LBP-08-05

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Alex S. Karlin
Alan S. Rosenthal

In the Matter of U.S. DEPARTMENT OF ENERGY (High Level Waste Repository: Pre-Application Matters)	Docket No. PAPO-00 ASLBP No. 04-829-01-PAPO April 23, 2008

MEMORANDUM AND ORDER
(Denying the Department of Energy's Motion to Strike)

Before the Pre-License Application Presiding Officer (PAPO) Board is the motion of the Department of Energy (DOE) to strike the January 17, 2008 certification made by the State of Nevada (Nevada), pursuant to 10 C.F.R. § 2.1003(a).[1] The Board heard oral argument on February 28, 2008. Upon consideration of the filings and the oral argument, and for the reasons set forth below, the DOE motion to strike Nevada's certification is denied.

I. BACKGROUND

This proceeding concerns the pre-license application phase of DOE's planned application for an authorization to construct a geologic repository for disposal of high-level radioactive waste (HLW) at Yucca Mountain in Nevada. This phase is established and governed by the Nuclear Regulatory Commission (NRC) regulations set forth at 10 C.F.R. Part 2, Subpart J.

[1] The [DOE's] Motion to Strike the January 17, 2008 Licensing Support Network Certification by [Nevada] (Jan. 28, 2008) [hereinafter Motion].

Our prior decisions have outlined and discussed the regulatory structure and history of the pre-application phase.[2] The event that triggered the issue now before the Board was DOE's October 19, 2007 certification that it had made all of its then extant documentary material available on the NRC's Licensing Support Network (LSN). On October 29, Nevada filed a motion to strike DOE's certification. The Board denied Nevada's motion in a brief December 12 order that was dully explained in a memorandum issued on January 4, 2008.[3] DOE's certification, as upheld, triggered the obligation of other potential parties to make their documentary material available on the LSN within 90 days.[4] On January 17, 2008, Nevada certified that it had complied with that requirement. DOE filed its motion to strike Nevada's certification on January 28, 2008.[5]

II. POSITIONS OF THE PARTICIPANTS

A. The DOE motion is based on the assertion that Nevada is in possession of documentary material that should have been included in its LSN production, but, to date, has not been submitted to the LSN administrator for that purpose. DOE maintains that Nevada failed to make a substantial good faith effort to ensure the completeness of its LSN production.

First, according to DOE, Nevada previously estimated that its LSN collection would be in

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[2] *See* LBP-04-20, 60 NRC 300 (2004).

[3] *See* LBP-08-01, 67 NRC ___ (slip op.) (Jan. 4, 2008). *See also* Order (Denying Motion to Strike) (Dec. 12, 2007) (unpublished).

[4] *See* 10 C.F.R. § 2.1003(a).

[5] The NRC Staff filed an answer to DOE's motion to strike but declined to take a position on this matter: "Based on a review of DOE's motion, the Staff believes DOE presents factual matters within the purview of the parties and does not raise issues of regulatory interpretation which necessitate Staff comment." NRC Staff Answer to [DOE's] Motion to Strike January 17, 2008 [LSN] Certification by [Nevada] at 2 (Feb. 6, 2008). As a consequence, the Staff did not participate in the oral argument on the motion.

the tens of thousands, with the potential of over one hundred thousand documents.[6] In light of this asserted fact, DOE believes that Nevada's LSN collection of less than 4,800 documents necessarily is substantially incomplete.[7] DOE also infers the insufficiency of the Nevada LSN collection from the fact that Nevada had produced 3,372 of the now total of 4,800 documents in 2006. According to DOE, had Nevada then regarded its LSN collection as being that close to completion, it would have so reported.[8]

Second, DOE takes aim at the nature of documents contained in Nevada's LSN collection. DOE claims that a substantial portion of documents added between January 7 and 14, 2008 consists of documents not authored by Nevada, but rather are DOE documents already on the LSN.[9] In that regard, DOE points to five categories of documents included in Nevada's LSN collection that are either duplicates of documents already placed on the LSN by DOE or publicly available official notice material not required to be on the LSN.[10] DOE further insists that Nevada's scant production of emails, less than 100, is not to be taken as a good faith production of that "type" of document.[11] As DOE sees it, such a limited production, with 54 hits under document type "email," cannot be representative of the actual number of emails in Nevada's document collection.

