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)	**October 13, 2005**

STATE OF NEVADA'S BRIEF IN RESPONSE TO DEPARTMENT OF ENERGY'S APPEAL FROM THE BOARD'S SEPTEMBER 22, 2005 ORDER

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The State of Nevada (Nevada) submits this Brief in Opposition to the Department of Energy's (DOE) appeal from the decision of the PAPO Board, U.S. Department of Energy (High-Level Waste Repository: Pre-Application Matters), LBP-05-27, Slip Op. (September 22, 2005) (the "Order"), granting Nevada's Motion to Compel and requiring DOE to produce two versions of its draft License Application (hereinafter "Draft LA") on the LSN in conjunction with its initial certification thereof.

I. PRELIMINARY STATEMENT

In an effort to garner sympathy for its untenable position, DOE mischaracterizes the PAPO Board's Order and exaggerates its scope. Addressing the requirement that it make available on its Licensing Support Network (LSN) database some of the most important relevant Documentary Material in its possession, two Draft LAs, DOE complains that the "harm occasioned" by the PAPO Board Order extends far beyond those drafts and "would effectively abrogate the regulation excluding preliminary drafts from the LSN and require DOE (and all other participants) to place on the LSN virtually every draft of every document potentially relevant to the Yucca Mountain proceeding." Appeal Br. 1. The fact is that the enormous and

long-awaited Draft LA is a document whose handling and concurrence process will not likely be replicated in the case of *any* other kind of document, much less many. DOE itself acknowledged that, after delivery to DOE of the Draft LA by its contractor Bechtel, many dozens of DOE staff, supervisors and managers carefully reviewed this "huge and hugely important" (Appeal Br. 26) document.

It confounds reason that a federal agency funded by ratepayers and United States taxpayers would spend so much time, effort, and resources in an effort to conceal from that public the fruits of billions of dollars of expense incurred by DOE over the past several years at the Yucca Mountain project. As has been articulated by the PAPO Board, the whole purpose of the formulation of an LSN substantially prior to the filing of an LA by DOE for the Yucca repository was to provide a "full and fair six-month period" of access by the licensing proceeding participants to *all* the relevant Documentary Material in the possession of DOE. The purpose of this "preview" is to take the place of "standard" discovery and to assist the proceeding participants to formulate meaningful contentions for submission after the LA is filed. DOE's refusal to disclose the Draft LA prompted Judge Rosenthal during a July 12, 2005 PAPO Board hearing to inquire, "[j]ust what practical advantage, besides litigation strategy, if somebody wants something you oppose it, is there to not giving them the document at this point?" PAPO Board Tr. 486.

In a desperate effort to continue to play "gotcha" (PAPO Board Tr. 396) and "hide the ball," DOE's appeal constitutes a somewhat disjointed attack on virtually every sentence of the PAPO Board's 53-page Order. DOE's tone ranges from shrill to contemptuous as it suggests that "the PAPO Board simply read the regulations and the record in whatever manner was necessary to achieve that result." Appeal Br. 42. Nevada will first explain why the PAPO Board's Order

was entirely correct and then undertake to address the unsound arguments of DOE, most of them warmed over formulations tried and failed before the PAPO Board.

II. ARGUMENT

A. The Draft LA is Documentary Material

There are three categories of information specified in 10 C.F.R. §2.1001 which qualify as "Documentary Material" required to be included by DOE in its initial LSN certification. The first of these is "any information upon which a party, potential party, or interested governmental participant intends to rely and/or to cite in support of its position in the proceeding." Since the final License Application (hereinafter "Final LA") incorporates the entirety of what DOE intends to rely on in support of its position, obviously its immediate predecessor, the Draft LA, necessarily contains an enormous portion of the information ultimately to be relied upon in the Final LA. NRC's Reg. Guide 3.69 states as its purpose "to provide a list of the topics of Documentary Material that LSN participants should identify or make available via the LSN under 10 C.F.R. §2.1003." Reg. Guide 3.69, at 2. After providing an exhaustive list of topics for which documents must be considered as Documentary Material (all of them pertinent sections of the LA), Reg. Guide 3.69 provides a further "Appendix A" enumerating the specific types of documents to be included, including circulated drafts and final documents. *Id.* Section 7.6 of the Appendix specifically identifies the LA, thus including the LA, and by definition, any circulated draft thereof, as Documentary Material that must be on the LSN. NRC confirms that "[t]his Regulatory Guide provides the detailed topical index for LSN Documentary Material," *id.*, "consistent with the requirements for the content of a License Application in 10 C.F.R. §63.21 and with licensing information specified in the License Application Review Plan (NUREG 1804)." *Id.* at 3.

The second prong of 10 C.F.R. §2.1001 provides that, as well as information upon which a party intends to rely, the characterization Documentary Material likewise applies to "any information that is known to, and in the possession of, or developed by the party that is relevant to, but does not support . . . that party's position." To the extent that information contained in the Draft LA does *not* find its way into the Final LA (and thus may not be information upon which DOE intends to rely), it is still information which is "known to, and in the possession of, or developed by" DOE or its contractors. Thus, if it is contained in the Draft LA but omitted from the final version because it no longer supports DOE's position, then it falls precisely within the definition of Subsection 2 of Documentary Material. As was recognized by the PAPO Board, any information contained in the Draft LA, but which "does not support" DOE's position in its Final LA, would likely be information relied upon by other participants in opposition to DOE's Final LA (as non-supportive of DOE, by definition).

