UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	**Docket No. PAPO-00**
U.S. DEPARTMENT OF ENERGY	**ASLBP No. 04-829-01-PAPO**
(High Level Waste Repository: Pre-Application Matters)	**NEV-03**

STATE OF NEVADA'S RESPONSE TO NRC STAFF'S APPEAL OF THE PAPO'S SEPTEMBER 22 ORDER AND ITS REQUEST FOR A STAY

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I. INTRODUCTION

NRC Staff appeals from the Pre-Application Presiding Officer's ("PAPO's") September 22, 2005 Decision (LB-05-27) granting the State of Nevada's motion to compel the Department of Energy ("DOE") to produce a particular draft license application ("Draft LA") on the LSN when it re-certifies to LSN compliance. NRC Staff also asks for a stay. For the reasons set forth below, NRC Staff's arguments are devoid of any merit, the PAPO decision should be affirmed, and the stay should be denied.

II. ARGUMENT

A. NRC Staff's Concerns About the Definition of "Non-Concurrence" Are Groundless

NRC Staff professes difficulty with the PAPO's common-sense concept of a "non-concurrence" in a document. As explained below, the precise nature of NRC Staff's disagreement with the PAPO and how it prefers to define this term is not clear from its brief. However, if NRC Staff means to argue that a document is not submitted for concurrence, cannot be the subject of a "non-concurrence," and cannot be a "circulated draft," unless there is a formal, recognized process that the agency chooses in its sole discretion to label specifically as a "concurrence" or "approval" process, NRC Staff is clearly wrong.

1. What is NRC Staff's Objection?

NRC argues that in order for there to be a "non-concurrence" in a document, there must be an objection to something in the document, NRC Brief at 9, and that the objection "should have been provided as part of a formal review process of the document in question and should clearly indicate that the author or reviewing party will not concur in the document absent the change being made." NRC Staff Brief at 9-10. However,

NRC Staff also says that the process need not be labeled as a "concurrence process," NRC Staff Brief at 9, and that "some kind of process" that may simply constitute "an internal review process" will be sufficient" so long as it is a "formal, recognized process." NRC Staff Brief at 8-9. NRC Staff also argues inconsistently that a concurrence process must include an "initialing step" (or possibly also a "sign-off sheet") that "does not necessarily include a signature," NRC Staff Brief at 8, note 11, and 10, note 15, and that the objection "need not necessarily be labeled a 'non-concurrence' but there must still be "some designation that the author or reviewer will not concur in the document." NRC Staff Brief at 9.

So, putting all this together, but ignoring the blatant inconsistencies, NRC Staff seems to prefer a definition of "non-concurrence" as follows. A "non-concurrence" is an objection to some statement in a document that is submitted in some kind of formal, recognized review process. The objection must be significant, like a non-concurrence, but need not use this term, and the process need not involve any signatures, but must have some level of formality. NRC Staff seems to concede that an e-mail requesting a change in a document may be a "non-concurrence."

The PAPO's definition would also avoid reliance on a formalistic "non-concurrence." The PAPO would look objectively at whether the document in question is the sort that would be submitted in some formal, recognized review process, the extent of management review, whether management review was for the purpose of agreement on the substance of the draft, and whether any comments were substantive. What is not clear, and what NRC Staff fails to explain, is how its definition would produce any

different result than the PAPO's test.[1] If, in fact, the document in question was well developed and complete (or clearly incomplete) and was submitted for a review by those in positions of authority, does this not suggest that a formal, recognized review took place? If the management review was extensive and thorough, and was for the purpose of obtaining agreement on substance, does this not indicate that some formal, recognized review process took place? If management asked for substantive changes to the document, does this not indicate that there *was* an objection?

2. Artificial Designations Cannot Count

Surely, NRC Staff cannot maintain that a management comment or request that a document be changed, made in the course of a planned, extensive and intensive review of a complete (or nearly complete) document, is not a "non-concurrence" unless the request is part of a review process that the agency chooses to call a "concurrence" or "formal review" process, and the manager specifically instructs that his or her change be made or heads will roll. This elevates form over substance, encourages abuse, and departs from the ordinary, dictionary definition of "concurrence" as substantive agreement or approval. The Commission uses ordinary dictionary definitions in construing its regulations, *Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit No. 3)*, CLI-01-10, 53 NRC 353, 356 (2001), and there is no reason to depart from this rule of construction here. Indeed, courts have cautioned that they will defer to the Commission's constructions of its own regulations "only so long as the agency's interpretation does no