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[6] Motion at 6 (citing Tr. at 8 (Charles Fitzpatrick) (case management conference in which Nevada stated it would make available approximately 100,000 documents)).

[7] *Id.* at 6, 29.

[8] *Id.* at 9 (citing the Nevada Commission on Nuclear Project's bi-annual report discussing the readiness of Nevada's LSN collection and failing to state that Nevada's production was complete or nearly complete).

[9] *Id.* at 1 n.2 (citing 10 C.F.R. § 2.1003(a)(1), which DOE characterized as "allowing party to exclude documents that another party has made available on LSN").

[10] *Id.* at 11-13.

[11] *Id.* at 4, 30.

DOE claims that there are other types of documentary material authored by Nevada's experts that should be on the LSN, namely 1) information concerning contentions; 2) review of DOE work product; 3) work product from Nevada's current experts; 4) graphic-oriented documents; and 5) documentation from Nevada consultants and other contractors.[12] The inadequacy of Nevada's LSN collection, DOE posits, can be inferred from searches for documents authored by, or sent to, Nevada's team of experts. DOE claims it searched Nevada's database and found an absence of work product from most of Nevada's retained experts.[13] In the few documents DOE did find, the content of the documents referred to additional existing data, calculations, and information that DOE asserts should be on the LSN.[14]

Lastly, DOE maintains that Nevada did not institute appropriate procedures to ensure that its documentary material production would be complete. DOE points specifically to the so-called "call memos" that were issued in 2004 and 2007 as instructions regarding the identification of documentary material that had to be retained for inclusion in the LSN collection. According to DOE, those memos were not distributed to all members on Nevada's project team with the consequence that material that should have been included in the collection was never evaluated for that purpose.[15]

B. Nevada maintains that DOE's motion has no basis either in law or fact. First, it

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[12] Motion at 14-24. DOE also lists four specific examples of work product by Nevada's team that are missing from the LSN. *Id.* at 23-24. DOE points to examples of expert progress reports made available on the LSN prior to a certain date leading DOE to believe Nevada has only made a partial production of documentary material. *Id.* at 17-18.

[13] *Id.* at 3.

[14] *Id.*

[15] *Id.* at 25, 31. DOE additionally claims that "Nevada's call memos [do not] appear to be consistent with the applicable regulations. Those memos are facially inadequate as procedures because they do not purport to extend the requirements for document preservation and submittal of documentary material beyond the direct recipients, and omit the personnel who work with them." *Id.* at 32.

responds that it implemented procedures and made a good faith effort to make documentary material available in its LSN Collection. It insists that the call memos, as supplemented by less formal communications, reached all of the members of its project team and provided them with the necessary instructions regarding the evaluation and retention of the documentary material that must be included in the LSN collection.[16] Nevada's response details numerous "summits," weekly telephone conferences, and written communications discussing LSN procedures and compliance among team members.[17] Second, Nevada maintains that these instructions were carried out with the consequence that its LSN collection includes all of its extant documentary material. Nevada notes that the collection contains each of the only three specifically identified documents that DOE claimed were missing.[18]

Third, Nevada disputes that its earlier estimates of the amount of documentary material have any present relevance.[19] According to Nevada, these were gross estimates designed

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[16] [Nevada's] Response to DOE's Motion to Strike Nevada's LSN Certification (Feb. 8, 2008) at 4 [hereinafter Response]. As stated by Nevada "[c]ontrary to DOE's criticism, the written information Nevada provided to its team reminded them about procedures and training Nevada *had been implementing for several years.*" *Id.*