Finally, Subsection 3 of the Documentary Material definition includes as Documentary Material "All reports and studies, prepared by or on behalf of the potential party, interested governmental participant, or party, including all related 'circulated drafts,' relevant to both the License Application and the issues set forth in the topical guidelines in Reg. Guide 3.69, regardless of whether they will be relied upon and/or cited by a party. The scope of Documentary Material shall be guided by the topical guidelines in the applicable NRC Regulatory Guide." The 5,000-page-plus Draft LA, completed after years of work by DOE's prime contractor in July 2004, is unquestionably a "report" or a "study" prepared on behalf of DOE within the meaning of Subparagraph 3. The vast majority of the LA contents required by 10 C.F.R. §63.21 are the various components of DOE's Safety Analysis Report (SAR). DOE cannot seriously assert that the semifinal, milk run SAR is somehow not a report within the

meaning of Subsection 3. In a June 4, 2004 amendment to 10 C.F.R. Part 2 (69 Fed. Reg. 32836), NRC further specified what is encompassed within Documentary Material:

> [T]o assist participants in identifying Documentary Material that may be relevant to the License Application in the time before it is submitted, the Commission is recommending that LSN participants use the NRC License Application Review Plan (NUREG 1804, Rev. 2, July 2003) as a guide. The Yucca Mountain Review Plan provides guidance to the NRC Staff on evaluating the DOE License Application. As such, it anticipates the form and substance of the DOE License Application and can be used as a reliable guide for identifying Documentary Material.

Id. at 32843.

There can be no question that DOE's Draft LA likewise "anticipates the form and substance of the DOE License Application" as its predecessor, and as such is critical Documentary Material. The Commission has stated its expectation that the LSN would provide potential participants with the opportunity to frame focused and meaningful contentions. Since the certification by DOE of its LSN statutorily must predate the filing of its LA by six months, and since it was the Commission's expectation that the LSN would provide participants with the opportunity to frame focused and meaningful contentions, then the Draft LA (so long as it is a "circulated draft") would necessarily be among the most essential exemplars of Documentary Material in DOE's possession. One cannot escape the conclusion that DOE's Draft LA is Documentary Material: NRC recommends that the participants use NUREG 1804 as a guide to identifying Documentary Material, and the *only* document in existence which could include all the hundreds of subjects set out in NUREG 1804 would necessarily be the circulated draft of the LA. Such a circulated Draft LA therefore *ought* to be the single most prominent document in DOE's LSN collection.

For DOE to suggest that the Draft LA is not relevant Documentary Material ignores the juxtaposition of Reg. Guide 3.69, NUREG 1804, and NRC's regulations embracing those benchmarks of relevance. It is axiomatic that the information in the Draft LA is intensely linked

to the topics of the LA: accordingly, *relevance* of the Draft LA to LA issues is undisputed; if the information *supports* DOE's position and may be relied on by DOE in the licensing proceeding, it meets Subsection 1; if it does *not* support DOE's position, it nonetheless falls within Subsection 2 (since it was known to, in the possession of, and developed by DOE); and an *additional* basis why the Draft LA is Documentary Material is the fact that the vast majority of it comprises the draft SAR pivotal to licensing. Indeed, DOE's contract with BSC provides as a mandatory measure of performance that: "The draft must address all applicable requirements of 10 C.F.R. Part 63 and NUREG 1804, Rev. 2." DOE Motion to Compel Response, Attachment A at B-7.

B. The Draft LA is a Circulated Draft

NRC's regulations require that not only final documents but also circulated drafts of those documents be made available on DOE's LSN at the time of initial certification. A circulated draft is defined as follows:

> Circulated draft means a non-final document circulated for supervisory concurrence or signature in which the original author or others in the concurrence process have non-concurred. A "circulated draft" meeting the above criterion includes the draft of a document that eventually becomes a final document, and the draft of a document that does not become a final document due to either a decision not to finalize the document or the passage of a substantial period of time in which no action has been taken on the document.

At one of the early PAPO Board hearings in which the Draft LA issue was raised, DOE counsel advocated DOE's position that "the draft wasn't circulated." Tr. 407. Judge Moore observed, "I would be shocked to learn that it is locked up in a closet, so somebody had to see it, and at least under some circumstances, those somebodies would consider it would have been circulated to them, I would think." Tr. 409. DOE reiterated "It wasn't circulated within DOE." *Id.*

In the time since the May 18 hearing, DOE has reversed its field numerous times. With respect to the subsequently admitted vast circulation of the Draft LA, DOE elevates form over substance by carefully characterizing the supervisory review accorded the Draft LA in terms such as "review," "comment," and "comment resolution," avoiding the use of the word "concurrence." Certainly when NRC coined the phrase "circulated for supervisory concurrence," it did not intend that requirement to be sidestepped by the simple implementation of semantic variations. Such a ruse would enable a party to avoid the characterization of *any* document in its possession as a "circulated draft" simply by using different verbiage in articulating its supervisory concurrence process. Rather, if DOE's management (after having received the Draft LA from its contractor) submitted the document to managerial review, and those managers registered comments, disagreements, or departures from the Draft LA's language and required changes to be made, then this is by any common sense interpretation a supervisory concurrence process. The record clearly shows the Draft LA was accorded that treatment.

At a meeting of the Nuclear Waste Technical Review Board (NWTRB) on January 22, 2004, W. John Arthur III, OCRWM's Deputy Director for Repository Development, reported, "One of the key areas that I should have stated earlier is we are in the process of developing the internal management plan for the approval and review of the actual license. That's going to be a very detailed document with a lot of supporting documentations." NWTRB 1-20-2004, Tr. 24. Referring specifically to the Draft LA, Mr. Arthur concluded, "Bechtel SAIC will provide a draft License Application to the Department of Energy in July of this year, and then, we allow that, again, remaining six months to do the necessary reviews and changes." *Id.* at 27. Mr. Arthur went on to promise that "Neither Margaret [Chu, OCRWM Director] nor myself will allow that license to leave the Department of Energy until we are satisfied we've met the necessary quality requirements." *Id.* at 28.

As the contractual deadline (July 26, 2004) drew near for Bechtel's delivery of the Draft LA, Mr. Arthur reported on May 18, 2004, "Every day I'm seeing new chapters, sections of the license coming through in varying levels of detail. The goal is by the end of July, to have all of those chapters internal to the whole review process within the Department of Energy." NWTRB 5-18-2004, Tr. 59. Soon after submission to DOE management of the Draft LA, Mr. Arthur reappeared at the NWTRB reporting that the Draft LA "pretty well tracks right against the Yucca Mountain Review Plan prepared by the Nuclear Regulatory Commission." NWTRB 9-20-2004, Tr. 40. He observed that "myself and a number of our senior managers have been spending [sic] 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 of the 70 subsections." *Id.* at 41-42.

