UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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)	**)**	**June 28, 2005**

NEVADA'S REPLY BRIEF IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF DRAFT LICENSE APPLICATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES AND REGULATIONS

OTHER MATERIALS

The arguments of the Department of Energy ("DOE"), the NRC Staff, and the Nuclear Energy Institute ("NEI") in opposition to the production of the July, 2004 draft license application ("Draft LA") elevate form over substance, ignore bureaucratic reality, and contort the meaning and purpose of the Commission's regulations.

I. THE FACTS

In drafting its initial brief Nevada was hampered by DOE's withholding of important facts about the internal processing of the Draft LA. DOE has now added some facts but still withholds others. Here is what we know so far.

The Draft LA was a "deliverable" under DOE's contract with Bechtel-SAIC LLC ("BSC"). DOE Br. at 9, Attachment A at B-6. The Draft LA was supposed to be a complete draft that had been reviewed by all BSC technical team leaders and all DOE mandatory comments on it were supposed to have been resolved. *Id.*, Attachment A at B-7. The next step was supposed to be "final agency review" in accordance with the "LA Management Plan" followed by delivery of the "Final LA" in November 2004. This "Final LA" was supposed to sufficient for tendering to NRC in December 2004. *Id.*, Attachment A at B-7, 8.

By mid May, 2004, DOE was "seeing new chapters" of the Draft LA and the goal was still "by the end of July, to have all those chapters internal to the whole review process within the Department of Energy." Nevada Initial Br. Ex. No. 7 at 59. BSC in fact sent the Draft LA to DOE in July, 2004. The Draft LA then underwent a "multidisciplinary working-level review," or what DOE calls a "chapter review," by DOE technical review teams. DOE Br., Attachment B (Declaration of Joseph D. Ziegler) at 2. This DOE review of the Draft LA was intensive. Nevada Initial Br., Ex. No. 10 at 16. Nevertheless, DOE claims that the Draft LA "was not distributed to DOE management for concurrence or signature." DOE Br., Attachment B at 2.

Instead, DOE says that its "technical review teams" made "mandatory comments" on the Draft LA and provided these to BSC in August, 2004. *Id.*

When the "mandatory comments" were provided to BSC the November/December schedule was "still on." Nevada Initial Br., Ex. No. 8 at 32. This means that DOE's internal reviews must have been sufficiently thorough and the comments must have been sufficiently definitive that the next BSC draft, scheduled for November, 2004, would have required less than one month of DOE review before formal submission to NRC. In fact, DOE told the NRC that "DOE Headquarters concurrence review is expected to be complete by early November." Exhibit No. 14 (attached) at 6. Still, despite the fact that the December, 2004 goal was "still on," and DOE managers had only several weeks to review and approve of the next draft for formal submission to NRC, DOE claims that its managers reviewed the Draft LA only "to learn of the license application's general state of preparation." DOE Br., Attachment B at 2. It is impossible to reconcile Mr. Ziegler's current declaration about the cursory nature of DOE's managerial review of the Draft LA with DOE's schedule or with Mr. Arthur's September 20, 2004 testimony before the Nuclear Waste Technical Review Board ("NWTRB") that "myself and a number of our senior managers have been spending continuously over the last three weeks, and it will complete in the next week and a half, the full review, integrated review of every section of that license [sic] of the 70 subsections." Nevada Initial Br., Exhibit No. 8 at 41-42. Considering the import of the document, Mr. Arthur's version of the facts is far more credible than Mr. Ziegler's litigation posture.

DOE's brief raises a number of unanswered questions. The definition of "circulated draft" refers to circulation for "supervisory concurrence." Although DOE carefully states that the Draft LA was not circulated to "DOE management" for concurrence, it does not deny it was

circulated to "supervisors" for concurrence. As a contractor performing at the behest of DOE, all BSC's work product was subject to DOE's supervision. Does DOE equate managers and supervisors? Were any members of the technical review teams who provided "mandatory comments" exercising authority as supervisors? It is not credible that DOE managers were looking at the Draft LA only to gauge its "general state of preparation" when a December 2004 deadline for submission to the NRC was looming. DOE has not revealed contemporaneous documents from BSC or within DOE that might disclose the parties' pre-litigation characterizations with regard to the review of the Draft LA. When Mr. Ziegler declares that agreement was reached on how to proceed for every section of the Draft LA (DOE Br., Attachment B at 2), does he mean that there were no non-concurrences or that non-occurrences were all resolved? Ms. Chu acknowledged: "we reviewed the draft intensively, and made many comments and which were incorporated." Nevada Initial Br., Exhibit No. 10 at 16. Does DOE contend that not a single objection was overruled in the interest of conserving resources or meeting schedules? Finally, as suggested above, how does one reconcile Mr. Ziegler's current declaration with what DOE told the NWTRB (continuous review for weeks by senior managers).

II. ARGUMENT

A. The Context for Identifying Documentary Material

The concepts of "documentary material" and "circulated draft" do not exist in a vacuum, but can be understood only in the context of the NRC regulations and guidelines that dictate the content of the Licensing Support Network ("LSN"). A careful review of NRC's 10 C.F.R. Part 63, Reg. Guide 3.69 ("Topical Guidelines for the Licensing Support Network"), and NUREG-1804 ("Yucca Mountain Review Plan") demonstrates that DOE's license application and its predecessor, the July 2004 Draft LA, are the *most* relevant and necessary documents out of some

3.5 million documents estimated by DOE. And the critical nature of the Draft LA as the one and only comprehensive draft of the application is confirmed by the terms of DOE's contract with its M&O contractor, BSC.

