January 25, 2008

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)	)	

THE DEPARTMENT OF ENERGY'S BRIEF ON APPEAL IN OPPOSITION TO THE STATE OF NEVADA'S NOTICE OF APPEAL FROM THE PAPO BOARD'S JANUARY 4, 2008 AND DECEMBER 12, 2007 ORDERS

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The U.S. Department of Energy (DOE) submits this brief in opposition to the State of Nevada's notice of appeal from the December 12, 2007 Order of the Pre-License Application Presiding Officer (PAPO) Board, *U.S. Dep't of Energy (High Level Waste Repository: Pre-Application Matters)*, slip op. (Dec. 12, 2007), as supplemented by its Memorandum of January 4, 2008, *U.S. Dep't of Energy (High Level Waste Repository: Pre-Application Matters)*, LBP-08-01, slip op. (Jan. 4, 2008). Pursuant to those Orders, the PAPO Board correctly denied Nevada's motion to strike DOE's October 19, 2007 initial Licensing Support Network (LSN) certification. The Commission should affirm the PAPO Board's decision.

PRELIMINARY STATEMENT

This is the second appeal to the Commission concerning the scope of documents DOE must make available at the time of its initial LSN certification under 10 CFR Part 2, Subpart J. The first appeal addressed Nevada's contention that DOE must make available certain versions of the draft License Application (LA),[1] and in rejecting Nevada's argument, the Commission set forth the principles of law that govern this appeal and that likewise compel rejection of Nevada's latest contention.

The Commission explained its decision on the prior appeal that the interpretation of a regulation in 10 CFR Part 2, Subpart J, "like the interpretation of a statute, begins with the language and structure of the provision itself. Further, the entirety of the provision must be given effect. Although administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation's language, its interpretation may not conflict with the plain meaning of the wording used in that regulation."[2]

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[1] CLI-06-05, 2006 NRC LEXIS 32 (2006).

[2] *Id.* at *21-22, citing *Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988), review denied, CLI-88-11, 28 NRC 603 (1988).

In other words, the Commission made clear that the LSN regulations must be applied as written. They cannot be added to or embellished, or new requirements and conditions imposed, even if Nevada thinks those modifications might advance the regulations' goals and make them "better." Similarly, the regulatory text must be applied as written without regard to regulatory guides, statements by parties, and other extraneous material such as that Nevada points to in lieu of the text.

The second cardinal principle that the Commission articulated is that the Commission expresses its intent in plain English. When the Commission intends a specific result in its regulations, it conveys that intent in an express regulatory requirement. The Commission does not leave the existence of important requirements to guesswork or to interpolation.[3]

These are the principles that the PAPO Board followed to correctly deny Nevada's last motion to strike. The plain text of Subpart J simply does not impose any requirement that DOE cannot make its initial LSN certification until DOE has completed all its "core technical documents and modeling basis information"—as Nevada argued before the PAPO Board—much less all the documentary material it intends to cite or rely on in the licensing proceeding—as Nevada more expansively argues at times on appeal. DOE's obligation, just like that of every other participant, is to make a substantial, good faith production of its documentary material it has generated or acquired as of some reasonable period of time before certification.[4] It is impossible for DOE or any other participant to do more.

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[3] *Id.* at *28.

[4] As the PAPO Board noted, a participant's duty to produce documentary material at the moment of certification applies only to documentary material in existence, with a reasonable lag time for producing documents that were created shortly before the certification. *U.S. Dep't of Energy (High Level Waste Repository: Pre-Application Matters*), LBP-08-01, *slip. op.* (Jan. 4, 2008) [PAPO Board Jan. 4, 2008 Op.] at 14. All references in this brief to the production of documentary material are subject to that qualification for reasonable lag time.

As the PAPO Board noted, Nevada does not challenge the sufficiency of DOE's production of existing documents.[5] DOE has implemented procedures to identify potential documentary material and make it available on the LSN. DOE also has implemented training on those procedures for federal and contractor staff working on the Yucca Mountain Project. Over the past three years, DOE has completed everything required by the PAPO Board. This has involved the collection and review of DOE's existing documents, including approximately 10 million unique emails on the back-up tapes for the DOE Office of Civilian Radioactive Waste Management (OCRWM) email system. DOE has additionally completed manual reviews of each document subject to a privilege claim in its LSN collection to verify the privilege and has provided redacted versions of these documents on the LSN as appropriate. DOE has also worked with the LSN Administrator to ensure that its existing documentary material has been indexed and made publicly available on the NRC's LSN portal. DOE continues to ensure that additional documentary material is made available on the LSN as it is generated.

As a result of these efforts, DOE has made available on the LSN more than 3.5 million documents, containing more than 30 million pages.[6] About 1.3 million of these documents have been available on the LSN since 2004. Another 2.1 million have been available since May 2007, and new documents have been added regularly since that date. At the time of the hearing on Nevada's motion, only 79 intended references in the LA remained to be completed or modified.[7]

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[5] PAPO Board Jan. 4, 2008 Op. at 10.

[6] *Id.* at 11.

[7] U.S. Department of Energy's Response to Questions in PAPO Board Order of November 16, 2007 (Nov. 27, 2007) at 1-2.

DOE's production of this "massive amount of documentary material"[8] has achieved the Commission's objective for the LSN of "avoid[ing] the time-consuming process of document discovery during the licensing proceeding."[9] Because of DOE's extensive production—plus the continuing supplementation of that production with new documentary material as it is created during the balance of the pre-license application phase—the need to delay the licensing proceeding to allow for the production of DOE's documents has been obviated.

DOE's extensive production also permits Nevada and all other potential participants to frame meaningful contentions, and Nevada's contrary suggestion is belied by its own public statements. Nevada told the PAPO Board two years ago that it had already begun drafting contentions based on the extensive information DOE had then made available.[10] Nevada said at the time that it expected to have several hundred contentions.[11] Nevada has publicly declared more recently that it has prepared "thousands" of contentions. The head of Nevada's Agency for Nuclear Projects said that in the press last year.[12] He reiterated that point in testimony before the Nevada legislature in January, 2008.[13]

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[8] PAPO Board Jan. 4, 2008 Op. at 11.

[9] 68 F.R. 66372, 66372 (November 26, 2003).