DOE did not "pull the plug" on its long-predicted December 2004 filing date for the Final LA until November 22, 2004, on the occasion of a DOE/NRC Quarterly Management Meeting. Even after that date, Ms. Chu addressed the NWTRB's winter board meeting and detailed the procedure DOE had employed to circulate, review, and modify the Draft LA. Addressing the July 2004 Draft LA, Ms. Chu said, "We've reviewed the draft intensively, and made many comments and which were incorporated." NWTRB 2-9-2005, Tr. 16.

Ms. Chu blamed the postponement of the filing of the Final LA on the D.C. Circuit Court of Appeals decision invalidating the 10,000-year compliance period and the decision of the PAPO Board to strike DOE's June 2004 LSN certification, both of which actions became final during November 2004. Referring to the Draft LA, she said, "We believe we have a draft License Application that after thorough cross-referencing, we believe that it complies with the current requirements of 10 C.F.R. Part 63, and the guidance in the Yucca Mountain Review Plan." *Id.* at 17-18.

The statements of the top two officials of DOE's Yucca Mountain team (made candidly and contemporaneously and not in connection with this dispute) illustrate that the Draft LA was subjected to intensive review by DOE management, with substantial comments and revisions made in accordance with those comments. Since the July 2004 Draft LA triggered a series of internal DOE reviews at sequentially higher levels of management, and since no other Draft LA was ever planned or intended to be accorded that review process, then it is safe to say: if DOE's litigation contention that the Draft LA was not a circulated draft were to be believed, then there would *never* be a circulated draft of the LA. If the July 2004 draft were not "circulated for supervisory concurrence," then the incredible conclusion would follow that DOE came within 30 days of its December 2004 LA submission goal without subjecting *anything* to the test of supervisory review and approval. That position is not credible, and the statements of Mr. Arthur and Ms. Chu unequivocally establish the contrary.

DOE's own internal schedules illustrate the sequence of reviews under which the Draft LA was scheduled to proceed and affirm its "circulated draft" status. The format of each of DOE's Project Summary Schedules (Nevada's Motion to Compel, Ex. 12) is the same, stating the particular activity called for, explaining it in detail, and then identifying the key actions which proceed and follow the action identified in the particular Project Summary Schedule. A review of some of these schedules illustrate the concurrence trail originally anticipated to be followed by the Draft LA as follows:

PSS Title	**Scheduled Date**
YMSCO Initiates Review of Draft LA by OCRWM/DOE Offices	03/01/01
DOE Completes Staff Review of Draft LA	11/15/01
Complete OCRWM Project and Office Managers' Concurrence of LA	01/10/02
OCRWM Submits Draft LA to DOE Offices for Concurrence	01/11/02
Complete DOE and Navy Concurrence of Draft LA	01/31/02
YMSCO Submits LA to RW-1 for Acceptance	02/07/02
DOE Submits License Application to NRC	03/01/02

No doubt to the chagrin of DOE, the "C" word (concurrence) is used repeatedly in DOE's own schedules for processing the Draft LA. The schedule entitled "DOE Completes Staff Review of Draft LA" explains:

> The Draft LA will be consistent with applicable NRC requirements, the technical guidance document, and any applicable DOE guidance. The review will include: a chapter review; interactive comment resolution; a revised document; verification of complete resolution; and consistence check. The milestone will be complete when the review comments have been resolved and revised Draft LA has been prepared and accepted by the reviewers.

The schedule entitled "Complete OCRWM Project and Office Managers' Concurrence of LA" described:

> Resolve comments by OCRWM office and project managers and obtain their concurrence. This milestone will be complete when all concurrence comments by OCRWM offices and project managers have been resolved and their concurrence on the Draft LA has been documented.

DOE's Project Summary Schedule entitled "OCRWM Submits Draft LA to DOE Offices for Concurrence" goes on to detail:

> Following OCRWM project and office managers' concurrence, OCRWM will submit the Draft LA to the appropriate DOE offices and the Navy for concurrence. This milestone will be complete when the Draft LA has been provided to the appropriate DOE offices and the Navy for their concurrence.

Finally, the DOE/Bechtel contract referring to the prerequisites for Bechtel's receipt of a bonus for completion of the Draft LA specified:

> The Draft LA must satisfy the following attributes: the draft must address all applicable requirements of 10 C.F.R. Part 63 and NUREG 1804, Rev. 2; it must have all technical team reviews, as defined in the DOE License Application Management Plan, completed; and all DOE mandatory comments and applicable technical direction letters must be resolved.

This step-by-step, detailed internal process for supervisory review/concurrence/revision of the Draft LA within DOE conclusively demonstrates that the Draft LA was a "circulated draft."

C. DOE's Scatter-Shot Attack on the PAPO is Meritless

DOE bitterly attacks virtually every conclusion and rationale articulated by the PAPO Board in its September 22 Order. In so doing, DOE makes inconsistent, internally contradictory arguments, mischaracterizes the PAPO Board's Order, ascribes improper motives to the PAPO Board's conclusions, and attempts to evade the unavoidable legal consequence of the detailed supervisory concurrence review process through which the Draft LA was put, all in furtherance of its continuing effort to hide the Draft LA from public scrutiny and provide the public and other participants in the licensing proceeding with the *least* possible amount of time to view DOE's relevant Documentary Material before it files its LA.

(1) **Inconvenience**: DOE first undertakes to attack the PAPO Board Order, not on its merits, but rather based upon the purported inconvenience it could cause DOE. Appeal Br. 3. In so doing, DOE compares the Order and its (vastly exaggerated) impact on DOE to last year's PAPO Board Order vacating DOE's LSN certification. Indeed, the circumstances of the two PAPO Board orders are eerily similar, but not in a way to which one would expect DOE to draw attention. In the LSN dispute, Nevada criticized DOE's failure to even *look at* millions of emails which were potentially relevant Documentary Material which should be included in its LSN database. DOE urged that there would be little or nothing of relevance in DOE's "archival" emails, and that Nevada had not *proven* that the content of these (*hidden*) emails was relevant. Persuaded by Nevada that emails among DOE staff would likely contain the most candid and insightful of comments about the Yucca repository, the Board ordered DOE to review its emails, over DOE's strenuous objection. DOE's comparison of that controversy to this one is revealing.