The only reason for the existence of Reg. Guide 3.69 is as an articulation of the appropriate content of the LSN, thus its title "Topical Guidelines for the Licensing Support Network." Reg. Guide 3.69 (June 2004) provides:

> Pursuant to these regulations, the Licensing Support Network (LSN), an electronic information management system, is being designed and implemented to provide for the entry of and access to relevant documentary material. The requirements in 10 C.F.R. 63.21 for a license application and the structure and content of the Yucca Mountain Review Plan (NUREG-1804), were considered in developing this regulatory guide. The principal purpose of the Yucca Mountain Review Plan is to ensure the quality, uniformity, and consistency of NRC staff reviews of the license application and any amendments. This regulatory guide defines the scope of documentary material that should be identified in or made available via the LSN.

Reg. Guide 3.69-1.

Section C of Reg. Guide 3.69 lists the *subject* matters of the documents to be made available via the LSN. Appendix A contains a "non-exhaustive" list of the *types* of documents to which the subject matters enumerated in Section C should be applied, and states that "types of documents not included in Appendix A should also be identified in or made available via the LSN if they are relevant to a topic in Section C of this reg. guide." The majority of the subject matters listed in Section C's "topical guidelines" relate to the details of a "Safety Analysis Report," which is heart of DOE's anticipated license application, as mandated by the NRC's overarching Yucca Mountain regulation 10 C.F.R. Part 63. The critical nature of the Safety Analysis Report is made clear in 10 C.F.R. § 63.21: "An application consists of general information and a Safety Analysis Report." Section 63.21 goes on to specify some 24 separate and detailed subjects which must be satisfactorily addressed as part of the Safety Analysis

Report. Even a cursory reading of these subjects shows that the Safety Analysis Report is the linchpin of DOE's safety case.

The comprehensive Yucca Mountain Review Plan (NUREG-1804) was prepared for the specific purpose of establishing a "laundry list" of all those specific subjects that would be reviewed for adequacy by the NRC Staff prior to granting a license to DOE for a Yucca Mountain repository (NUREG-1804 at iii). Each section of this 400-page document "addresses determining compliance with specific regulatory requirements from 10 C.F.R. Part 63." *Id.*

Given the present focus in this case (assessing the stature of DOE's Draft LA as "Documentary Material"), one must consider whether the draft delivered by BSC to DOE in July 2004 contained the type of information likely to be relied upon, either by DOE or its adversaries, and whether it contained studies or reports prepared on behalf of DOE. The answer to this is suggested in the contract excerpt which DOE attached to its own Response Brief as Attachment A. In describing the terms under which Bechtel might earn an incentive fee for "submission of a complete Draft LA," the BSC contract specifies:

> The contractor will have to develop the safety case for the demonstration of compliance with the Commission's performance objectives for preclosure radiological safety. The contractor will also present discussions of potential hazards, analyses, of events that might disrupt operations and affect safety, and identify structures, systems, and components of the repository that would assure safety before and after repository closure. The contractor will also develop a Total System Performance Assessment conducted to support licensing, including a discussion of the models, inputs, and assumptions used to demonstrate compliance with postclosure safety objectives; discussions of features, events, and processes that affect postclosure performance; and summaries of the contribution of engineered barriers to performance.

DOE Br., Attachment A at B-6, B-7.

The contract then mandated: "A complete draft of all sections of the LA must be provided to DOE by July 26, 2004." The contract goes on to provide that the contractor "shall

receive $11,043,476" provided it met both the "performance measures" and the "assumptions and conditions" required for the Draft LA. The contract details the mandatory performance measures to include: *"The draft must address all applicable requirements of 10 C.F.R. 63 and the NUREG-1804 Revision 2."* DOE Br., Attachment A at B-7 (emphasis added).

The juxtaposition of 10 C.F.R. Part 63, Reg. Guide 3.69, NUREG-1804, and the requirements of the BSC contract are not accidental. Rather, 10 C.F.R. Part 63 sets out voluminous studies which must be accomplished and explained by DOE in its Safety Analysis Report; Reg. Guide 3.69 makes the primary focus of documents to be included in the LSN those comprising DOE's Safety Analysis Report; NUREG-1804 further parses those requirements into literally hundreds of pages of detailed requisites; and finally, DOE's contract with BSC requires the delivery in July 2004 of a complete, composite Draft LA which was required to meet all the requirements of 10 C.F.R. Part 63 and NUREG-1804. Taken together, the regulations and contract establish the Draft LA as the single most relevant piece of documentary material which would ever be placed on the LSN, short of the LA itself, which will not be available for many months after the time DOE certifies its LSN. The elevated contractual importance accorded this document and the massive review of its 70-odd sections both by DOE's technical experts and, for weeks and weeks, by its "senior managers," overwhelmingly defeat the litigation position DOE now assumes that the document was a mere preliminary draft.