[10] May 18, 2005 Hearing Tr. at 400 (statement of Charles Fitzpatrick).

[11] May 18, 2005 Hearing Tr. at 402 (statement of Joseph Egan).

[12] Statement of Robert Loux, Executive Director of Nevada Agency for Nuclear Projects, in S. Tetreault, "Documents Added to Yucca Database," *Las Vegas Review Journal* (May 1, 2007) (DOE Ex. A). (All exhibits referenced in this brief were exhibits to the parties' briefs before the PAPO Board.)

[13] Testimony of Robert Loux, Executive Director of Nevada Agency for Nuclear Projects, before the Nevada Senate Committee on Nuclear Projects (January 16, 2008). In that testimony, he said Nevada has "drafted a couple thousand contentions with many more to come" as Nevada continues its review of DOE's LSN collection. A transcript of this testimony is not yet available,

Nevada has been drafting those contentions based on its review of the millions of documents DOE has made available on the LSN. According to its outside counsel, Nevada assembled a special team of lawyers and experts in 2001 to prepare for the Yucca Mountain licensing proceeding. Nevada's team "has been performing a thorough evaluation of the scientific and legal integrity of the work done by DOE and its contractors at Yucca" since that time.[14]

As part of their "review of the technical record for the project," Nevada's lawyers and experts "have been combing DOE's electronic database," *i.e.,* the documents DOE has made available on the LSN.[15] When DOE made available approximately 2.1 million additional documents in the first part of 2007, Nevada announced that its science consultants were dividing those documents among themselves so the documents could be "critiqued for information that could become part of the State's case against the project."[16] In light of this undisputed record, Nevada's arguments to the Commission that it is "impossible" for Nevada to draft contentions, that Nevada has "no practical ability" to draft contentions, and that Nevada cannot even "begin" its work,[17] borders on the sanctionable.[18]

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but will be available at the following address: http://leg.state.nv.us/74th/Interim/Scheduler/committeeIndex.cfm?ID=10141.

[14] Statement of Joseph Egan before the House Subcommittee on the Federal Workforce and Agency Organization (April 5, 2005) at 1 (DOE Ex. B).

[15] *Id.* at 3.

[16] DOE Exhibit A at 1.

[17] The State of Nevada's Brief on Appeal from the PAPO Board's January 4, 2008 and December 12, 2007 Orders (January 15, 2008) [Nevada Brief] at 4, 16-17.

[18] Indeed, Nevada's recently certified LSN collection, while demonstrably incomplete, contains memoranda that illustrate that Nevada's experts have been engaged in detailed evaluations of DOE's work product for years, and that they communicate by email in doing so.

The reality is that DOE's certified LSN collection contains many documents intended to be cited or relied on in the LA as well as extensive underlying calculations, data, and other material on which those documents are based. The limited remaining items will promptly be made available on the LSN as they are completed, and Nevada and all other potential participants will have an ample opportunity to review them. The NRC Staff has made clear that it will take the time it needs prior to docketing to thoroughly review the LA and supporting information. The Staff will not docket the LA until it is satisfied about the results of that review. This provides practical assurance that all remaining work prepared for the LA will be available on the LSN in time for Nevada to adequately review it well before Nevada is required to file contentions.[19]

Nevada's motion should be seen for what it is—a bid to delay the licensing proceeding for delay's sake. Nevada seeks to delay these proceedings by recasting the LSN regulations to impose a condition on DOE's initial certification that does not exist on the face of those regulations. In the prior appeal, the Commission rejected Nevada's plea to impose on DOE's initial LSN certification a requirement not found in Subpart J even though it was said the requirement would help Nevada frame more meaningful contentions in the pre-license

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E.g., LSN participant accession number NEV5000141 (May 14, 2007 memo from M. Thorne referring to email from V. Gilinsky). Nevada's experts are spread around the world, and presumably communicate by email to accomplish their work. *See, e.g.,* NEV5000148 & NEV5000153 (referring to work apparently being performed in China).

[19] The Staff has, at various times, stated its expectation about pre-docketing review time as between three and six months. Since the obligation to file contentions is triggered not by filing the LA but by its docketing, the amount of time available to Nevada to complete its review of the LA and precursor materials is, in reality, not just the time between DOE's LSN certification and the LA filing date, but somewhere between a quarter and a half a year beyond that period.

application period.[20] The Commission should reject Nevada's latest attempt to rewrite Subpart J and should affirm the PAPO Board's decision.

ARGUMENT

I. SUBPART J DOES NOT IMPOSE THE CONDITION NEVADA ADVOCATES

Nevada has been inconsistent in its characterization of what Subpart J requires. In its motion for declaratory judgment on this issue before the PAPO Board, Nevada argued variously and inconsistently that DOE cannot certify until it makes available on the LSN, on the one hand, all work product DOE "knows or expects to cite or rely on in the Yucca *licensing proceeding*" versus, on the other hand, the material DOE expects "to rely on in the *license application.*"[21] Nevada retreated from those positions in its supplement to that motion. It argued in that supplement that (1) it was not asking DOE "to stop producing documents" following initial certification, (2) "reasonable compliance" is sufficient, and (3) DOE can certify as long as a "substantially complete set" of documents is available.[22] This formulation seemingly would permit certification before all of DOE's supporting information is completed.

Nevada changed its theory again in its motion to strike and made no mention of "reasonable compliance" and a "substantially complete set" of documents. Nevada instead reverted to the formulation of its original motion including its inconsistencies. Nevada's motion to strike additionally injected a novel formulation for DOE's initial certification obligation that was absent from its prior papers—the production of all "core technical documents and modeling

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[20] *U.S. Dep't of Energy (High Level Waste Repository: Pre-Application Matters)*, LBP-05-27, Slip. Op. (Sept. 22, 2005) at 25.

[21] State of Nevada's Motion for Declaratory Ruling to Define and to Compel Compliance by DOE with 10 CFR § 2.1003(a) (filed July 23, 2007).

[22] State of Nevada's Reply to the Responses to Nevada's Motion for a Declaratory Order (filed August 9, 2007).

basis Documentary Material." Nevada does not define those terms other than to mention that they include documents "like"—but seemingly not limited to—the Total System Performance Assessment (TSPA) and other Analysis Model Reports (AMRs).[23] Nevada does not attempt to explain the criteria for determining what constitutes a "core technical document" or what comprises "modeling basis Documentary Material."