The PAPO Board reasoned that changes made between the Draft LA and the Final LA (i.e., the removal of information upon which DOE no longer intends to rely) would likely spawn "non-supporting" information as to DOE's position, something that is therefore Documentary

Material upon which the other participants in this proceeding might well rely. DOE again rails: "Nevada did not identify any information in either draft that does not support DOE's intended position in the licensing proceeding. Neither did the PAPO Board." Appeal Br. 10. Arguing in precisely in the same manner as it did in the LSN email dispute, DOE tries to win by pointing to the absence of specific evidence – specific evidence as to which it alone has access and as to which it has denied Nevada and the PAPO Board access. Continuing the *deja vu* comparison, DOE goes on to *admit* that its review of millions of emails (which it had fought to ignore) resulted in "ballooning the size of DOE's production already to nearly 3.5 million documents with more than 28 million pages of information." Appeal Br. 3. Those facts unequivocally prove that the position of Nevada and the PAPO Board with respect to the withheld LSN emails was *correct*, and further demonstrates that, despite its not having specifics in hand regarding the content of DOE's hidden Draft LA, the reasoning and decision of the PAPO Board is compelling and correct.

(2) **DOE's "Basic Licensing Document" Argument is Without Merit**: According to DOE, 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). DOE is incorrect. There is nothing in Section 2.1003(b) which suggests that "basic licensing documents" are not also "Documentary Material." The simple purpose of Section 2.1003(b) is to clarify that it is the *generators* of "basic licensing documents" who are responsible for LSN production of those documents. 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 the clarification afforded by Section 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. In the face of that PAPO Board explanation, DOE incorrectly asserts: "Subpart (a) makes clear that no party need re-produce documents produced on the LSN by another party, so Subpart (b) cannot be justified either on the ground that its purpose is to prevent duplicate production by other participants." Appeal Br. 10. In so arguing, DOE ignores that which was brought to its attention in Nevada's Reply Brief in Support of Its Motion to Compel at page 7: "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." In other words, at the time Section 2.1003(b) was added, it had precisely the function the PAPO Board found and constitutes *no* basis for suggesting that the "Basic Licensing Documents" are not also "Documentary Material."

(3) **Contradictory Positions Regarding Supervisory Review**: Given the definition of circulated draft as a "non-final document circulated for supervisory concurrence," the nature of any DOE supervisory review given the Draft LA (if any) is decisive. Nonetheless, DOE has provided wildly contradictory evidence on the scope and purpose of its managers' Draft LA reviews.

DOE's *litigation* version of the nature of DOE's management review is contained in the carefully crafted Declaration of Joseph D. Ziegler, Director, Office of License Application and Strategy, Office of Repository Development, U.S. Department of Energy. Mr. Ziegler's Declaration, offered in support of DOE's position that the Draft LA was not circulated for supervisory review, states: "DOE's Deputy Director, Office of Repository Development, and I read various parts of the July 2004 Draft LA, just as we had read drafts of individual sections as they were being drafted before July 2004. We read portions of the July 2004 Draft LA *to learn of the License Application's general state of preparation.*" DOE Brief in Opposition to Motion

to compel, Attachment B. DOE's ORD Deputy Director to whom Mr. Ziegler referred was W. John Arthur III. Mr. Arthur's statements made to the NWTRB on September 20, 2004, came long before this dispute over production of the Draft LA, and at a time contemporaneous with the events he was describing, and contradict Mr. Ziegler's statement. Mr. Arthur observed: "Myself and a number of our senior managers have been spending [sic] continuously over the last three weeks, and it will be complete in the next week and a half, the full review, integrated review of every section of that license of the 70 subsections." NWTRB 9-20-2004, Tr. 41-42.

Later, the OCRWM Director, Ms. Margaret Chu, confirmed the same: "You may remember that our management and operating contractor, BSC, delivered the first draft of the License Application in July of 2004, and we reviewed the draft intensively, and made many, many comments . . ." NWTRB 2-9-2005, Tr. 16. Confronted with the chasm between the litigation statements of Mr. Ziegler, on the one hand, and Mr. Arthur and Ms. Chu on the other, DOE attempts to fill the void with yet another version of the scope of the supervisory review, now suggesting that the Draft LA does not "become a 'circulated draft' because a manager or supervisor comments on the draft. . . . Persons with managerial and supervisory responsibilities are surely permitted (and expected) to participate in the *drafting process* without transforming into a 'circulated draft' every draft they see." DOE Response to PAPO Board July 18, 2005 Order p. 2 (emphasis supplied).

One wonders precisely what top management officials such as Messrs. Ziegler and Arthur were doing with the Draft LA – Was it two individuals simply looking at the "general state of preparation"? Was it a team of senior management officials continuously, for a period of many weeks, conducting a full integrated review of every section? Or were they *drafting* the document, despite paying a mega-bonus to DOE's general contractor to do so? This DOE inconsistency may be traced to the fact that, apparently, despite its plethora of relevant

documents, DOE does not even have a written review plan for the Draft LA. Asked by the PAPO Board to "provide a copy of the documents that establish or describe the process whereby DOE plans to review, finalize, and file the draft License Application," DOE responded, "There is no document that does that." DOE's Response to PAPO Board July 18, 2005 Order p. 6.

The document which comes closest to addressing the issue is called "DOE's Management Plan for Development of the Yucca Mountain License Application," but this document was constantly being revised, including a September 2004 revision (DOE's Response to PAPO Board July 18, 2005 Order, Ex. D) which came into being right in the midst of DOE's Draft LA review process. In any event, DOE states that "neither version of the LA Management Plan purports to describe in detail, nor fully or accurately recounts the actual review process that occurred between July and November 2004 and the actual schedule of these events." DOE's Response to PAPO Board July 18, 2005 Order p. 6.