B. The Draft LA is Documentary Material Under Section 2.1003(a)

According to DOE and NEI, the Draft LA need not be on the LSN, because it is neither "documentary material" subject to disclosure on the LSN under 10 C.F.R §2.1003(a), nor is it a "basic licensing document" subject to disclosure on the LSN under 10 C.F.R. §2.1003(b). This view is incorrect.

First, there is nothing in §2.1003(b) that suggests that "basic licensing documents" are not "documentary material." Indeed, a "basic licensing document" is a "document" and §2.1001 defines "document" in a way that does not distinguish it from "documentary material." The clear purpose of §2.1003(b) is to clarify that it is the *generators* of "basic licensing documents" who are responsible for LSN production of those documents, not to carve "basic licensing documents" out from the definition of "documentary material."[1] This specification of who was responsible for LSN production of these documents was necessary because it was expected that basic licensing documents would be "acquired by" or "in the possession of" participants other than those generating them, and without §2.1003(b) the regulations might be read to require *every* participant who intended to cite them to produce these very large documents on the LSN.[2]

Second, the interpretation advanced by DOE and NEI produces an absurd result. If LSN production of "basic licensing documents" is outside the scope of §2.1003(a), then there is no obligation to produce any circulated draft of the application on the LSN because production of circulated drafts on the LSN is governed by that subsection (a) and, as DOE points out, subsection (b) makes no mention of any drafts. DOE Br. at 4. The result would be that non-concurrences by DOE technical experts in the most important document in the proceeding (the application including the Safety Analysis Report) need not be disclosed on the LSN, while less

[1] This can also be seen from the introductory clause of §2.1003(a), which provides for LSN disclosure "[s]ubject to the exclusions in §2.1005 and paragraphs (b), (c), and (e) of this section." If DOE were correct, the introductory clause would have read "subject to the exclusions in §2.1005 and in paragraph (b) of this section, and subject to paragraphs (c) and (e) of this section." Instead, paragraph (b) is lumped in with paragraphs (c) and (e), thereby indicating that all three paragraphs are alike in explaining the duty in paragraph (a) but not detracting from it.

[2] Section 2.1003(b) was included in Subpart J before §2.1003(a)(1) was amended to specify that documentary material placed on the LSN by one participant but acquired by another need not be placed on the LSN again by the acquiring participant.

important non-concurrences in thousands of other, trivial documents must be disclosed. NRC could not have intended such an absurd result.

Moreover, as both DOE (DOE Resp. Br. at 6) and NEI (NEI Resp. Br. at 7) point out, Regulatory Guide 3.69 specifically provides that drafts of basic licensing documents (such as draft environmental evaluations) are to be disclosed on the LSN. To be sure, drafts of the application are not mentioned here, but the principle is the same: since Regulatory Guide 3.69 highlights some draft basic licensing documents that must be placed on the LSN, but only §2.1003(a) requires placement of drafts on the LSN, it follows that the drafters of this Regulatory Guide assumed that circulated drafts of basic licensing documents were subject to LSN disclosure under §2.1003(a).

Third, DOE's and NEI's arguments fail to pay close attention to the definition of "documentary material" in §2.1001. The Draft LA clearly falls under paragraph (1). The focus of paragraph (1) is on the nature of the *information* in a document, not the nature of the document itself, and given its advanced stage of preparation, based on fourteen years of site study and analysis, the Draft LA must have vast amounts of information in it that will be identical to information in the final application submitted to NRC. *Information* in the final application will be (indeed must be) relied upon by DOE. Therefore, the Draft LA in fact has information in it that DOE intends to rely on, and the Draft LA thus meets the definition of documentary material in §2.1001.

The Draft LA also meets the definition in paragraph (2) because it is impossible to imagine that absolutely everything in the Draft LA supports DOE. Or, put another way, it is impossible to imagine that the Draft LA has nothing in it that could be used by others to oppose the project. For example, much of the raw data on the geology and hydrology of Yucca

Mountain that must be in the Draft LA will show the fractures and short travel times in the unsaturated zone, and opponents will use this data to show that the Yucca geologic and hydrologic setting does not contribute adequately to, and in fact detracts from, the safety of the repository. Indeed, given the huge disparity in resources, many opponents will likely be forced to use much of DOE's basic data exclusively to support their positions.

Also, as argued in Nevada's initial brief, project opponents will want to explore differences between the Draft LA and the final application. DOE criticizes this argument because it is "ungrounded in any purported difference." DOE Resp. Br. at 4; *see also* NEI Br. at 5. But the further information DOE and NEI would require is unobtainable without the production of the Draft LA. It is true that the docketed application is what will be at issue in the licensing proceeding (DOE Br. at 4, NEI Br. at 3), but this is irrelevant. An expert's final testimony in the hearing is what is at issue, but this does not detract from the relevance of prior inconsistent expert statements in prior testimony drafts. Indeed, it is precisely because the docketed application is the focus of the licensing proceeding that inconsistent prior drafts of that application could be critical in evaluating it.

Finally, the Draft LA is a report within the meaning of paragraph (3). Under 10 C.F.R. §63.21(a) the heart and soul of the LA is a "Safety Analysis Report," and contrary to what DOE says (DOE Br. at 5), there is nothing odd about the concept that the Draft LA would be relevant to the final application. As discussed, *supra*, the juxtaposition of 10 C.F.R. Part 63, Reg. Guide 3.69, NUREG-1804, and the contract requirements for the Draft LA all establish the Draft LA as nothing less than a complete, detailed dress rehearsal for the final application.

