable in full text (approximately one million documents were withheld and there was a "conscious DOE decision to certify on June 30, 2004, before DOE's privilege review was finished"), Order at 19-25; (2) DOE's privilege review process was in such "disarray" that it resulted in the withholding of thousands of documents on obviously non-privileged subjects like alloy-22 corrosion and swimming pool parties, Order at 23-24; (3) the PAPO Board extracted from DOE a confession that many of the four million e-mails it withheld as "archival" were created as recently as 2002 and perhaps 2003, Order at 27; and (4) many of the over eighty-thousand documents not produced by DOE because they were received by DOE's LSN contractor during a "gap" between April 15, 2004 and June 30, 2004 were not in fact "still being generated," as DOE has suggested, but were actually pre-April 15, 2004 documents. Order at 31.

The PAPO Board's reasoned examination of the meaning of "available" should be affirmed. It accounts for all of the relevant regulatory language, prior NRC Staff interpretations, and is in accord with the essential purposes of the Commission's LSN regulations, the history of the LSN, and sound policy on the efficient conduct of licensing proceedings.

B. DOE's Argument Ignores the Relevant Regulations

DOE's argument begins (as it must) with the actual language of the pertinent regulations. But its argument here is based almost solely on the language of only one provision, 10 C.F.R. § 2.1009(b). This subsection states (among other things) that the responsible official must certify that "to the best of his or her knowledge, the documentary material ... has been identified and made electronically available." DOE seizes on the fact that the language of this one provision does not mention anything specific about indexing or explain what is meant by "electronically available." Moreover, DOE claims to see great significance in the purported difference between the words "available" and "accessible." Brief at 7-9. These arguments are specious.

First, DOE ignores both the language of 10 C.F.R. § 2.1011(c)(4) and the PAPO Board's careful exegesis of this subsection. Order at 38-39. Section 2.1011(c)(4) refers specifically to "documentary material certified in accordance with § 2.1009(b) by the participants to be in the LSN" [emphasis added]. Since 10 C.F.R. § 1001 defines "Licensing Support Network" as "the combined system that makes documentary material available electronically," it follows that "in the LSN" within the meaning of 10 C.F.R. §1011(c)(4) means in the "combined system." Since 10 C.F.R. § 2.1011(c)(4) refers specifically to the certification called for by 10 C.F.R. § 2.1009(b), it follows necessarily that the certification called for by the latter section must also be certification that documentary materials are in fact in "the combined system." This is contrary to DOE's interpretation, whereby a certification may be based on document availability in one's own web site only.[6]

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[6] Given DOE's failure to address 10 C.F.R. § 1011(c)(4), its argument about the omission of "in the LSN" or "via the LSN" in 10 C.F.R. § 2.1009(b), Brief at 8, is a straw man. Regulations cannot be extracted and read solely in a vacuum, but must be examined in their regulatory context, and in such a way as not to offend other provisions of the same set of regulations. The applicable principle is the one cited by the PAPO Board, that "the agency's entire regulatory

DOE's alleged distinction between "availability" of documents and "accessibility" of documents is baseless. Sections 2.1001 and 2.1009(b) do indeed use the word "available." But the standard thesaurus that is part of Microsoft Word indicates that "available" and "accessible" are synonyms. While the word "access" appears in 10 C.F.R. § 1007(a)(2), this regulation requires only that "a system to provide access" to the LSN be provided at DOE headquarters and at other locations, and thus obviously refers to availability of hardware to access the LSN, suggesting nothing about the contents of a certification under 10 C.F.R. § 2.1009(b). Likewise, although Section 2.1001 (definition of LSN Administrator) specifies that the Administrator is responsible for "coordinating access" to and controlling the integrity of data in the LSN, it says nothing about the contents of a certification under 10 C.F.R. § 2.1009(b). Neither of these regulatory provisions supports DOE's contention that the Commission carefully chose the word "available" precisely because it meant something different than "accessible." In sum, DOE's argument that it is charged with certifying "availability" of documentary materials only on its own web site while the LSN Administrator is charged with making those materials "accessible" via the LSN, Brief at 7, has no support in the regulations or in the English language.