In the face of DOE's myriad versions of the scope of its supervisory review of the Draft LA, it is reasonable that Mr. Arthur's version, offered contemporaneously and unconnected to any litigation motive, should be credited. Significantly, the aforementioned Mr. Ziegler contradicted his own affidavit testimony when, at a DOE Quarterly Management Meeting on November 22, 2004, he listed among the accomplishments of DOE in the past three months, "completed a comprehensive management review of the License Application." PAPO Board Tr. 481.

(4) **Comments on the Draft LA: Resolved or Unresolved**: The resolution *vel non* of comments on the Draft LA is another area in which DOE's statements are inconsistent and self-serving. Surprisingly, since DOE takes the position that one must have "unresolved" comments in order to have a "circulated draft" (a position with which Nevada stoutly disagrees), DOE brags, "It was undisputed that all the comments on the July 2004 draft were resolved" (Appeal

Br. 10), relying again on the Declaration prepared for Mr. Ziegler's signature. Assuming for the sake of argument that the existence of an *unresolved* comment was a prerequisite for a "circulated draft," this certainly would not justify LSN participants drafting their internal procedures in such a way as to eliminate the existence of circulated drafts through the expedient of eliminating by fiat the possibility of unresolved comments. That is exactly what DOE's Management Plan for Development of the Yucca Mountain LA (September 2004) (DOE's Response to PAPO Board July 18, 2005 Order, Ex. D) seeks to accomplish. Addressing the issue of comment resolution, that Plan provides:

> For any comment response that cannot be accepted, the review coordinator and the author attempt to negotiate an acceptable resolution. If comments cannot be resolved satisfactorily, the comment is elevated. The dispute *is resolved* in consultation with the review coordinator, the BSC LA coordinator, and the PLAD nuclear engineer. If resolution still is not reached, the issue proceeds up the management chain to OLAS and BSC management and, as applicable, to management of the reviewing organization *until agreement on the issue is reached* by a representative of each of these lines of authority. Following resolution of comments, the author is responsible for incorporating the changes into the draft document and submitting it to the production staff for processing."

DOE's Response to PAPO Board July 18, 2005 Order, Ex. D (emphasis supplied).

Given the fact that every comment was mandated by DOE to be resolved, whether by negotiation or by coercion, it is disingenuous for DOE to argue that all comments on the Draft LA were resolved, and accordingly, that it was not a "circulated draft." Furthermore, this DOE stratagem fails in the face of DOE's contradictory admissions. In its Response to the PAPO Board July 18, 2005 Order, DOE admitted in answer to a direct question concerning DOE comments on the Draft LA, that "[n]ot all of those items were resolved by November, 2004," and "[i]t is impossible to know if and how open issues will be resolved." *Id.* at 17. DOE went on to admit, "Assuming there were any non-concurrences, it would not be known whether they were unresolved until this entire process is complete." *Id.* at 18.

Finally, the regulatory definition (10 C.F.R. §2.1001) merely requires that persons in the concurrence process "have non-concurred" in the draft, not that there is an existing unresolved non-concurrence. But DOE's assertion that "all comments are resolved," which strained credulity anyway in the face of a 5,000-page document with hundreds of persons having input, is defeated by its own contrary admissions.

(5) **DOE's Regulatory "Word Substitution" Tactic Fails Again**: In prior filings, and again in its appeal brief, DOE employs the tactic of taking a regulatory excerpt, supposedly substituting verbiage which its adversary (or in this case, the PAPO Board) allegedly endorses, and then reciting the regulation with the substituted word, in order to ridicule the opponent. This sophomoric tactic fails again here, where DOE quotes from the regulatory definition of the third type of Documentary Material (studies and reports) and then purports to ridicule the PAPO Board by rewriting the words of the regulation, substituting in the PAPO Board's position. The tactic fails because DOE substitutes incorrect words, inconsistent with the PAPO Order. The substitution of wording which is *consistent* with the Commission's order provides a perfectly satisfactory result: (a) the regulation provides for the LSN inclusion of "all reports and studies"; (b) DOE suggests that the PAPO Board's Order, since it finds the Draft LA to be a report, would read that "all draft License Applications" be included in the LSN; (c) but the *correct* word embodying the PAPO holding, properly paraphrased, would read "all *circulated* draft License Applications must be on the LSN." Articulated in a way which is consistent with, and does not misstate, the PAPO Board's holding, there is nothing offensive whatsoever about the holding, since all circulated draft Documentary Material must indeed be placed on a party's LSN database.

(6) **DOE's Ambivalence and Illogic with Respect to "Non-Concurrence" and "Circulated Draft"**: DOE takes the position that no specific concurrence review process was

ever adopted to address the handling of the Draft LA, and accordingly, that DOE's concurrence process applicable to the Draft LA was a 1981 DOE "Correspondence Manual." Not only is that suggestion absurd on its face, but that document's definition of a "non-concurrence" is utterly inconsistent with DOE's own position on the prerequisites for a "circulated draft." The Correspondence Manual (DOE's Response to PAPO Board July 18, 2005 Order, Ex. A) states: "Nonconcurrences are directed to the *entire concept* of the response and not to how the response is written." *Id.* at VI-2. With that DOE definition of "non-concurrence" in mind, one is dumbfounded by the utter inconsistency and illogic of DOE's position on "circulated draft." DOE argues that, in order for a draft to be a "circulated draft," there must exist a pending "*unresolved*" non-concurrence outstanding from the supervisory review. Contradicting itself, DOE also asserts that the review and decision process with respect to the particular document must have been completed in order for it to be a "circulated draft." It is difficult to conceptualize a document as to which the decision process has been completed, but at the same time the same document has an unresolved pending supervisory non-concurrence. When one adds to this mix DOE's "Correspondence Manual" definition of non-concurrence, DOE is apparently insisting that, in order for there to exist a "circulated draft," there must be an unresolved objection by a supervisor to the entire concept of the Draft LA, and yet a situation where the document review process and decision has nonetheless been completed. Indeed, there is only one imaginable circumstance that can touch each of those three distinct DOE bases: it would be a situation where the non-concurrence went to the very concept of filing the Draft LA, and the process was finished because the decision was made to abandon the document. As it happens, this is precisely what occurred in November 2004. In the same month that two critical decisions against DOE became final (the vacation of its LSN certification and the vacation of the 10,000-year Yucca Mountain standard), DOE's general counsel (if no one else) presumably registered an

objection (i.e., non-concurrence) to the very concept of the filing of that particular pending Draft LA, since its underpinnings had been removed, and so, DOE made the decision to abandon that document.