The foregoing does not lead to unlimited production of application drafts, as DOE suggests (DOE Br. at 5). Only "circulated drafts" of the application need be disclosed on the

LSN.

C. The Draft LA is a Circulated Draft

DOE and NRC Staff argue that the Draft LA is not a "circulated draft" because, to be such a draft, it must have been distributed for approval in some acutely formal process in which there is a formal "non-concurrence" by someone in the concurrence process. We are told this "non-concurrence" must constitute a "formal, unresolved objection." Comments, even "mandatory" comments, are not sufficient. Moreover, we are told no disclosure is required while the concurrence process is ongoing. DOE Br. at 7-9, 12; NRC Staff Br. at 3-5.

NRC never intended to apply the definition of circulated draft in a way that allows DOE (and others) to create an artificial internal review process that effectively eliminates the possibility of there ever being any circulated drafts of the application and allows for the suppression of dissenting views. That possibility is upon us if, as DOE says, a draft can be a circulated draft only if it is distributed in an internal review process that is formally and artificially designated as a concurrence process, and intensive reviews of a draft document that result in "mandatory comments" do not result in any permanent, unresolved "non-concurrences." DOE now asserts its review/concurrence process precludes the Draft LA (or any other draft, if there were one) from *ever* being a circulated draft.

NRC's regulations do not define "concurrence," other than to provide in the definition of circulated draft that it begins with the author of the document. Therefore, the ordinary definition of the term (as in the Microsoft Word Thesaurus or in Webster's New College Dictionary) should control. The ordinary definition of concur is "agree," "assent to," "go along with," or "accept." A concurrence process for a document is simply a process whereby the author of a document and others are asked by supervisors whether they agree, accept, or go along with the

document in question. Someone has "non-concurred" if he or she has not agreed, accepted, or gone along with the document in question. If we import ordinary meaning into the definition of circulated draft, we find that a document is a circulated draft if it meets three conditions: (1) it must be a draft; (2) it must have been circulated for review at the behest of one or more supervisors to see if the author and others agree, accept, or go along with it; and (3) someone must not have agreed, accepted or gone along with it.

The Draft LA meets these three conditions. It is a draft. It was circulated at the behest of supervisors to see if people agreed with, accepted, or went along with it. The fact that DOE artificially refused after the fact to call the review process a "concurrence process," calling it instead a "chapter review process," elevates form over substance and departs from ordinary meaning. To the contrary, DOE's own Project Summary Schedules showed the concurrence path followed by the Draft LA and mandate the word "concurrence" at each successive level of DOE review. *Cf.* Nevada Initial Br. at 14-16. Finally, some people at DOE must in fact not have agreed, accepted, or gone along with the document because we are told the document had to be revised to accommodate mandatory comments.

DOE's artificial concept of the term "concurrence" likewise produces an absurd result. Under DOE's concept, there was no concurrence process at all for the Draft LA. Instead, the concurrence process was to begin only with the "next" draft. But, since DOE was aiming to complete the concurrence process in early November for a December 2004 submission to NRC, this means that the entire review, concurrence and signature process for a huge and complicated document to be "complete and accurate in all material respects" (10 C.F.R. §63.10), including review of every pertinent word, equation, and computer program by each of the hundreds of authors, scores of supervisors, the OCRWM Director of License Application and Strategy, the

OCRWM Director, Office of Repository Development, the OCRWM Director, and the DOE Secretary (and his designees), was to be completed in a few weeks. This is patently ridiculous. Of course, this would conceivably be doable if, as common sense suggests, it was understood that reviews during late November 2004 by BSC and OCRWM under an extremely tight deadline would focus on changes since the last draft and on any last-minute unresolved problems, and review by the DOE Secretary would focus on major policy issues. But this must also mean that, in 2004, it was understood by DOE that the concurrence process for the final license application included separate prior concurrence processes for both the July 2004 and November 2004 drafts, and perhaps other drafts within BSC as well. It would be natural and expected for anyone embarking on the review of a complicated document to focus on changes or new issues since the last draft. In 2004 the planned final DOE (and BSC) concurrence on the application must have relied on previous concurrences, which means that previous concurrence processes existed. So the Draft LA was part of a concurrence process and was in fact "circulated for concurrence" within the meaning of the definition of circulated draft.

This leaves the arguments that there were no unresolved objections to the Draft LA and that, in any event, no production is required while the concurrence process is ongoing. The obvious answer to these arguments is that NRC's regulations do not support them. The actual language of the regulation requires only that the draft document be "circulated for supervisory concurrence or signature." There is no requirement that the concurrence process be completed. And the requirement is that the "original author or others *have* non-concurred," *not* that they *still* non-concur. The history of the regulation is not unequivocally to the contrary. It discusses the definition of circulated draft in terms of whether there "has been" an unresolved objection, not whether there still is one. 53 Fed. Reg. 44411, 44415, November 3, 1988. This makes sense, for

it assures that original non-concurrences will be disclosed so that later pressure to conform cannot stifle dissent and full disclosure.