C. The Commission Expressly Rejected DOE's Interpretation Four Years Ago

As the Order makes clear, Order at 44, the interpretation DOE advances in its appeal is technically identical to LSN "Design Option I," which was expressly rejected by the Commission in 2000 when it first proposed to amend the LSN regulations to adopt the current central portal design. 65 Fed. Reg. at 50,943 (August 22, 2000).[7] If the Commission were now

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scheme" must be examined as a whole. Order at 38, citing *inter alia*, *Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3),* CLI-01-10, 53 NRC 353, 366 (2001).

[7] DOE argues the Commission rejected merely the concept in "Design Option 1" that participants' search engines could serve as the sole method of access. Brief at 15. But DOE's

to adopt DOE's interpretation, it would be executing an about-face in the rules that would undercut regulatory stability and require a new round of rulemaking. *See Alaska Professional Hunters v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999).

D. The Commission's June 2004 Rulemaking Did Not Address the Current Dispute

DOE argues, Brief at 9-11, that the Commission dispelled the notion that indexing had to be complete before certification when it declined to address proposed rule language to this effect in a 2004 rulemaking. The PAPO Board thoroughly addressed this argument and rejected it. Order at 45-47. The Order concludes, and the Commission's rule preamble is very clear, 69 Fed. Reg. at 32,840 (June 14, 2004), that the rule language proposed by participants to eliminate any doubt that indexing was a prerequisite to certification was in fact *never considered by NRC on its merits*. Rather, it was deemed by the Commission to be "outside the scope of this rulemaking." *Id.* Thus, the fact that the suggested language was not adopted says nothing about whether the Commission thought the suggested language was consistent or inconsistent with a proper interpretation of the then-extant (and current) LSN rules, and therefore it says nothing about the legal merits of DOE's current argument, which would, indeed, amount to rulemaking by fiat.

DOE extracts too much from the Commission's statement in the same rule preamble 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." DOE contends that "approximately the same time frame" does not mean "before" the certification, so the Commission must have thought it was sufficient for indexing to occur

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theory would not foreclose the possibility that its web site would indeed *be* the sole method of access for some considerable time or even the full mandatory six-month discovery period, since nothing under DOE's construction would prevent an application from being docketed and the licensing proceeding commenced without *any* documents actually being available on the central LSN site.

after the certification, as if "approximately the same time frame," though not equivalent to the word "before," were nevertheless equivalent to the word "after." More importantly, it would have been illogical for the Commission to decline to address the proposed rule language on its merits and then to officially reject the concept implicit in that very proposed rule language a short time later in the same preamble. Yet, that is precisely what DOE's construction here requires. The PAPO Board's explanation is the more logical one, and the one consistent with the testimony of the LSN Administrator[8] and the history of the LSN.

In its argument about the duty to supplement, added in the Commission's 2004 rulemaking, Brief at 11, DOE both forgets its own argument below and misconstrues what the PAPO Board held. At page 35 of its Order, the Board addressed and rejected DOE's argument that its failure to make its documentary materials available was somehow excused by the duty (and corresponding opportunity) to supplement its document production after the certification. This whole discussion addresses the defects in DOE's certification caused by its insufficient document production, not the need for indexing as a prerequisite to certification.

Finally, DOE argues that the Commission's disposition of a DOE comment in the 2004 rulemaking and adoption of certain DOE language removing a reference to NRC's ADAMS system is "more telling" about the Commission's intent in 2004. Brief at 11-12. To be sure, the Commission did adopt the rule language proposed by DOE. However, all we know from this is that the Commission agreed with the suggested rule language, which does not by its terms address the issue now on appeal. The Commission said simply it "agrees with" DOE's suggested language and provided no further explanation. See 69 Fed. Reg. at 32839 (June 14, 2004). But the actual DOE language is not at all inconsistent with the PAPO Board's interpretation, and