(7) **The Draft LA is Not a Mere Preliminary Draft**: In spite of DOE's effort to trivialize the import of the Draft LA, the evidence demonstrates the contrary. The Draft LA was a "deliverable" under DOE's contract with BSC. DOE Motion to Compel Response p. 9, Attachment A at B-6. The Draft LA was supposed to be a complete draft that had been reviewed by all BSC technical teams, and all DOE mandatory comments on it were supposed to have been resolved. *Id.* at 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 be sufficient for tendering to NRC in December 2004. *Id.* at Attachment A at B-7, 8.

The document DOE relies on to demonstrate that the Draft LA was *not* a "circulated draft," circulated for management concurrence, actually shows the opposite. Thus, Janet Christ, in an email discussing the Draft LA supervisory review process (DOE's Response to PAPO Board's July 18, 2005 Order, Ex. I), states:

> Every weekday from 7:00 a.m. to 3:00 p.m. will be reserved to allow the joint management review team to conduct a review of the document, in preparation for the comment resolution sessions. The outcome of the review will be a complete LA that will go to DOE headquarters for review beginning October 4, 2004. It is anticipated at that time, that the joint management review team will endorse the LA as written to higher levels of management within DOE.

An "aerial" view of DOE's activities regarding the Draft LA reflects that there was a continuum of activities planned and carried out from July 2004 through November 2004, consisting of sequential reviews at the working level and then at the management level within DOE, featuring comments, resolution of those comments, and appropriate revisions. The fact that revisions took place is a necessary component of any management concurrence review

process, and accordingly, cannot be characterized by DOE as creating a new and different draft with each revision, such that the Draft LA is a moving target to the point where no version of it can ever be pinned down as a circulated draft. To deny the existence of "circulated draft" documents by reliance on the fact that their review resulted in some change would automatically abrogate the existence of circulated drafts as a meaningful category, something NRC obviously did not intend when it carefully provided that circulated draft documents *as well as* final documents must both be included in the LSN.

Whether one views the massive document laid in front of DOE's management in September 2004 as a *different* document (as the PAPO Board apparently did) from the July 2004 submission, or whether it is simply a more polished version of the earlier one, it is undeniable that DOE's managers, after years of waiting and promising a December 2004 LA submission, were now on the cusp of meeting that commitment. The DOE management review, long planned to be performed on the Draft LA, had never been performed on any other Draft LA, and was not intended to ever be repeated again. This was *the* management review of the Draft LA ultimately to be delivered to NRC. If this was not a "non-final document circulated for supervisory concurrence," then no Draft LA ever would be; and given the lengthy and intense supervisory review accorded the Draft LA, one can scarcely conjure up *any* document which DOE would ever concede was a circulated draft if this was not.

D. The Draft LA is Not Subject to Litigation Work-Product Privilege

The PAPO Board correctly held that DOE's Draft LA may not be withheld from the LSN on the basis of litigation work-product privilege, for two separate and independent reasons: First, the Draft LA was prepared by DOE to meet the stated requisites of 10 C.F.R. Part 63, in order to request DOE's regulator, the NRC, to issue it a license; as such, the Draft LA may not be withheld on a claim of litigation work-product privilege, *even if* its preparation also had some

litigation purpose. Second, because DOE had stated its position that the Draft LA *was* subject to the litigation work-product privilege, because DOE had asked the PAPO Board to decide that issue promptly, because DOE had specifically been given the opportunity and was required to submit its arguments and authorities in support of its claim that privilege applied, and because DOE intentionally failed to do so, the PAPO Board correctly ruled that DOE had waived its claim of litigation work-product privilege as to the Draft LA.

1. On the Merits, DOE's Claim of Litigation Work-Product Privilege for the Draft LA is Meritless

There is general agreement that paperwork prepared "in anticipation of litigation" may be privileged under the litigation work-product privilege. In addition, there is general agreement with respect to an exception to the applicability of that general rule. As precisely stated by NRC counsel at the May 4, 2005 PAPO Board hearing (Tr. 86), *"but materials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes would not be covered."* (Emphasis added.)

The key exception to the general rule is set out in *U.S. v. Adlman*, 134 F.3d 1194 (2d Cir. 1998):

> The formulation of the work-product rule used by the Wright & Miller treatise, and cited by the Third, Fourth, Seventh, Eighth and D.C. Circuits, is that documents should be deemed prepared "in anticipation of litigation," and thus within the scope of the Rule, if "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 FEDERAL PRACTICE & PROCEDURE § 2024, at 343 (1994) (emphasis added). *See In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979); *National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992); *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir.), *cert. denied*, 484 U.S. 917, 108 S. Ct. 268, 98 L. Ed. 2d 225 (1987); *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 586 n. 42 (D.C. Cir. 1987).

* * * *

> Conversely, it should be emphasized that the "because of" formulation that we adopt here withholds protection from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation. It is well established that work-product privilege does not apply to such documents. *See* FED. R. CIV. P. 26(b)(3), Advisory Committee's note ("Materials assembled in the ordinary course of business . . . are not under the qualified immunity provided by this subdivision."); *see, e.g., National Union Fire*, 967 F.2d at 984. Even if such documents might also help in preparation for litigation, they do not qualify for protection because it could not fairly be said that they were created "because of" actual or impending litigation. *See* WRIGHT & MILLER § 2024, at 346 ("even though litigation is already in prospect, there is no work-product immunity for documents prepared in the regular course of business rather than for purposes of the litigation").