Nevada has also reversed course on its view of whether DOE must complete all its supporting material six months before submittal of the LA. In its motion for declaratory judgment Nevada said that was not what was required. In its motion to strike, however, Nevada said DOE must complete all the material to be cited in the LA, make that material available on the LSN, and then wait "at least" 6 months.[24]

Nevada has not cogently and consistently articulated what it contends is the controlling standard for DOE's initial certification and the various formulations of that standard that Nevada has set forth are nowhere found in the LSN regulations. Regardless of Nevada's formulation, the condition(s) it seeks are not found in Subpart J.

A. The Regulatory Text Does Not Impose Nevada's Limitation

As the PAPO Board stated, Nevada's motion to strike presents a legal issue: whether Subpart J prevents DOE from making its initial LSN certification until it has "finalized, and produced, all of the core technical documentary material that it intends to rely on in the proceeding."[25] That is a straightforward question of regulatory interpretation, and it is an

[23] Motion to Strike DOE's October 19, 2007 LSN Recertification and to Suspend Certification Obligations of Others Until DOE Validly Recertifies [Nevada Motion to Strike] (October 29, 2007) at 20.

[24] Nevada Motion to Strike at 18.

[25] PAPO Board Jan. 4, 2008 Op. at 10.

undeniable fact that no provision of Subpart J imposes any such condition. Indeed, Subpart J makes no mention of "core technical documentary material," much less condition DOE's initial LSN certification on completion of that material. That is a term and a requirement that Nevada seeks to add to Subpart J.

A plain reading of Subpart J shows instead that it contains no condition—whether measured in quantitative or qualitative terms—on the quantum of material DOE must complete before it can certify. DOE's certification requirement is found in 10 C.F.R. § 2.1009. As pertinent here, the first part of that regulation requires DOE to designate a responsible official for administration of its obligation to provide electronic files of documentary material, to establish procedures to implement the requirements of § 2.1003, and to provide training to its staff on those procedures.[26] The second part of that regulation imposes the certification obligation, and it provides merely: "The responsible official designated under paragraph (a)(1) of this section shall certify to the Pre-License Application Presiding Officer that the procedures specified in paragraph (a)(2) of this section have been implemented, and that to the best of his or her knowledge, the documentary material specified in § 2.1003 has been identified and made electronically available."[27] Nothing in that regulation requires that DOE additionally attest as part of its initial certification that DOE has completed its supporting documentary material.

Regarding the timing of that certification, the regulation provides: "The initial certification must be made at the time the participant is required to comply with § 2.1003."[28] Significantly, nothing in that proviso requires that the initial certification must wait until DOE

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[26] 10 C.F.R. § 2.1009(a).

[27] 10 C.F.R. § 2.1009(b).

[28] *Id.*

has completed its "core documentary material"—or any other of the various formulations Nevada has advanced to delay DOE's certification.

Turning to § 2.1003, that provision too does not state that DOE cannot make its initial certification until DOE has completed its "core documentary material." Rather, § 2.1003(a) provides merely that DOE "shall make available, no later than six months in advance of submitting its license application for a geologic repository . . . [a]n electronic file including bibliographic header for all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by" DOE.[29] Thereafter, DOE must supplement its LSN production with "any additional material created after the time of its initial certification . . . ."[30]

Nothing in those provisions mandates that DOE must have generated or acquired all its supporting (or any other) documentary material at least six months in advance of submitting the license application. Section 2.1003(a)(1) merely prescribes the outside window by when DOE must begin to make documentary available on the LSN. It does not impose a substantive deadline for the completion of DOE's work product.

Further, the supplementation provision in § 2.1003(e) plainly contemplates that the parties, including DOE, can and will continue to create documentary material after their initial certifications; that they will create additional documentary material during not only the balance of the pre-license application phase following their initial certifications but in the post-docketing phase as well; and that their obligation is merely to supplement their production to make available such additional documentary material.

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[29] 10 C.F.R. § 2.1003(a)(1).

[30] 10 C.F.R. § 2.1003(e).

Read together, these provisions set forth a logical sequence of events that are not conditioned in the manner Nevada advocates. DOE must begin to make documentary material available on the LSN no later than six months before it submits the LA. DOE must provide an initial certification within the same time frame. That certification is DOE's attestation that it has implemented procedures to enable it to meet its LSN obligations, not just in the present but going forward as well. It is additionally an attestation that DOE has implemented training of its personnel to meet and to continue to meet its LSN obligations. And, it is an attestation that DOE has made available the documentary material it has generated or acquired as of that time, and that it will continue to supplement its production with additional documentary material that is thereafter created or identified. What the regulations do not require as part of the initial certification is an additional attestation that DOE's supporting material for the LA is complete.

It should also be noted that Subpart J provides that if DOE makes its initial certification less than six months before it submits the LA, the LA cannot be docketed until six months after DOE's initial certification.[31] If the "Six-Month Rule" that Nevada advocates were true—that is, if Subpart J guaranteed Nevada six months to review all of DOE's supporting information before DOE submitted the LA—this provision would no longer have any function. The Commission would have required delay in submittal of the LA, and not merely docketing, until there had been six months of pre-submittal review. As it is, this provision affirmatively contradicts Nevada's position.

B. Nevada Misreads The Regulations

Nevada never recognizes the fact that no provision of Subpart J imposes the limitation it seeks, and what little Nevada says about the regulatory text is self-evidently erroneous. Nevada

[31] 10 CFR § 2.1012(a).

relies foremost on the definition of "documentary material" in 10 C.F.R. § 2.1001, and in particular the reference in that definition to the information upon which a party "intends to rely and/or to cite in support of its position" in the licensing proceeding. Nevada claims that the PAPO Board's ruling "effectively eliminates the requirement that DOE produce the material upon which it 'intends to rely'" as found in this definition.[32]

The fundamental problem with Nevada's argument is that the definition of "documentary material" in § 2.1001 imposes no obligation on DOE or any other party by itself. It is silent about the parties' LSN certification obligations and does not prescribe when the parties can or cannot certify, or what documents they must have completed by the time of their certifications. It merely defines the type of information that qualifies as documentary material. It does not dictate the timing of when a party must produce that information.