[1] As explained in the PAPO's decision, and in Nevada's Brief in opposition to DOE's appeal, the Draft LA at issue would meet the definition of circulated draft whichever definition of concurrence or non-concurrence is used. Indeed, the Draft LA was submitted for review in a formal, recognized process called a "concurrence" process by DOE.

violence to the plain meaning of the provision." *Guard v. NRC*, 753 F.2d 1144, 1148-1149 (D.C. Cir. 1985), citing to *Deukmejian v. NRC*, 751 F.2d 1287, 1310 (D.C. Cir 1984) and *Union of Concerned Scientists v. NRC*, 711 F.2d 370, 381 (D.C. Cir. 1983).

Furthermore, such an artificial construction would be inconsistent with the statement in the rule preamble, quoted by NRC Staff in its Brief at 9, that "[a]lthough many of the LSS participants or their contractors do not have the same type of concurrence process as DOE and NRC, the Commission expects all LSS participants to make a good faith effort to apply the intent of this provision to their document approval process." Clearly, it must be the "intent" or substance of a participant's approval process that controls, not the label, otherwise no one except NRC Staff and DOE need ever have any "circulated draft," and both DOE and NRC Staff could avoid ever having a "circulated draft" by simply limiting the label "concurrence" to the senior management review process that takes place just before the final signature.

If the concern is that the PAPO's definition would provide for circulated drafts whenever any complete (or nearly complete) document is given to anybody for comment, even on an ad hoc and informal basis, Nevada believes NRC Staff is misreading the PAPO's decision. The PAPO found, based on documentary evidence, that the Draft LA was in fact submitted for approval as a part of a "careful, thorough, and formal review process." PAPO Decision at 37. The thrust of the PAPO's careful reasoning is avoidance of the artificiality and abuse inherent in the position that a document is not submitted for "concurrence" unless the review process is for "concurrence," and in the position that there is no "non-concurrence" unless the reviewer uses the formula phrase "I do not concur." Clearly, the PAPO had in mind the bureaucratic realities of government

agencies, and contemplated that a circulated draft would be associated with an "internal decision-making process" or "serious management review" (PAPO Decision at 35). Under the PAPO's Decision, there cannot be a circulated draft unless the document in question was entered into some kind of pre-arranged review process in which it was understood that reviews were required, not optional, and that suggested changes or objections had to be addressed.

Finally, there is no factual basis offered to support NRC Staff's scary stories about flooding and cluttering the LSN with extraneous drafts. Indeed, the whole purpose of the PAPO's discussion limiting non-concurrences to substantive changes to complete or nearly complete documents is to avoid such flooding or cluttering.

B. NRC Staff's Reliance on Regulatory History Violates the Law

NRC Staff argues that the PAPO failed to comply with statements in the LSN rule preamble which, it maintains, provide that that no circulated draft needs to be submitted on the LSN while the internal decision process is "ongoing," and that there can be no circulated draft unless there is an "unresolved objection." NRC Staff's arguments unlawfully elevate the importance of preamble language over the language of the rule itself.

Language in a rule preamble is not part of the rule itself and is not codified in the Code of Federal Regulations. As the Commission observed correctly in its brief in *Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004), "the statement of considerations is not part of the rule itself and must be construed in a manner consistent with NRC regulations." Brief at 45. The PAPO's explanation of why the preamble language relied on by the NRC Staff cannot be reconciled with the rule itself is thorough

and convincing. The rule (10 C.F.R. §2.1001) defines a "circulated draft" in terms of whether the author or others "have non-concurred," not in terms of whether the author or others are still non-concurring. And if the author or someone else has in fact "non-concurred," it does not logically matter whether, in the final analysis, that non-concurrence (or objection) is resolved or not. Moreover, the two preamble statements that non-concurrences must be "unresolved" and that the decision process cannot be "ongoing" are contradictory, because if the decision process in not "ongoing" but completed it follows that non-concurrences have been "resolved." If given this legal effect, as NRC Staff argues, there would never be any circulated draft because the definition constitutes a logical impossibility.

A circulated draft, by definition, includes a draft of a document that does not become a final document because of the passage of a substantial time in which no action on the document is taken. But if time has passed with no action, the decision process is technically "ongoing" and so the preamble statement that the decision process cannot be "ongoing" is again utterly contrary to the definition.