The court in *U.S. v. Frederick*, 182 F.3d 496, 501-02 (7th Cir. 1999) dealt with both the rule and the exception in a case relating to tax documents prepared for use in meeting Internal Revenue Service requirements. Cautioning against any expectation on the part of the taxpayer that such documents, required to meet IRS regulatory mandates, could be categorized as privileged (even if prepared by an attorney), the court opined:

> . . . [A] dual-purpose document – a document prepared for use in preparing tax returns and for use in litigation – is not privileged; otherwise, people in or contemplating litigation would be able to invoke, in effect, an accountant's privilege, provided that they used their lawyer to fill out their tax returns. Likewise, if the taxpayer involved in or contemplating litigation sat down with his lawyer (who was also his tax preparer) to discuss both legal strategy and the preparation of his tax returns, and in the course of the discussion bandied about numbers related to both consultations, the taxpayer could not shield these numbers from the Internal Revenue Service. This would not be because they were numbers, but because, being intended (*though that was not the only intention*) for use in connection with the preparation of tax returns, they were an unprivileged category of numbers.

(Emphasis added).

Likewise, in a matter involving documentary materials required to be submitted to the U.S. Patent Office, the court easily dismissed the suggestion of their privilege: "We shall not prolong this opinion by any lengthy discussion of contested documents. Many relate to tests and experiments. Phillips has a duty to disclose to the Patent Office all facts relating to the possible equities of the patent application. It cannot hide behind the work product doctrine the research,

tests, and experiments which are pertinent to the patent application." *Natta v. Hogan*, 392 F.2d 686, 693 (10th Cir. 1968).

A case directly on-point for this proceeding, dealing with documents prepared in accordance with NRC regulatory requirements, is *Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2)*, LBP-86-7, 23 NRC 177 (1986). The issues there were various quality assurance and corrective action reports as to which the applicant sought to assert work-product privilege on two grounds – that the documents were prepared in anticipation of litigation, and that attorneys had played a substantial role in their preparation. The ASLB rejected the applicant's argument, holding:

> . . . [T]hese programs and reports were assumed by Applicant under its obligations to NRC Staff and the Commission's regulations. That the drafts may have been prepared with an eye towards litigation and by Applicant's attorneys, rather than its technical staff and consultants, should be of more interest to NRC's technical staff than to the Licensing Board. The input of counsel to documents required under the regulatory process and otherwise discoverable cannot immunize these documents from discovery. Counsel in this case were assisting in a management function that is outside the scope of both attorney-client and work product privilege.

Applying the above principles to this proceeding, it is clear that DOE's Draft LA is not entitled to the work product privilege. DOE's mischaracterization of its Draft LA as litigation work product is an ominous harbinger of what could become literally hundreds of privilege challenges in this proceeding, as DOE could conceal vast amounts of other critical licensing information under the misapplied work-product rubric, information nevertheless vital to the license application and review process regardless of anticipated "litigation."

With respect to the Draft LA, Judge Karlin correctly suggested at the May 4, 2005 PAPO Board hearing that, "I don't think it is being prepared for the adjudicatory process. . . . It's required in the normal regulatory process. It's got nothing to do with an administrative hearing or litigation. You've got to file an application. So in the ordinary course, that document is

prepared because of the normal process for getting a license, not because of a hearing." Tr. 89-90. Nonetheless, DOE counsel persists in mischaracterizing the Draft LA as litigation work product, arguing, astonishingly, that "it is not being prepared for *some independent regulatory reason.*" Tr. 90 (emphasis added).

But regulations adopted by the NRC solely in connection with the potential licensing of the candidate Yucca repository dispositively set out the independent regulatory reason for DOE's preparation of an LA. In 10 C.F.R. §63.1, NRC provides:

> This part prescribes rules governing the licensing (including issuance of a construction authorization) of the U.S. Department of Energy to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area sited, constructed, or operated at Yucca Mountain, Nevada, in accordance with the Nuclear Waste Policy Act of 1982, as amended, and the Energy Policy Act of 1992.

Making even clearer the prerequisite of DOE's LA, the regulation goes on at Section 63.3 to provide:

> (a) DOE may not receive nor possess source, special nuclear, or byproduct material at a geologic repository operations area at the Yucca Mountain site except as authorized by a license issued by the Commission under this part.
>
> (b) DOE may not begin construction of a geologic repository operations area at the Yucca Mountain site unless it has filed an application with the Commission and has obtained construction authorization as provided in this part. *Failure to comply with this requirement is grounds for denial of a license.*

(Emphasis added.)

In Section 63.21, NRC's regulations set out 24 separate paragraphs specifically detailing the information which must be included in the DOE LA and adding that it must be accompanied by an Environmental Impact Statement prepared in accordance with the Nuclear Waste Policy Act of 1982, as amended.

Finally, NRC mandates, at Section 63.22(a):

> An application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area at Yucca Mountain, and an

> application for a license to receive and possess source, special nuclear, or byproduct material at a geologic repository operations area at the Yucca Mountain site that has been characterized, any amendments to the application, and an accompanying environmental impact statement and any supplements, must be signed by the Secretary of Energy or the Secretary's authorized representative and must be filed with the Director in triplicate on paper and optical storage media.

Aside from 10 C.F.R. Part 63, NRC has provided substantial additional guidance (both the Topical Guidelines of Reg. Guide 3.69 and the License Application Review Plan, NUREG-1804, each discussed *supra*). Both make clear the close nexus between DOE's articulation of all the many component parts of the LA and its meeting its regulatory obligations. Clearly, documents created by DOE to establish its adherence to the criteria of the Topical Guidelines of Reg. Guide 3.69, to those of the License Application Review Plan (NUREG-1804), and to the provisions of 10 C.F.R. Part 63, are all documents prepared by DOE in the normal course of its business to meet regulatory requirements and are not subject to protection under a claim of work-product privilege. The only document which DOE might create in connection with Yucca which could qualify for that privilege would be one which *would not have been* created in response to regulatory requirements (e.g., an attorney's outline for questioning a witness in the licensing proceeding). That characterization cannot credibly be asserted with respect to the Draft LA.