This does not, contrary to Nevada's argument, "effectively eliminate[] the requirement that DOE produce the material upon which it 'intends to rely.'" DOE, like every party, is required to make available at the time of its initial LSN certification the information then in existence on which it intends to cite or rely. Then, DOE must supplement its production as it completes any additional information which it intends to cite or rely on.[33] DOE must update its production of this information each month[34] and then provide a supplemental certification when

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[32] Nevada Brief at 21.

[33] 10 C.F.R. § 2.1003(e).

[34] PAPO Board Jan. 4, 2008 Op. at 16, citing *U.S. Dep't of Energy (High Level Waste Repository: Pre-License Application Matters)*, Revised Second Case Management Order (July 6, 2007) (unpublished) at 21.

it submits the LA.[35] In brief, nothing in the PAPO Board's ruling allows DOE to omit from the LSN the information upon which DOE intends to cite or rely.

Similarly of no moment is Nevada's reliance on the phrase "all documentary material" that appears in § 2.1003(a)(1). As the PAPO Board noted, that phrase is qualified by the remainder of § 2.1003(a)(1) that limits a certifying party's production obligation to the documentary material it has generated or acquired, with no requirement that the party must have generated or acquired all its supporting material by that time. Section 2.1003(a)(1) must be read as a whole, and "the entirety of the provision must be given effect."[36] To read in isolation the phrase "all documentary material" without regard to that important qualification in the rest of the regulation violates that basic command of regulatory interpretation.

Moreover, there is no basis to limit the term "all documentary material" in § 2.1003(a)(1) to "supporting" documentary material, as Nevada does. The term applies to all three classes of documentary material, *i.e.*, supporting information, non-supporting information, and reports and studies. Were Nevada's reading of § 2.1003(a) accepted, DOE and every other participant would have to have in hand a completed set of all three classes of documentary material at the time of initial certification. No other documentary material could be generated after certification. That would make superfluous the regulatory requirement for DOE to update its certification when it submits the LA.[37]

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[35] 10 C.F.R. § 2.1009(b); 10 C.F.R. § 2.1012(a).

[36] CLI-06-05, 2006 NRC LEXIS 32 at *21.

[37] *In re Texas Utilities Company (Comanche Peak Steam Electric Station, Units 1 and 2)*, LBP-84-10, 1984 NRC LEXIS 150 at *10 (1984) (regulation sections are to be interpreted consonant with one another).

Nevada's discussion of the terms "generated" and "acquired" in § 2.1003(a) does not further its argument. Nevada says that the reference to documentary material "generated . . . or acquired by" a party makes clear that a party must make available "documents it 'acquired' from other sources," and cannot confine its production to documents it authored.[38] But Nevada's statement of the obvious does not advance its broader contention that § 2.1003(a) further requires that a party must have generated or acquired by the time of its initial certification all the documentary material it intends to cite or rely on.

Nevada's discussion of the supplemental production obligation of § 2.1003(e) and the supplemental certification provision of § 2.1009(b) is likewise misplaced. Nevada argues the purpose of those provisions is simply to allow DOE to make "technical corrections or improvements it did not anticipate, and run quality control studies it wishes to add."[39] However, there is no support for such a narrow view of the supplementation provisions. There is no indication in Subpart J (or elsewhere) that the Commission intended these supplementation requirements to be limited to the type of production Nevada urges in its brief. Had that been the case, the Commission could have, and surely would have, limited the scope of § 2.1003(e) and the update provision of § 2.1009(b) in some such manner. What the Commission did instead in § 2.1003(e) is broadly and unqualifiedly refer to "**any** additional material created after the time of [a party's] initial certification."[40] That the Commission did not limit these supplementation requirements indicates that Nevada's reading of these regulations is wrong.

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[38] Nevada Brief at 22.

[39] Nevada Brief at 26.

[40] 10 C.F.R. § 2.1003(e) (emphasis added).

In sum, Nevada cannot point to any provision in Subpart J that bars DOE from making its initial certification until it has completed all its supporting information. Nevada cannot identify any such provision because no such provision exists in Subpart J.

If the Commission intended that DOE must complete all its reliance material six months before submitting the LA, it is inconceivable that the Commission would have omitted such an important and unprecedented requirement and left its existence to inference, interpolation and guesswork. If the Commission had so intended, the Commission would have imposed that requirement unambiguously in direct terms somewhere in the otherwise comprehensive and detailed provisions of Subpart J. As the PAPO Board wrote: "We do not think that the Commission would have articulated such a fundamental requirement in such an obscure and incidental way."[41]

This appeal presents a situation similar to that raised by the appeal concerning Nevada's earlier motion to compel production of the draft LA.[42] In that appeal Nevada advanced various policy arguments urging that access to the draft LA be required because this would make more meaningful the six-month period between DOE's initial certification and submittal of the LA and advance Nevada's preparation of contentions. Nevada labored to explain how such a production requirement could be implied in Subpart J. The Commission rejected Nevada's strained interpretation and declared that it would have used direct language to require production of the draft LA if that had been its intent: "If the Commission had intended to require separate LSN

[41] PAPO Board Op. at 13.

[42] Nevada's Motion to Compel Production of DOE's Draft Yucca Licensing Application, or in the alternative, for a Declaratory Order (June 6, 2005).

submission of parts of the LA, it would have stated that intention unambiguously, with no surplus language."[43] The same is true here.

II. THE RULEMAKING HISTORY DEFEATS NEVADA'S APPEAL

There is no need to refer to Subpart J's rulemaking history to adjudicate Nevada's appeal. This is not a situation where the regulations are ambiguous or in conflict, and so the regulations must be applied as written without resort to the rulemaking.[44] Nevertheless, the rulemaking history corroborates that Subpart J does not impose the condition on DOE's initial LSN certification Nevada advocates.

A. The Commission's Statements Of Intent Defeat Nevada's Appeal

Although Nevada asserts a great deal about the intent behind § 2.1003(a), the unassailable fact is that the Commission's Statements of Consideration for Subpart J do not state that all material DOE intends to cite or rely on must be finished and available on the LSN before DOE makes its initial certification. The significance of this cannot be overstated. The Commission has issued many Statements of Consideration for Subpart J over the last 20 years. Those Statements are extensive and address in detail every aspect of Subpart J. If the Commission's intent were that DOE must complete all its supporting information before it can certify, it defies reason that the Commission would have been silent all those years about such an important requirement.