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[8] DOE complains that the LSN Administrator's testimony was not subject to cross-examination but neglects to say that DOE did not *ask* to cross-examine him.

may have been adopted simply because the Commission wanted the certification to depend on indexing in the central LSN site rather than on the availability of DOE documents in NRC's idiosyncratic and hard-to-use ADAMS system. It is at best a stretch to argue, as DOE does, that the 2004 rule adoption signaled the Commission's agreement with DOE's broader argument that having the certification depend on anything beyond the certifying party's control would be unfair.[9]

"Fairness," like individual regulatory provisions, must also be gauged in context. Here, the LSN Administrator testified that the LSN system was up and running and available to index DOE's documents beginning in October 2001, Tr. at pp. 91-111, and DOE had known for 15 years that it would have to compile and furnish its documents to a central document management system. But DOE waited until May 2004 even to *start* providing documents to the Administrator, notwithstanding repeated pleading by the Administrator that, if he did not start receiving the documents, DOE was headed for a train wreck. *Id.* Shortly after DOE finally began providing its documents and summarily "certified" its production, DOE suddenly ordered the Administrator to withdraw tens of thousands of documents, and then tens of thousands more, because they had not been properly screened for privileges. *Id.* During this period, DOE ordered the Administrator to blank out all of DOE's production on the LSN. *Id.* It is hardly surprising that these shenanigans ultimately resulted in technical difficulties for the LSN Administrator. But these types of difficulties – self-induced by the applicant's lack of diligence

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[9] A certification that depends on the actions of third parties, even independent governmental bodies, is clearly not unprecedented. *See e.g., Castenson v. City of Harcourt*, 86 F. Supp. 866 (N.D. Iowa, 2000), which involved a certification by a city that it complied with NEPA in filing a grant request in circumstances when compliance with NEPA required reviews and decisions of officials of governmental units independent from the city.

– should not serve to undermine the regulatory regime surrounding the LSN program on grounds of "fairness."

Likewise, DOE's attempt on "fairness" grounds to compare its grossly defective certification with NRC Staff's unchallenged certification, which occurred without issue despite the fact that 86 documents remained to be indexed due to minor technical difficulties, rings hollow. Those 86 documents represented a mere 0.2-percent of NRC's total document submission. By contrast, DOE's submission was admittedly deficient by at least 70-percent of the documents DOE itself conceded were required to be available, to say nothing of the millions of additional documents the Board later determined in its Order were improperly omitted from DOE's initial document identification process, or the hundreds of thousands of documents that were not yet screened for privileges. The fact that no objections were made by anyone to NRC's genuinely *di minimus* non-compliance due to technical difficulties experienced by the LSN Administrator speaks volumes. What it shows is that, where there is in fact a good faith effort to comply, and where the steady proffer of documents is the result of an organized, competent, and timely effort, the technical difficulties of a third party beyond the submitter's control will not act to impede or undermine anyone's certification. But that is a far cry from the dire situation DOE recklessly brought upon itself.

III. CONCLUSION

For the foregoing reasons, DOE's appeal should be denied and the PAPO's Board's Order should be affirmed.

Respectfully submitted,

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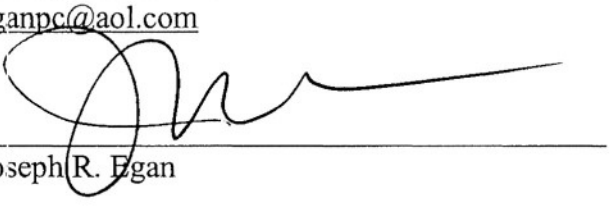

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CERTIFICATE OF SERVICE

I hereby certify that copies of **STATE OF NEVADA'S BRIEF IN OPPOSITION TO THE DEPARTMENT OF ENERGY'S APPEAL** and the State of Nevada's **MOTION TO STRIKE PORTIONS OF DOE'S BRIEF** were served upon the persons listed below either by electronic mail and/or Electronic Information Exchange on this 20th day of September.

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