The authorities cited by DOE ignore these settled principles. Rather, DOE cites and attaches to its appeal brief a number of cases in which plaintiffs in garden variety civil lawsuits were able to protect from disclosure drafts of their complaint. Obviously, a draft of a lawsuit complaint is prepared for one purpose only – anticipation of civil litigation. Those cases are simply inapposite where, as here, the primary purpose of the Draft LA was to satisfy 10 C.F.R. Part 63, which makes the filing of an LA by DOE a regulatory prerequisite to obtaining a license. The one case cited by DOE which relates to a regulatory licensing matter, *In re Kerr-McGee Chemical Corp. (West Chicago Rare Earth Facility)*, 22 NRC 604, 1985 WL 56991 (1985), unequivocally supports Nevada's position. Analyzing whether work done by consultant Stearns

Catalytic was discoverable or was privileged litigation work product, the court reasoned, "It appears from the language of the contract that the Stearns Catalytic's work encompasses many, if not most, of the facets of decommissioning and waste disposal which are the province of the licensee under ordinary circumstances attendant to termination of its license. Work performed by an expert for a licensee in the normal course of its relations with the NRC should not be shielded from discovery in subsequent litigation. . . . Work done by Stearns Catalytic on these matters falls in the category of that required in the normal course of Kerr-McGee's relationship with the NRC and should not be shielded from discovery." *Id.* at 615.

2. DOE Waived Its Claim of Litigation Work-Product Privilege for the Draft LA

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 over 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. (As Judge Rosenthal observed at the May 18, 2005 PAPO Board hearing during which the briefing schedule for the Draft LA issue was agreed upon: "The DOE has, I gather, accepted, indeed suggested that as the process for getting this issue before us." Tr. 392-93.) 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 Memorandum in Response to May 11, 2005 Memorandum and Order p. 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 DOE letter did not provide any discussion, rationale, argument, or authority for its claim of litigation work-product privilege, merely stating its purported existence.

The Board's Order further required Nevada to move to compel the production of the Draft LA on DOE's LSN 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).

However, DOE wholly failed to provide *any* justification whatsoever for its assertion of litigation work-product privilege, despite the Board's request that it do so. Given the fact that DOE had verbally asserted the applicability of litigation work-product privilege to the Draft LA at PAPO hearings, and given the fact that DOE has specifically requested that the Board consider and decide this issue promptly, and given the fact that the Board had agreed to this request and set out a procedure to be followed (an exchange of letters to be followed by an exchange of briefs), and given that DOE's letter to Nevada to "tee-up" the issue declined to produce the Draft LA on the basis of litigation work-product privilege, it is virtually inexplicable why DOE would merely say in its motion to compel response brief that "the privilege status of the Draft LA is not germane to the State's motion." DOE Brief in Opposition to Nevada's Motion to Compel p. 15. 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 sought to take the issue off the table by abandoning it. One can hardly think of a document more obviously 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 utterly failed to do so. The PAPO Board's finding of waiver was thus entirely justified.

E. DOE Staff's Comments are Final Documents

DOE tacitly acknowledges a void in its LSN database when it adds to its appeal an attack on a statement, undoubtedly *dicta*, by the PAPO Board: "For example, the written comments by the 90-plus reviewers of the Draft LA are presumably final documents." On its face, the PAPO

observation seems eminently correct and unobjectionable. In deciding whether a particular document is required to be on the LSN, presumably DOE would apply a series of determinative tests: Is the subject matter relevant? Is it Documentary Material (something on which DOE intends to rely, or something that is non-supportive of DOE's position, or something that qualifies as a study or report)? If yes to the foregoing, is it a final document, or a circulated draft (in either case, the document would then be required on the LSN), or is it merely a preliminary draft document (in which case, it need not be on the LSN)? Without even seeing the content of a DOE staff person's comment on the Draft LA, one might anticipate that such a comment would indeed be relevant; that it might be Documentary Material of the type that is either going to be relied upon or conversely is critical of or non-supportive of DOE's position; and that, depending on its authorship and scope, it could conceivably be a study or report. The outcome of those analyses would depend on the particular comment. However, it cannot be seriously suggested that such comment is not final (a separate issue – whether a particular comment may be privileged – does not affect the matter of its finality when written).

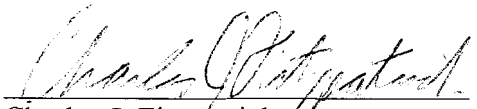
In arguing against that conclusion, DOE nowhere suggests that the comments made by its staff themselves go through several versions, such as a preliminary draft comment, a circulated draft comment, and a final comment. Nor would one expect that. Rather, DOE makes the argument that a comment pertaining to a particular document somehow takes on the character of that document. A comment on a preliminary draft becomes a preliminary draft document itself, even if it is the first, last, and only statement of its author given on a particular subject. Likewise, a comment on a circulated draft would itself be deemed by DOE to be a circulated draft comment. DOE suggests that the PAPO Board "cited no authority" (Appeal Br. 40) for its conclusion that comments are by their nature final when made. But it is DOE whose position is unsupported. One can only conclude that as DOE works to complete its LSN database, its

intention is to exclude virtually every comment on every draft document produced by DOE regarding the Yucca Mountain project. This is the only explanation for why an offhanded but accurate observation by the PAPO Board would hit a nerve to the point where DOE added to its appeal an issue never raised, briefed, or put before the PAPO Board for its consideration.

III. CONCLUSION

For the reasons set out in Nevada's Brief in Response to DOE's Appeal from the Board's September 22, 2005 Order, Nevada respectfully prays the Commission in all things affirm the PAPO Board's Order, with respect to its findings (1) requiring that DOE produce the July 2004 and September 2004 circulated draft License Applications on its Licensing Support Network database at the time of its initial certification; (2) that on the merits, DOE's Draft LA is not subject to litigation work-product privilege, and in any event, DOE has waived its right to assert litigation work-product privilege with respect to the Draft LA; and (3) that comments on the Draft LA are final documents, to be treated appropriately as such in connection with DOE's creation and certification of its Licensing Support Network database.

Respectfully submitted,



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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 and foregoing State of Nevada's Brief in Response to Department of Energy's Appeal from the Board's September 22, 2005 Order on the Electronic Information Exchange on this the 13th day of October, 2005.

Susan Montesi