This is especially true for the Statement of Consideration in 2001 when the Commission promulgated the current version of § 2.1003. The Commission acknowledged then that

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[43] CLI-06-05, 2006 NRC LEXIS 32, at *28.

[44] CLI-06-05, 2006 NRC LEXIS 32 at *21-22; *see also In re Duke Energy Corp.*, 61 NRC 241, 199 (2005) ("the wording of a regulation generally takes precedence over any contradictory suggestion in its administrative history.").

"development of the license application and supporting materials is an ongoing process."[45] The Commission also acknowledged DOE's view that initial certification six months before submitting the LA will "make it more likely that the material entered [on the LSN] will be more fully developed and current."[46] The terms "ongoing process," "more likely" and "more fully developed" are not synonymous with "finished" or "complete."

Had the Commission intended that all of DOE's supporting material must be complete at the time of DOE's initial certification, the Commission surely would have expressed that intent clearly. Instead, as just noted, the Commission related without objection the expectation that DOE's supporting material would not be complete at initial certification.

The Commission went even further in the same rulemaking to expressly address the question: "When are documents created after the initial certification of compliance required to be made available?"[47] In answering the question, the Commission observed that DOE had noted in its comments on the proposed rule that "new information will continue to be produced during the period before it submits the license application." Again, the Commission did not criticize this observation or state that DOE's continued generation of information after its initial certification was antithetical to § 2.1003. Rather, the Commission stated merely: "Documentary material created after the initial certification of compliance is expected to be made available reasonably contemporaneous with its creation, rather than stored for entry as a group at some point during the remaining time before DOE submits the license application."[48]

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[45] 66 FR 29453, 29459 (May 31, 2001).

[46] *Id.*

[47] *Id*. at 29460.

[48] *Id.*

If the Commission intended what Nevada now advocates, the Commission surely would have said something in this Q&A to express that view. It did not, and notably stated instead that DOE should make the new documentary material available on a rolling basis as DOE created it and not wait until its supplemental certification when submitting the LA.

The Commission reiterated that view in 2003 and 2004 when it promulgated the supplementation requirement of § 2.1003(e). In proposing that rule, the Commission made the following statement that recognized that the participants would continue to create documentary material after their initial certifications:

> Proposed § 2.1003(e) would require LSN participants to supplement the documentary material provided under § 2.1003(a) in its initial certification with documentary material produced after that event. While ***much*** of an LSN participant's documentary material will be made available early, ***it is reasonable to expect that additional material will be created after the initial compliance period specified in § 2.1003(a).***[49]

The Commission made the same observation in its notice of final rulemaking.[50]

"Much" does not equal "all." Further, the Commission did not differentiate DOE from the other participants and require DOE, unlike all the other participants, to have all of its supporting documentary material completed at initial certification. The Commission's language instead clearly contemplates that while "much" of DOE's documentary material is expected to be available at initial certification, not all of it would be complete by that time. Nor did the Commission's language limit the types of documentary material whose post-certification creation was acceptable (*e.g.*, as Nevada contends, non-supporting information). Rather, the Commission expected that documentary material could be created by any party and added to its

[49] 68 FR 66372, 66375 (November 26, 2003) (emphasis added).

[50] 69 FR 32836, 32843 (June 14, 2004).

LSN collection after initial certification, as long as that addition was reasonably contemporaneous with its creation. This is critical, and fatal to Nevada's argument.

Significantly, Nevada did not object to § 2.1003(e), propose that DOE be carved out of its scope and treated differently, or otherwise complain that the Commission's statements were at odds with § 2.1003(a). Indeed, when asked by the PAPO Board whether Nevada had expressed the view at any time during the two decades of rulemaking over Subpart J that DOE had to complete its core technical documents before its initial LSN certification, Nevada's counsel conceded that it had not:

> Q: Judge Karlin: Is there anyplace you can cite in all those 20 years, almost, where the State of Nevada articulated this position and said they have to have all core technical documents done before they can certify? Anyplace you can cite me for that?
>
> A: Mr. Fitzpatrick: 10 CFR 2.1003 and CFR 2.1001.
>
> Q: Judge Karlin: They don't say that. We just discussed that they say you make documentary material available, and this is not documentary material, by definition.
>
> A: Mr. Fitzpatrick: I didn't understand you to mean literally.
>
> Q: Judge Karlin: No, I mean literally.
>
> A: Mr. Fitzpatrick: Okay. No, I don't know of anywhere that that phrase core document -- "core technical documentation" appears.[51]

As the PAPO Board wrote, "If Nevada's position were correct, we would have expected it, and others, to have raised a great hue and cry when the Commission made these statements [in the 2003/2004 rulemaking]." Nevada instead acquiesced in the Commission's statements of consideration in the two rulemakings regarding the certification requirement. Nevada's

[51] December 5, 2007 Transcript at 21-22.

contemporaneous acquiescence belies the manufactured arguments of its counsel years after the fact.[52]

B. The Rationale For The Initial Certification Defeats Nevada's Appeal

The Commission's rationale for the initial certification schedule in § 2.1003(a) does not support Nevada either. That schedule was not conceived as a deadline for completion of DOE's documentary material, but rather as a means to alleviate the burdens on DOE and potential participants of document production on the LSN too early.

More specifically, the LSN regulations originally required DOE and NRC to make documentary material available beginning 30 days after DOE's submission of its site recommendation to the President, and the other participants were required to begin their productions no later than 30 days after the site selection became final after review by Congress. These regulations required the participants to make LSN certifications but did not specify when those certifications should be made. The Commission thus proposed in 2000 to require certifications at the time of a participant's initial production to the LSN of their documentary material on the then existing schedule tied to site recommendation and selection.[53]

In its comments on the rulemaking, Nevada proposed to alter the time for both the availability of documentary material and certification. Nevada wanted to delay both the date participants had to begin making documents available and the date for their initial certifications, and to tie those events to submittal of the LA rather than site recommendation and selection.

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[52] Seeking to overcome its concession below, Nevada cites on appeal a statement it made in the rulemaking to the effect that the parties' LSN databases are to be "complete substantially prior to the docketing of DOE's license application." Nevada Brief at 11. That statement is beside the point. Nevada does not merely want DOE's core technical documents to be complete prior to docketing of the LA. It wants DOE to have completed its supporting material at least six months before submitting the LA.