Staff has no good rebuttal to the PAPO's analysis. It first argues (Brief at 11) that the preamble language is not extraneous because it applies to 10 C.F.R. § 2.1003, which explains what documents must be placed on the LSN, and not to 10 C.F.R § 2.1001, which contains the definition of circulated draft. But this gets us nowhere because section 2.1003 refers back to "circulated drafts" as defined in section 2.1001.[2] NRC Staff

[2] The preamble statement that no circulated draft needs to be submitted while the decision-making process is ongoing concedes, on its face, that there is such a thing as a circulated draft while the decision process is ongoing. To the extent this preamble statement goes to when a circulated draft must be placed on the LSN, and not to the definition of the term, it is utterly contrary to 10 C.F.R. § 2.1003, which dictates when

next argues (Brief at 12) that the PAPO erred by "narrowly focusing only on the question of whether these [preamble] statements help in defining certain terms" as opposed to determining the "Commission['s] intent with respect to what should be placed on the LSN." This is specious. The Commission's intent regarding what must be placed on the LSN, in particular what distinguishes a preliminary draft that need not be put on the LSN from a circulated draft that must be, is determined by the language in the rule itself, that is, the "certain terms" NRC Staff seems to find irrelevant. Preamble language has no legal significance apart from the rule itself.

Finally, NRC Staff argues (Brief at 12-13) that the two preamble statements are not contradictory because issuance of the final document does not imply that the individual's concern has been resolved; it only indicates that the decision was made despite the person's concerns. So, according to NRC Staff, the decision process can be complete with a non-concurrence unresolved. This contorts the common sense definition of "resolve," which simply means deciding or making your mind up about a matter. If someone in a position of final authority rejects someone's concern, and the decision process is complete, he or she has decided or made up his or her mind about the concern and it is resolved.

NRC Staff also does not explain how its favored preamble language can be reconciled with the requirement in the rule that various kinds of non-final documents are still circulated drafts.

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documentary material must be placed on the LSN and has no provision for any delay while any internal decision process is ongoing.

C. NRC Staff's Stay Request Should be Denied

Although DOE, the entity most directly affected by the PAPO's decision, does not ask that the decision be stayed while the appeal is pending, NRC staff does ask for a stay.[3] For the reasons set forth below, NRC Staff's application flouts the Commission's rules and decades of NRC and judicial precedent. If the Commission grants the NRC Staff's request, the Commission should expect hundreds of future stay applications based on similar grounds in this and other cases, and meeting the Congressional deadline for completion of the Yucca licensing proceeding will be impossible.

NRC Staff cites to the familiar four-factor stay criteria in 10 C.F.R. § 2.342(e). These criteria are the same as those in the former 10 C.F.R. § 2.788. *See* 69 Fed. Reg. 2182, 2225 (January 14, 2004). Therefore, all of the case law under the former regulation is equally applicable to the new one. This case law makes it clear that these criteria are "stringent," that they "make it difficult for a party to obtain a stay of any aspect of a Licensing Board proceeding," and that "[t]herefore, only in unusual cases should the normal discovery and other processes be delayed pending the outcome of an appeal or petition to the Commission." *Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site)*, CLI-94-9, 40 NRC 1, 2 (1994).

[3] DOE states that "it will not certify the LSN until after disposition of [this] appeal, compliance with whatever requirements may be imposed by the Commission, and completion of final internal validations." "The Department of Energy's Fifth Monthly Status Report Regarding LSN Certification and License Application Submittal," filed with the PAPO on October 3, 2005. DOE here carefully avoids giving any hint about when it might actually file the long-awaited LA, so there is no basis for any possible claim that the PAPO's decision will have any effect on timing of the actual licensing proceeding. Therefore, should the Commission grant NRC Staff's motion, the stay should be expressly limited to NRC.

The second factor (10 C.F.R. § 2.342(e)(2)), which is whether the party seeking the stay will be irreparably injured unless the stay is granted, is the most important one. "Irreparable injury is the most important factor…." *Id* at 5. Indeed, the Commission's stay criteria are modeled after judicial case law governing the grant of preliminary injunctions,[4] and the U.S. Supreme Court holds that "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray*, 415 U.S. 61, 88 (1974), quoting from *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-507 (1959), and citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir 1958) to the same effect.[5] The D.C. Circuit holds similarly that, "[d]espite this flexibility [to balance the four factors], we require the moving party to demonstrate at least 'some injury.'" *CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995). *See also Public Service Company of Oklahoma et al (Black Fox Station, Units 1 and 2)*, ALAB-505, 8 NRC 527, 530 (1978) ("A stay application which does not even attempt to make a showing on that factor [irreparable injury] is virtually assured of failure").