In any event, we have only the carefully scripted litigation words of Mr. Ziegler (DOE Br., Attachment B) to show that there are now no unresolved non-concurrences. Mr. Ziegler says that for each mandatory comment on the Draft LA there was "acceptance of the comment, a justification for the original text, or an alternative proposal." But "justification" could still have left the commenter unsatisfied, and who knows what the author or the commenter thought about any "alternative proposal"? We are told merely that ultimately "agreement was reached on how to proceed," and "[t]he agreed resolutions of mandatory comments were incorporated into the next draft." *Id.* But this does not preclude the possibility that agreement was reached to proceed in the face of an objection, recognizing that down the road the objection would be disclosed. After all, given the hundreds of people working on the project, it is difficult to believe that no one working on the seventy-plus sections of the Draft LA ever got effectively overruled on *any* objection.

D. The PAPO Board May Consider the Public Interest

In its initial brief, Nevada argued straightforwardly that in deciding whether to order disclosure of the Draft LA, the Board should consider the public interest in disclosure as required by the Freedom of Information Act ("FOIA"). DOE recoils at the very thought the public interest might have any bearing here. DOE Br. at 16-18.

NRC Staff concedes, as it must, that the privileges (assuming they apply at all) at issue here (the work product and deliberative process privilege) are qualified privileges and thus may be subject to a balancing test. There is nothing about such a balancing test that goes beyond the bounds of NRC's regulations, as the cases cited in the NRC Staff's brief establish. NRC Staff

Br. at 7, n.8. Nor is there anything about such a balancing test that goes beyond DOE's regulations, as Nevada's initial brief also pointed out. Nevada Initial Br. at 21.

E. Disclosure of the Draft LA Cannot Undermine the Adjudicatory Process

NEI, like DOE, must believe that there is something to hide in the Draft LA, since it views disclosure of that document to be anathema. NEI argues that disclosure of the Draft LA would undermine the adjudicatory process because NRC's regulations do not contemplate that anyone will be given access to the Draft LA in the pre-application phase. NEI Br. at 9-15. NEI's primary argument seems to be that the "pre-application" phase of the proceeding cannot, by definition, have anything to do with disclosure of any draft of the application because this would turn the pre-application phase into the application phase. Instead, NEI argues, the pre-application provides only for disclosure of information supporting or underlying the application. Neither law nor logic supports NEI's position. Disclosure of the Draft LA would not turn the pre-application phase into an application phase for the simple reason that disclosure of this nearly final draft would not pre-empt the filing of the final application. Moreover, NEI's argument that if the Commission had wanted DOE to disclose the Draft LA it would have said so merely begs the question at issue in this brief – whether NRC's regulations require disclosure of the Draft LA.

NEI argues disclosure of the Draft LA would "reset the schedule established by the Commission in this proceeding" by giving Nevada (and others) too much time and information (a nearly final of the application) to prepare their contentions. *Id.* But disclosure of the Draft LA will not reset any schedule. The pre-application phase will still be a minimum of six months beginning with DOE's LSN certification, whether or not the Draft LA is disclosed. Moreover, the purpose of the Commission's schedule is to achieve the goal of a licensing decision in three

or four years, and giving potential parties and participants more complete information to enable them to prepare adequate contentions contributes to this goal, as the Commission recognized in promulgating Subpart J. To be sure, disclosure of a close-to-final version of the LA will greatly assist all other parties to the proceeding (including NRC Staff and NEI) and will implement the "full and fair six months" access to all DOE Documentary Material which the LSN was created to ensure. It will also contribute to the transparency of the proceeding and to its credibility in the eyes of a skeptical public.

Moreover, in considering whether disclosure of the Draft LA would advance or undermine the adjudicatory process, it should be kept in mind that the Draft LA will need to be disclosed as a part of deposition and related expert witness discovery, and so the pertinent question is not whether but when the Draft LA must be disclosed. This is because the Draft LA will have been reviewed by DOE witnesses DOE plans to offer, or Nevada intends to call, so the disclosure of the Draft LA is not barred by *any* privilege. Information considered by expert witnesses must be disclosed to an opposing party. FED.R.CIV.P. 26 (a)(2)(B) expressly requires the disclosure of "the data or other information considered by the [expert] witness in forming the opinions."[3] As the Advisory Committee on Civil Rules explained when this rule was revised in 1993:

> Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions -- whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying of being deposed.

FED.R.CIV.P. 26 advisory committee's note. The overwhelming majority of courts have faithfully followed the text of the rule and the Advisory Committee's guidance, concluding that

[3] "The legal authorities and court decisions pertaining to Rule 26 of the Federal Rules of Civil Procedure provide appropriate guidelines for interpreting NRC discovery rules." *E.g., Toledo Edison Co. (Davis-Besse Nuclear Power Station*), ALAB-300, 2 NRC 752, 760 (1975).