[53] 65 FR 50937 (August 22, 2000).

That deferral, Nevada advocated, could "ease the burden of compliance" by allowing participants to omit from their production documents that had become "obsolete, invalid or irrelevant" due to changes in the repository design or other intervening developments. Deferral could help "eliminate the possibility of expending resources on unnecessary review of documents that might be superseded by the time of the license application." Deferral also would allow the LSN Administrator more time to design the LSN with the "most up-to-date technology." Nevada thus recommended that the "initial capture" of documentary material on the LSN be postponed and tied to submittal of the LA.[54]

Nevada made no suggestion whatever that this alteration in the approach for LSN production and initial certification was tied to completion of DOE's (or any other party's) documentary material. The Commission accepted both of Nevada's proposals with no comment that the change was intended to reflect a deadline when the parties were to complete their documentary material.

Thus, the motivation behind the schedule for the initial certification in § 2.1003(a) was not to ensure that DOE had completed all its supporting documentary material six months in advance of LA submittal. It was to "ease the burden of compliance" by deferring the "initial capture" of documents on the LSN by all participants, including DOE.

It is also against that backdrop that DOE proposed that its initial certification occur six months before submitting the LA. DOE's proposal was not made to establish a deadline for completion of the information to be cited or relied upon in the LA. It was made in the context of the negotiated rulemaking over Nevada's proposal to uncouple the LSN production obligation from site characterization and to tie it to LA submittal. It simply proposed a deadline by when

[54] 66 FR 29453, 29459 (May 31, 2001).

DOE had to "flip the switch" and start making documents available on the LSN. DOE did not represent that it would have finished its supporting information by that time, and Nevada's post hoc attempt to impart such meaning to DOE's proposal fails.

III. NEVADA'S "PRACTICAL" CONCERN IS UNFOUNDED

As it did below, Nevada predicts "dire consequences" if it does not prevail and urges adoption of its position on policy grounds even though the plain text of Subpart J does not support its position. That is no substitute for application of the Commission's regulations as written, as one of the Commission's licensing boards recently held:

> [F]undamentally, I lack authority to adopt a "policy" that invalidates a Commission regulation. . . . In urging me to adopt an approach that is at odds with the governing regulations, the Intervenors essentially are attempting to use this proceeding to re-write those regulations. This they may not do. . . .[55]

Nevada's alarm also has no grounding in reality. Nevada contends that the PAPO Board's ruling would "nullify" the Commission's regulations, make the LSN meaningless, and enable DOE to certify with no documents. However, the abusive certification Nevada hypothesizes in fact has not occurred. DOE has made available on the LSN in excess of 3.5 million documents. The purpose of the LSN has been met, especially since most of those documents have been available on the LSN since at least May, 2007, and nearly 1.3 million of those documents have been available on the LSN since 2004.

Further, the type of abusive certification Nevada imagines would be impossible in the real world even if DOE had not yet certified. The LA and its supporting information are not something that can be prepared in a few months. As Nevada notes, DOE has been studying Yucca Mountain over 18 years. The LA itself has been in development for several years. The

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[55] *In re Hydro Resources*, ALSB Docket No. 40-8968-ML, ASLBP No. 95-706-01-ML, 2006 NRC LEXIS 7, *34-36 (2006) (citations omitted).

LA will be the result of extensive data compiled over these 18 years of study as well as rigorous scientific and engineering processes that have been used to analyze those data and prepare the underlying documents that support the LA. Given the volume of the information and analyses underlying the LA and the discipline of the processes to produce them, "much" of the information DOE intends to cite and rely upon must necessarily be (and is) complete six months before DOE submits the LA. Contrary to Nevada's suggestion, DOE could not in 2007 certify with zero documents.

The only "dire consequence" posed by this appeal is the burden Nevada's position, if accepted, would impose on the other participants to this proceeding. As the PAPO Board correctly noted, the duty to produce documentary material "applies to all potential parties, not just DOE."[56] So if § 2.1003 were interpreted to mean that DOE must complete all its expected supporting information by the time of certification, the same obligation would apply to Nevada, affected units of local government, Indian tribes, public interest groups and individuals—in short, to anyone who may seek to participate in the Yucca Mountain proceeding. That would mean Nevada and every potential participant would be required to complete within 90 days after DOE's initial certification all the information they know or expect they may use in the licensing proceeding.

There is nothing in the text, structure or logic of Subpart J that indicates that the Commission intended Nevada and all other potential participants to have completed their review of DOE's documentary material and have finished their opposing analyses within 90 days of DOE's certification. Since no such obligation exists on the face of § 2.1003(a) with respect to

[56] PAPO Board Jan. 4, 2008 Op. at 12.

Nevada and the other potential participants, no such obligation can be read into § 2.1003(a) with respect to DOE.

Nevada tries to "have its cake and eat it too" on this issue. Nevada insists that all of DOE's supporting information must be complete when DOE certifies, but not so for Nevada. Nevada says it "cannot possibly identify what it will rely upon" only 90 days after DOE's certification (thus laying the foundation for certification with essentially none of its experts' work product).[57] Nevada's extreme position is not credible, considering that millions of DOE's documents have been available for years and that Nevada's experts have been analyzing them and already preparing contentions.

But that aside, Nevada's argument proceeds from a false premise. Under Nevada's view of the regulations, it necessarily would have access to all of the information to be cited and relied upon in the LA at the time of DOE's initial certification. As a result, it would know all the information upon which DOE intends to cite or rely on, and thus Nevada in turn would be required to complete and make available all the information which it intends to cite or rely on in opposing DOE. After all, if Subpart J were supposed to guarantee six months of pre-LA submittal review of all of DOE's documentary material, then it equally would guarantee three months pre-LA submittal review of all of Nevada's documentary material.

As the PAPO Board notes—and as Nevada agrees—there is nothing to suggest that the Commission intended that Nevada's and all other participants' work product must be complete when they certify. The rules, however, apply equally to DOE. Nevada cannot have Subpart J

[57] Nevada Brief at 26.

read one way when applied to DOE and a different way when applied to it. This is what the PAPO Board meant when it wrote that "what's sauce for the goose is sauce for the gander."[58]

IV. NEVADA'S EXTRANEOUS ARGUMENTS LACK MERIT

Nevada includes in its brief various matters that are not pertinent to the legal issues posed by its appeal. While those matters are irrelevant, DOE addresses principal ones to correct Nevada's misleading discussion of them.