[17] *Id.* at 3. ("Since 2003, there have been numerous expert 'summits' (meetings of the entire consultant team, attorneys, and Nevada staff); at every one of those meetings, a block of time was set aside for the conduct of instruction on the requirements and definitions associated with the LSN and the provision of Documentary Material"). *See id.*, Decl. of Charles Fitzpatrick (Feb. 8, 2008) at 1-2; *id.*, Decl. of Susan Lynch (Feb. 7, 2008) at 2-3 [hereinafter Lynch Decl.] (describing summit meetings and weekly telephone conferences that included discussions of LSN compliance); *id.*, Exh. 1 (guidance memo detailing LSN obligations and compliance procedures); *id.*, Exh. 18 (call memo detailing procedures for collection of documentary material including Regulatory Guide 3.69 and specific examples to analyze LSN-worthiness of documentary material); *id.*, Exh. 19 (email to Nevada team-members about LSN Compliance); *id.*, Exh. 20 (memo describing LSN training and procedures implemented by Nevada); *id.*, Exh. 21 (memo providing Nevada's team with information on how to comply with LSN procedures, including instructions created and used by DOE to assist its team in identifying documentary material for inclusion on the LSN).

[18] *Id*. at 12-14.

[19] *Id.* at 15-17.

simply to provide the LSN administrator with some indication as to what might prove to be the time necessary to place the Nevada collection on the LSN.[20] It was not intended to be an accurate representation of the size of the ultimate collection.

In the final analysis, Nevada maintains, the DOE motion rests on little more than speculation and conjecture. Nevada purports to counter all of the factual allegations made against it by DOE and disputes DOE's review of its LSN collection. In its response, Nevada lays out the assertions made by DOE and counters each with its own factual assertion or information omitted by DOE.[21]

III. ANALYSIS

A. In large (if not total) measure, and in contrast to the recent unsuccessful motion of Nevada to strike the DOE certification, the motion now in hand seeks to raise purely factual issues. In essence, DOE asks us to conclude that, as a matter of fact, there must be documentary material in Nevada's possession that should have been, but to date has not been, included in Nevada's document collection placed on the LSN.

Pursuant to 10 C.F.R. § 2.325, the burden of proof rests on the movant. As in the case of any motion resting on assertions of fact, it is reasonable to expect that the movant will buttress it with some concrete evidence, often if not usually supplied in the form of an affidavit or declaration by a person with asserted knowledge of the fact or facts upon which the motion is based. As the movant seeking an order striking Nevada's certification, DOE bears the burden of supporting all points required for such an order. Here, however, no such solid evidentiary showing was even attempted.

We are provided, instead, with little more than the suspicion of DOE counsel, based upon

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[20] *Id.* at 17.

[21] *Id.* at 29-38.

what is offered as circumstantial evidence, that Nevada necessarily must be deemed to have withheld from its LSN collection documents that it was required to include. In short, what we have before us is little more than rank speculation and conjecture. Indeed, to the extent that DOE saw fit to identify particular documents that assertedly had unjustifiably been omitted from the Nevada collection, it has turned out that all three of those documents were, in actuality, already to be found on the LSN.[22] Nor did DOE pursue discovery against Nevada to support its suspicions,[23] request any relief from the Board with respect to conducting discovery, or seek an extension of time to gather support for its motion or to conduct discovery before filing its motion within the time limit imposed by 10 C.F.R. § 2.323(a).

Even if we were to assume that the circumstantial presentation of counsel was sufficient to constitute a *prima facie* case on the otherwise unsupported DOE proposition that Nevada defaulted in carrying out its LSN responsibilities, that assumption does not advance DOE's cause. Any such *prima facie* case has been satisfactorily rebutted in Nevada's response to the motion.

In addition to addressing in the body of that response the underpinnings of the DOE counsel's speculation and conjecture, Nevada attached thereto, *inter alia*, the February 7, 2008 declaration of Susan Lynch in support of Nevada's insistence that it had fully complied with its regulatory obligation to make, in its words, "a good faith effort to create an accurate and complete LSN database."[24] Ms. Lynch is the Administrator of Technical Programs in Nevada's Agency for Nuclear Projects, an assignment that she has held since 1998. Her responsibilities in that position have included the participation in, and the monitoring of, the preparation of

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[22] *Id.* at 12-14.