"the requirements of (a)(2) 'trump' any assertion of work product or privilege." *Karn v. Ingersoll-Rand Co.,* 168 F.R.D. 633, 639 (N.D. Ind. 1996). *See also Musselman v. Phillips,* 176 F.R.D. 194, 202 (D.Md. 1997) ("[W]hen an attorney furnishes work product – either factual or containing the attorney's impressions – to an expert witness . . . providing opinion testimony . . . an opposing party is entitled to discover such a communication, provided it is considered by the expert."); *Johnson v. Gmeinder,* 191 F.R.D. 638, 646 (D. Kansas 2000) ("[T]he policy reasons, the plain language of amended Rule 26(a)(2)(B), the Advisory Committee Note, and the weight of authority supports this Court's conclusion that any type of privileged material, including materials or documents prepared by a non-testifying expert, lose their privileged status when disclosed to, and considered by, a testifying expert."). Draft reports of experts are unequivocally included within the disclosure command of FED.R.CIV.P. 26 (a)(2)(B).[4] "Courts have required disclosure of 'drafts of reports or memoranda experts have generated as they develop the opinions they will present at trial.'" *Colindres v. Quietflex Mfg.,* No. CIV.A. H-01-4319, 2005 WL 1367102, at *4 (S.D. Tex. May 26, 2005) (quoting *B.C.F. Oil Refining Inc. v. Consolidated Edison Co.,* 171 F.R.D. 57, 62 (S.D.N.Y. 1997)). *See also American Fidelity Assurance Co. v. Boyer,* 225 F.R.D. 520 (D.S.C. 2004) (granting motion to compel disclosure of "[a]ny and all other material used, referred to or consulted in preparing the Expert's Report . . . to include any draft reports"); *Oneida, Ltd. v. United States,* 43 Fed. Cl. 611, 620 n.18 (Ct.Fed.Cl. 1999) (Drafts of expert reports "are readily discoverable.").

[4] Indeed, draft expert reports were commonly disclosed even before the 1993 amendment of Rule 26. *See, e.g., Hewlett-Packard Co. v. Bausch & Lomb, Inc.,* 116 F.R.D. 533, 536 (N.D. Calif. 1987) (noting the earlier version of the Rule as "the source of authority to order disclosure of *drafts of reports* or memoranda experts have generated as they develop the opinions they will present at trial") (emphasis in original); *County of Suffolk v. Long Island Lighting Co.,* 122 F.R.D. 120, 122 (E.D.N.Y. 1988) (same); *Abruzzo v. United States,* 21 Cl.Ct. 351, 357 (Cl.Ct. 1990) ("[B]oth draft and final versions of expert reports are discoverable, and are not subject to a showing of 'substantial need' by the discovering party.").

The desperate arguments of DOE – that Nevada somehow seeks to impose a one-sided obligation on DOE, since it is not *presently* delivering drafts of its contentions – and NEI – that the closure of the Draft LA would "reset the schedule" and give Nevada *too much* time and information – are both inaccurate and ironic. Nevada seeks no one-sided obligation, but will also make available its circulated drafts. Moreover Nevada has been quite willing to have its experts participate in informal open technical exchanges with NRC Staff; only NRC staff has been reluctant. As far as NEI's suggestion that receipt of the Draft LA at this point would be premature, Nevada urges that its availability now would comport with the intent of NRC's creation of the LSN, while its withholding would perpetuate DOE's philosophy of delay, of hiding the ball, and of playing "gotcha."

The statutory schedule for DOE's licensing effort provided that DOE would file its final license application three months after its site recommendation, which occurred in February 2002. Had DOE adhered to that schedule, it might credibly have argued that the importance of revealing the Draft LA was minimal, given the anticipated prompt delivery of the final version. Instead, we are now over three years (instead of three months) past the site recommendation, without a DOE license application. Moreover, a complete Draft LA has been available for the last eleven months, while DOE continues to thumb its nose at those who would benefit from its disclosure. Last year at this time, DOE purported to certify its LSN database containing some 1.2 million documents, of which it had forbidden NRC to disclose a single one prior to the date of its certification. A year later, DOE apparently continues to deliver massive volumes of documents to NRC for inclusion in its anticipated second LSN certification – again forbidding NRC to make any of these documents available to the public until the moment of DOE's second certification. In so doing, DOE continues to conceal deliberately from view that information

which will be critical to all participants during the licensing proceeding. One can only wonder at DOE's motivation.

F. DOE has Failed to Provide Any Support for its Claims of Privilege, and the Draft LA Must be Disclosed

It is axiomatic that a party who seeks to withhold a document on the basis of a claim of privilege has the burden to demonstrate the applicability of the privilege asserted. Counsel for DOE and Nevada had argued at PAPO hearings as to the applicability of the litigation work-product privilege to the Draft LA. As a consequence of those discussions, DOE *specifically requested* that the Board "tee-up" the issue of the requirement for the availability of DOE's Draft LA on the LSN and the timing of that availability. Indeed, in its May 12, 2005 "Memorandum In Response to May 12, 2005 Memorandum and Order Regarding Second Case Management Conference," DOE specifically requested that its assertion of litigation work-product privilege be determined and *be determined soon*. Thus, DOE pled, "Nevada asserted at the May 4 hearing that the drafts of the License Application do not qualify as litigation work-product (and implicitly that they are required to be produced on the LSN). Although the May 11, 2005 Order did not request briefing on this matter, DOE respectfully requests the Board to establish a briefing schedule on the issue whether the LSN regulations require production of drafts of the License Application. This is an important issue, and *its resolution now will avoid inevitable future disputes*." DOE May 12, 2005 Memorandum at 27 (emphasis added). DOE went on to claim that "the drafts, as well as edits and comments thereon, are privileged litigation work product since they are undertaken in preparation of the license application, which is the primary litigation document in the licensing proceeding. Disclosure of these documents developed in anticipation of litigation would be an 'unnecessary intrusion by opposing parties and their counsel' into the process by which DOE assembles information, sifts relevant facts from

irrelevant facts, prepares legal theories, and plans its litigation strategy." *Id*. at 27-28.