Statement by NRC Staff Lawyer. Nevada attributes to the Commission a quotation to the effect the "DOE has to have all of their documents online six months before they submit the application."[59] Nevada goes so far as saying that in light of this quotation, "the Commission ***misled*** state and local governments about this proceeding" if the Commission affirms the PAPO Board.[60] What Nevada obscures is that the quotation is not from the Commission, and nowhere appears in the Commission's Statements of Consideration for Subpart J. It is an isolated statement by an NRC Staff attorney from a public informational meeting.[61] The meeting's purpose was not to discuss the scope of DOE's document production obligation at initial certification, but the schedule for participation by others in the licensing proceeding. That isolated statement can be given no force and certainly provides no basis to add new requirements into Subpart J. Unlike that meeting, the considered views of the NRC Staff on the precise issue at hand are contained in the brief they submitted to the PAPO Board. In that brief, the NRC

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[58] PAPO Board Jan. 4, 2008 Op. at 14.

[59] Nevada Brief at 12.

[60] Nevada Brief at 28 (emphasis in original).

[61] Nevada Motion to Strike at 7; Nevada Ex. 5.

Staff reviewed the text of Subpart J and the Commission's Statement of Considerations and concluded that Nevada's position is "not correct."[62]

PAPO Board's Order Striking DOE's Earlier Certification. Nevada's citation to the Board's decision in 2004 striking DOE's prior certification is not well founded. As the PAPO Board pointed out at the hearing[63] and in its opinion,[64] the Board's 2004 decision did not address whether DOE must have completed all of its supporting documentary material before DOE could certify. It concerned whether DOE had then sufficiently produced its "extant" documentary material.

The Board's decision in 2004 could not have addressed the issue raised in this appeal because Nevada did not raise that issue in its motion to strike in 2004. Nevada's 2004 motion complained about the unavailability of existing documents, primarily because DOE had not finished the process of collecting and identifying existing documents that qualified as documentary material. Nevada did not contend that DOE's certification was insufficient because all of DOE's expected documentary material was not finished. Statements from this Board's decision in 2004, therefore, must be read against that backdrop. Those statements did not address whether DOE's supporting work product must be finished by the time of its initial certification, and cannot fairly be construed now as having done so.[65]

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[62] NRC Staff Answer to Nevada Motion to Strike Department of Energy Licensing Support Network Certification (Nov. 9, 2007) at 6.

[63] December 5, 2007 Hearing Tr. at 23-25.

[64] PAPO Board Jan. 4, 2008 Op. at 14.

[65] Reflective of that fact, the questions the Board ordered DOE to answer regarding Nevada's motion to strike asked about "extant documentary material." The Board asked no question about work product DOE had not completed. *See* 2004 NRC LEXIS 15 (2004) at *1, Questions 2 and 3.

If anything, the only relevance Nevada's earlier motion to strike has to the instant motion is the inconsistency between Nevada's arguments in the two motions. Nevada knew at the time of DOE's certification in 2004 that not all of DOE's supporting material was finished, including the TSPA, AMRs, and the Preclosure Safety Analysis (PCSA). Nevada knew this because DOE regularly reported in public on the status of its work product such as at the NRC's Quarterly Management Meetings. Nevada's representatives attended those meetings and/or received the summaries of the meetings that included copies of DOE's presentations.

The status reports leading up to DOE's 2004 certification made clear that DOE's supporting documentary material was not finished. The incomplete documents included the same types of documents addressed in Nevada's motion—the TSPA, PCSA and AMRs.[66]

Further, there was open discussion at the meetings that some of the "building blocks" of the LA would not be completed until after DOE's contractor delivered a draft of the LA in July.[67] The completion of those "building blocks" self-evidently would occur only after DOE's certification in June.

Yet, Nevada did not object to DOE's certification in 2004 on the ground that the TSPA, AMRs, PCSA and other "building blocks" of the LA were incomplete and not yet finished. To the contrary, Nevada affirmatively recognized in its motion to strike that the LSN regulations permitted DOE to certify in these circumstances so long as DOE made available its documentary material in existence at the time of certification.

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[66] February 2004 Quarterly Management Meeting Summary, License Application Status PowerPoint at 4 (DOE Ex. D); May 2004 Quarterly Management Meeting Summary, License Application Status PowerPoint at 3 (DOE Ex. E).

[67] DOE Ex. E, Summary Minutes at 5.

In this regard—and in stark contrast to the omission in Nevada's current motion—Nevada's 2004 motion to strike acknowledged that the rulemaking history recognized the likelihood that DOE would generate additional documentary material after its initial certification:

> The notice of final rulemaking also pointed to the likelihood that additional "documentary material" would be generated after the date of DEN's [Department of Energy's] initial certification, and it made provision therefor: "Documentary material created after the initial certification of compliance is expected to be made available reasonably contemporaneous with its creation, rather than stored for entry as a group at some point during the remaining time before DOE submits the license application." *Id.* at 29460. This ongoing delivery of newly created material – not in existence at the time of DEN's initial certification – would be consistent with "the need to provide participants with early and useful access to documentary material before DEN submits the license application. As DEN noted in its comments on the proposed rule, new information will continue to be produced during the period before it submits the license application.[68]

Nevada then set forth its view of § 2.1003(a). That regulation, Nevada maintained, "could not be clearer that [DOE's] initial certification must include all documentary material that is known to, in the possession of, or developed by or at the direction of [DOE] ***at the time of certification***."[69] Nevada reiterated that view on the following page of its motion, declaring: "it follows that the initial certification must correspondingly apply to all the available [DOE] documentary materials ***in existence at the time of initial certification***."[70] Nevada never maintained in its motion that § 2.1003(a) requires anything more.

Nevada now ignores its own positions of record and contends inconsistently that it is not sufficient under § 2.1003(a) for DOE to make available all its known documentary material in

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[68] Nevada Motion to Strike the Department of Energy's LSN Certification and for Related Relief (July 12, 2004) [First Nevada Motion to Strike] at 7, ¶ 15.