NRC Staff's effort to meet this critical stay factor is critically flawed in four respects. First, the NRC Staff's assertions of injury are not supported by evidence in the record or affidavit, as the Commission's rule requires. 10 C.F.R. § 2.342 (b)(3). Second, even if the arguments of Staff counsel were echoed in a supporting affidavit, they are wholly insufficient. NRC Staff tells us nothing about the number of NRC documents that

[4] More specifically, the stay criteria in 10 C.F.R. § 2.788 were carefully drafted to follow the criteria for preliminary injunctions adopted by the U.S. Court of Appeals for the D.C. Circuit. *See* 42 Fed. Reg. 22128 (May 2, 1977).

[5] *Virginia Petroleum Jobbers Ass'n v. FPC* was specifically cited by the Commission as the basis for its stay criteria. *See* 42 Fed. Reg. 22128 (May 2, 1977).

may be affected or the interim NRC Staff resources that will need to be expended without a stay. All NRC Staff says is that it has an "immediate obligation to make available" documents that fall under the PAPO's order and that because of this "[i]t will have to review its current process for identifying circulated drafts to determine whether it needs modification to ensure it is in compliance with the PAPO Board's order." NRC Staff Brief at 14. This is nothing more that an argument that the decision must be stayed because otherwise the NRC Staff will be required to comply with it. If this is enough "irreparable injury," *every* decision must be stayed pending appeal, which cannot be what the Commission intended. *See Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1).* ALAB-810, 21 NRC 1616, 1620 (1985).

Third, NRC Staff's alleged burden is only a litigation expense. The Commission has firmly and consistently held that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site),* CLI-94-9, 40 NRC 1, 2 (1994).

Fourth, NRC Staff does not need a stay to avoid the "injury" it claims. There is no requirement that NRC Staff certify its LSN until after DOE does. 10 C.F.R. §§ 2.1003 (a) and 2.1009(b). Since DOE's prior certification has been invalidated and DOE will not re-certify until after the Commission decides the instant appeal, NRC Staff may simply withdraw its certification if it finds interim compliance with the PAPO's decision to be unbearable. In short, the NRC Staff's "injury," if it exists at all, is self-inflicted and not irreparable in any possible sense.

Given the total absence of irreparable injury, analysis of the other three factors is unnecessary. Nevertheless, Nevada will analyze them briefly. First, if we ignore the

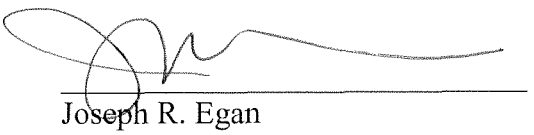
absence of any actual irreparable injury and assume for purposes of argument that NRC Staff has made some weak "injury" showing, Staff's likelihood of success on the merits must be "overwhelming." *Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site)*, CLI-94-9, 40 NRC 1, 5 (1994).[6] For the reasons given above, NRC's Staff's merits arguments are unpersuasive and certainly far from "overwhelming;" to say otherwise would be an insult to the PAPO. The novelty and importance of the issues on appeal do not warrant a stay. *Id.* Moreover, insofar as the public interest is concerned, while NRC Staff is correct that a clear understanding of "circulated draft" will benefit all participants, that will be accomplished by the appeal and has nothing whatsoever to do with a stay. On the other hand, NRC Staff fails to address the possibility of harm to other participants because of a delay in making relevant documents available in a timely manner.

III. CONCLUSION

For the above reasons, NRC Staff's arguments are devoid of any merit, the PAPO decision should be affirmed, and the stay should be denied.

[6] The case cited by NRC Staff, *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977), is not to the contrary. This case merely held that, where the other three factors strongly favor relief, a substantial case on the merits is all that is required. But here there is no such showing on the other factors.

Respectfully submitted,



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Pre-Application Matters)	)	**October 13, 2005**

CERTIFICATE OF SERVICE

In accordance with the PAPO Board's Second Case Management Order of July 8, 2005, I certify that I have filed a true and correct copy of the above foregoing State of Nevada's Response to NRC Staff's Appeal of The PAPO's September 22 Order And Its Request For A Stay on the Electronic Information Exchange on this 13th day of October, 2005.

/Nakita Toliver

Nakita Toliver