The Board honored DOE's request and recognized that an early decision on the availability of the Draft LA (including resolution of whether it should be deemed prepared in anticipation of litigation or simply prepared in the ordinary course of business to meet regulatory requirements) would advance the interests of expediting a decision and avoiding potential myriad other disputes over the "work-product" status of various documents. The Board accordingly ordered Nevada to again formally request the Draft LA and ordered DOE to articulate in some detail its reasons for declining to provide it. Nevada did make the request, and in response, DOE asserted four reasons for withholding, two of them privileges: deliberative-process privilege and litigation work-product privilege.

The Board's order further required Nevada to move to compel the production of the Draft LA at the time of DOE's initial LSN certification or to seek a declaratory order, and Nevada accordingly did so, arguing in detail as to the inapplicability of each of the four bases relied upon by DOE for withholding. The Board accorded DOE a specific opportunity to provide the justification for its stated basis for withholding (*i.e.*, to carry its burden of proof on privilege). DOE addressed two of its reasons (that the Draft LA is not Documentary Material and is not a circulated draft) and conceded that "any deliberative process privilege would be overridden by regulation." DOE Br. at 15.

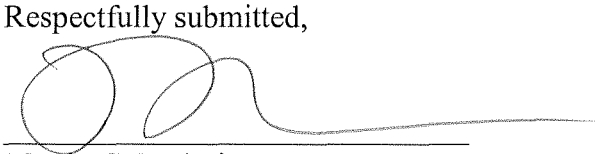
However, DOE wholly failed to provide *any* justification whatsoever for its assertion of litigation work-product privilege. Given the authorities cited in Nevada's Initial Brief establishing that work-product privilege may not be asserted as to documents prepared in the ordinary course of business or to meet regulatory requirements, even if prepared by attorneys, it may not be a surprise that DOE is seeking to take the issue "off the table." One can hardly think

of a document more clearly prepared to meet regulatory requirements than the Draft LA. However, DOE's motive is irrelevant: what matters is that DOE asserted a privilege, was specifically ordered to meet its burden of establishing its applicability, and has utterly failed to do so. Asserting its newly minted argument that one cannot judge whether the Draft LA was a "circulated draft" until the time of its submission of the Final LA is simply an evasion. DOE apparently seeks "two bites" at arguing the availability of the Draft LA on the LSN and proposes to postpone "Phase II" of its argument until six months or more after its LSN certification, at the time of its filing of the Final LA. The character of the Draft LA as litigation work product (or not) is established by facts which are in existence today. DOE's failure to justify its assertion of work-product privilege and its concession of the inapplicability of the deliberative-process privilege leave the Draft LA in an obvious position: unprivileged and discoverable.

III. CONCLUSION

DOE should be ordered to disclose the Draft LA.

Respectfully submitted,



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June 28, 2005

EXHIBIT
No. 14

SUMMARY OF THE
U.S. NUCLEAR REGULATORY COMMISSION / U.S. DEPARTMENT OF ENERGY
QUARTERLY MANAGEMENT MEETING
IN ROCKVILLE, MARYLAND
AUGUST 19, 2004

Introduction

The U.S. Nuclear Regulatory Commission (NRC) and U.S. Department of Energy (DOE) held a public Quarterly Management Meeting on August 19, 2004. The purpose of this meeting was to discuss the overall progress of the project at the proposed geologic repository site at Yucca Mountain (YM), Nevada. The meeting was hosted at the NRC Headquarters in Rockville, Maryland, with video and audio connections to the Center for Nuclear Waste Regulatory Analyses (CNWRA) in San Antonio, Texas, and an audio connection to the DOE offices in Las Vegas, Nevada. Other participants included representatives from the NRC Region IV, State of Nevada, Nevada Nuclear Waste Task Force, the press, and interested members of the public.

The NRC issued the notice for this public meeting on July 21, 2004. The meeting notice is available in the NRC's Agency-wide Document Access and Management System (ADAMS) with accession number ML042030128.

NRC Opening Remarks

Margaret Federline, Deputy Director, NRC's Office of Nuclear Materials Safety and Safeguards, thanked and welcomed DOE, members of the public, and all stakeholders in attendance to NRC headquarters. Ms. Federline's remarks touched on three areas: (1) the July 9, 2004, United States Court of Appeals' Ruling on EPA Standards; (2) The State of Nevada's request for financial assistance in the licensing review of the YM Nuclear Waste Repository; and (3) NRC certification of electronic availability of its documentary material.

Ms. Federline introduced one of NRC's new managers. Mr. Elmo Collins is the new deputy Director for the Licensing and Inspection Directorate, within the Division of High-level Waste Repository Safety. Mr. Collins brings over 13 years of inspection and licensing experience to the NRC's Office of Nuclear Materials Safety and Safeguards (NMSS) from Region IV where he was the Director of the Division of Nuclear Materials Safety.

Regarding the U. S. Appeals Court rulings on the Environmental Protection Agency (EPA) radiation protection standard, Ms. Federline stated that on July 9, 2004, the United States Court of Appeals dismissed all challenges to the site selection of YM. The Court, however, concluded that the 10,000-year compliance period selected by EPA violates the Energy Policy Act, because it is not consistent with findings and recommendations of the National Academy of Sciences. Ms. Federline continued that pending clarification of the legal challenges to the Yucca Mountain Project (YMP), the NRC continues to prepare to perform a review of DOE's license application (LA) objectively and in accordance with the regulations.