[69] First Nevada Motion to Strike at 9, ¶ 4 (emphasis added).

[70] *Id*. at 10, ¶ 7 (emphasis added).

existence at the time of initial certification. The Commission should not allow Nevada to assume such inconsistent positions in this proceeding.

DOE's Frequently Asked Questions. DOE's Frequently Asked Questions (FAQs) are not pertinent to the interpretation of § 2.1003(a). The FAQs are not Commission documents, and since they were first prepared in 2004, they obviously could in no way constitute part of the rulemaking for § 2.1003(a) in 2001.

Further, the FAQs do not purport to enumerate required contents of the initial LSN certification. They provide general advice to Yucca Mountain Project personnel to help them identify potential documentary material to ensure DOE collects the pertinent documents. The focus of the FAQs is the breadth of potential relevance and not the timing for completion of DOE's work product.

Nevada also wrongly tries to attach significance to the fact that an early version of the FAQs states that 10 CFR Part 2 requires DOE "to provide the general public and parties to the licensing hearing with electronic access all documentary material relevant to the licensing proceeding," whereas a later version omits the word "all."[71] The first version does not purport to address whether DOE's supporting documentary material must be finished at DOE's initial certification, and thus the change in the latter version has no significance to the instant motion. Both statements express a generalization that is as unremarkable as it is immaterial to Nevada's motion—the LSN is the vehicle for the participants' document production.

Draft LSN Strategy Documents. Nevada's reference to several draft LSN strategy papers from the 2000/2001 timeframe is of no moment.[72] What matters to this appeal is the

[71] Nevada Brief at 10.

[72] Nevada Brief at 9-10.

Commission's intent as reflected in the language it used in Subpart J, and not what some DOE employees may or may not have been musing in internal drafts that were never approved. It should also be observed that the statements Nevada selectively emphasizes from those drafts are not instructive either, as they are generalized, inconsistent, or beside the point (as might be expected from drafts).

Nevada's Preparation of Contentions. Nevada says that it is "undisputed" that it is "*impossible*" for it to frame contentions.[73] The PAPO Board made no such finding, and DOE did dispute that assertion. DOE presented evidence—which Nevada did not contest—that Nevada has stated publicly that it has already prepared "thousands" of contentions based on the extensive data, calculations, reports and studies, emails and other documents DOE has made available on the LSN.

Regarding the TSPA—the sole subject matter Nevada discusses in its brief—Nevada's own submission before the PAPO Board showed that Nevada has the TSPA model as it existed around the beginning of October, 2007. Nevada directly received this model in connection with the *Draft Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada* (October 2007) (Draft SEIS), which included an external hard-drive with approximately 150-gigabytes of underlying data supporting that model. A bibliographic header for this hard-drive is available on the LSN.[74]

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[73] Nevada Brief at 16 (italics in original)

[74] About 140 gigabytes of the data on the hard drive is compressed, and uncompressed equals about 250 gigabytes of data. If electronically formatted for the LSN, its content would equal about 1 terabyte (1,000 gigabytes) of information. A bibliographic header for the external hard drive is available on the LSN with the following LSN accession number: DN2002478969.

Nevada's own TSPA expert conceded in his declaration that "the type of information given on this hard drive will be fundamental to scrutinizing the adequacy of the TSPA-LA."[75] He also conceded that it is easy to track whatever final changes might be made to the TSPA from the October, 2007 version to the version used with the LA.[76] The testimony of Nevada's own expert, therefore, demonstrates that the Draft SEIS provides Nevada with significant information regarding the TSPA which is informing its preparation of contentions.[77]

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[75] Thorne Dec. ¶ 5 (Nevada Ex. A).

[76] *Id*. ¶ 9.

[77] Documents that were unavailable to DOE until Nevada supplemented its LSN production in January, 2008, after the briefing and argument on the motion to strike, further demonstrate the usefulness to Nevada of the TSPA information provided with the Draft SEIS. Nevada apparently met with the NRC Staff on October 5, 2007 to discuss the development of the TSPA, and the meeting left Nevada's expert Mike Thorne with the impression—contrary to the position taken by Nevada—that it had a current understanding of the TSPA, and that the TSPA-SEIS was close to what DOE would likely use for the LA. Thorne wrote:

> Examination of the references cited in support of this new model (*e.g*. all those on pages F-67 and F-68 plus the first three of those on page F-69 of Appendix F of the SEIS) shows that they have been generated by Sandia National Laboratories during 2007. This makes it clear that the TSPA-SEIS is a very recent version of the TSPA and it is reasonable to suppose that it resembles closely the version that will become the TSPA-LA.

NEV5000172 (Thorne, Meeting with NRC Staff on TSPA and TPA) at 2. *See also, e.g.,* NEV5000177 at 1 ("If you have not already done so, can I strongly encourage you to go through Appendix F of the SEIS? It provides a very clear indication of the scenarios that will be carried forward into the T SPA-LA and the way that they are likely to be treated."), NEV5000178, at 1 (Memo to M. Malsch, "Marty, Here is a first draft of text for the affidavit. Overall, having explored the hard disk reasonably fully, I think that DOE has done a pretty good job in providing information to underpin the TSPA-SEIS calculations.")

CONCLUSION

The Commission should affirm the PAPO Board's order and decision denying Nevada's motion to strike. Section 2.1003(a) does not contain the restriction on DOE's initial certification that Nevada advocates, and what Nevada seeks is a *de facto* amendment to that regulation. DOE's initial certification complies fully with Subpart J and should stand.

U.S. DEPARTMENT OF ENERGY

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January 25, 2008

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)	)	

THE DEPARTMENT OF ENERGY'S BRIEF ON APPEAL IN OPPOSITION TO THE STATE OF NEVADA'S NOTICE OF APPEAL FROM THE PAPO BOARD'S JANUARY 4, 2008 AND DECEMBER 12, 2007 ORDERS
CERTIFICATE OF SERVICE

I certify that copies of the foregoing THE DEPARTMENT OF ENERGY'S BRIEF ON APPEAL IN OPPOSITION TO THE STATE OF NEVADA'S NOTICE OF APPEAL FROM THE PAPO BOARD'S JANUARY 4, 2008 AND DECEMBER 12, 2007 ORDERS in the above-captioned proceeding have been served on the following persons on January 25, 2008 through the Electronic Information Exchange.

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