Mr. Arthur reminded the meeting attendees that the Atomic Safety and Licensing Board conducted a hearing on July 27 to hear concerns by the State of Nevada and that the DOE and other parties were currently awaiting the Board's decision.

Mr. Arthur then discussed LA progress. He stated that as of the end of June, the DOE estimated that they were about 79 percent complete in their progress toward completion of the LA, which includes addressing the Key Technical Issue (KTI) agreements (85% complete), development of the LA Document (59% complete), Preclosure Safety Assessment (99% complete), Total System Performance Assessment (81% complete), and the design of the repository to support the LA (83% complete). Mr. Arthur said that the progress in Preclosure Safety Assessment would be adjusted downward to 80-85% at the upcoming Management Operating Review for July to reflect integration with engineering design.

Mr. Arthur then discussed the LA document development and review progress. Technical team reviews of the individual sections of the draft LA document are complete and integrated chapter reviews are nearing completion. The chapter reviews focus on integrating and ensuring consistency among the sections that comprise each of the chapters of the Safety Analysis Report and the General Information sections. DOE Headquarters concurrence review is expected to be complete by early November so that the LA and the Environmental Impact Statement can be made ready for submission to NRC in late December.

Mr. Arthur stated that DOE has made significant progress in addressing the KTI agreements. As of the July 23, 2004, DOE letter (Ziegler to Reamer), DOE had submitted responses to 264 of the 293 KTI Agreements. Mr. Arthur indicated that responses for the remaining KTI agreements and supplemental responses are on schedule to be submitted by the end of August 2004. He added that DOE would not provide direct responses on any requests for additional information DOE receives after the July 23 letter. Mr. Arthur stated that DOE believes that the intended purpose of the KTI agreement process would be met with the submittals to be provided at the end of August 2004, and considers the KTI agreement process to be complete at that time. However, he asked NRC for feedback on responses to KTI agreements categorized as "high risk significance" as soon as possible to facilitate any necessary DOE actions as they proceed into the licensing process.

Regarding nuclear power industry benchmarking, Mr. Arthur stated that the Office of Repository Development (ORD) meets on a quarterly basis with industry leaders to discuss best practices and lessons learned in the areas of quality assurance (QA), corrective action program (CAP), safety conscious work environment (SCWE), and the industry LA validation process and is evaluating cross-training assignments for federal personnel to other nuclear facilities after submittal of the LA.

Mr. Arthur reported that to facilitate the cultural realignment of ORD into an applicant/licensee, DOE has commissioned a License Transition Team. The responsibility of this team is to develop a transition plan that defines the goals, actions, milestones, and responsibilities for a successful transition to the NRC-regulated applicant/licensee environment. This team will report to the Associate Deputy Director Ken Powers and is chaired by Richard Spence. Based, in part, on the DOE's experience with NRC's Technical Evaluation of three AMRs and a recent NRC staff presentation to the ACNW, the DOE is considering processes for supporting NRC's inspection programs and interactions with the Region IV Office in anticipation that the inspection program could begin as soon as NRC receives DOE's LA.

Reviewing the status of the QARD, Mr. Brown said that Revision 16 of the QARD, which is based on 10 CFR Part 60, will be effective Monday, August 23. The next revision of the QARD, based on 10 CFR Part 63, will be addressed during a technical exchange in September. DOE plans to submit the revised QARD in the first week in September. Strategic planning is a new OQA initiative to support LA review, design, construction, and operations aspects of the project, which will investigate such items as skill mix and staffing issues, training requirements, and processes and procedures.

Mr. Elmo Collins (NRC) asked DOE what is DOE-OQA's biggest challenge. Mr. Brown responded that ensuring that the line is responsible for quality was the biggest QA challenge.

Noting that the recent RIT surveillance was compliance-based, Mr. Tom Matula asked what performance-based audits would be performed in the future – including performance-based audits of AMRs and other license application supporting documents. Mr. Brown responded that three performance-based audits are planned, including a Headquarters audit. Mr. Joe Ziegler further noted that, although it is not called a performance-based audit, the DOE staff performs reviews of BSC technical documents for adequacy as an oversight function.

Action Item Status

The status of open action items was discussed. It was agreed to modify one action item (MM0304-03) to provide a briefing to NRC at or before the next quarterly management meeting. No new action items were established. DOE agreed that the following topics would be discussed at the next quarterly management meeting: status of the licensee transition plan, new performance metrics for 2005, and SCWE aspects of the normal problem resolution process.

Public Comments

No members of the public made comments during the meeting.

Date: 8/27/04

for C. William Reamer, Director
Division of High Level Waste Repository Safety
Office of Nuclear Material Safety
and Safeguards
U.S. Nuclear Regulatory Commission

Date: 8/26/2004

Joseph D. Ziegler, Director
Office of License Application and Strategy
Office of Repository Development
U.S. Department of Energy

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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)	)	**June 28, 2005**

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Nevada's Reply Brief in Support of Motion To Compel Production of Draft License Application has been served upon the following persons by electronic mail:

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