[23] *See*, *e.g.*, 10 C.F.R. § 2.1018(a)(1)(v).

[24] Response at 1. *See also* Lynch Decl.

Nevada's LSN database.[25] In the course of the declaration, Ms. Lynch sets forth the measures that were taken to ensure that the database was both accurate and complete. We need not freight this decision with a detailed rehearsal of her representations in that regard. Suffice to say, we find in them adequate support for Nevada's rejoinder to the DOE attack upon the Nevada certification that, once again, has a wholly circumstantial foundation.

Additionally, DOE maintains that Nevada's LSN collection is missing certain types of documentary material, including work product from Nevada's experts. What DOE fails to show however, is any evidence that the results of its searches represent the entirety of documents in existence on the LSN. Instead, DOE in effect asserts that it performed certain searches on the LSN and failed to realize desired results. Such assertions, without more, demonstrate only that the entered search terms failed to return any documents, not that the documents do not exist on the database. Documents on the LSN are only required to be identified by participant accession number, document date, document type, and title.[26] The mandatory guidelines for creating a title of a document to be included on the LSN only require that the title be alphanumeric. Because, there is no requirement that the title have any relevance to the document's contents, a search on the LSN for documents by title may be futile. Nevada has sufficiently rebutted DOE's speculation that certain document "types" are missing from the LSN collection by pointing out problems with the search methods used and the absence of any evidence to prove DOE's claims.[27] Given this state of affairs, there appears to be no good reason to conduct any additional exploration of the DOE's claims.

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[25] *See id.* at 2-5. *See also* Lynch Decl. at 1.

[26] *See* LSN Baselined Design Requirements, Release 1.0, Table A (June 5, 2001).

[27] Response at 12-14. Nevada points to DOE's failure to find the three specific documents DOE contends to be missing on the LSN in its motion despite all three documents existing on that database. *See also id.* at 26-28 (detailing DOE's claims of missing documentary material that have no supportive evidence).

To the contrary, to allow DOE now to pursue the matter further through resort to customary discovery procedures would be to countenance what would be little more than an impermissible fishing expedition. Once again, DOE did not request discovery in this matter or an extension of time in order to gather evidence.[28] By the same token, there is no cause for this Board to expend time and effort in continuing to pursue the subject itself. The short of the matter is that, once there has been a reasoned refutation of factual claims of a purely conjectural nature, the need for any further consideration of those claims has come to an end.

B. What is left for consideration is the Dissent's insistence that, for reasons developed at great length, Nevada's 2007 call memo was defective. Specifically, according to the Dissent, that call memo was required to address the retention for LSN inclusion purposes of documentary material that does not support Nevada's position in this proceeding, so called DM-2 documentary material.[29] For two separate and independent reasons, it is patent on analysis that the Dissent is off the mark and provides no justification for the rejection of the Nevada certification.

1. To begin with, it is beyond cavil that the Dissent's attack upon the 2007 call memo raises a host of factual and legal issues that are not encompassed to any extent in the DOE motion. All that is to be found in that 36-page motion with regard to the adequacy of that call memo is one sentence: "the [2007] call memo seemingly advised recipients to omit critical commentary about Nevada's work product and favorable commentary about DOE's."[30] Needless to say, there is absolutely nothing in that passing cursory reference to the call memo that might

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[28] In that regard, we do not need to reach the question of the extent of discovery permissible under 10 C.F.R. §§ 2.1018 or 2.1004 because DOE made no request for any discovery.

[29] *See* 10 C.F.R. § 2.1001.

[30] Motion at 31.

possibly be taken as constituting a specific claim that the memo was deficient for the reasons that are now assigned at such length by our dissenting colleague.[31] Indeed, DOE counsel did not even allude in his opening oral argument to the deficiencies asserted in the Dissent. Rather, they first surfaced in our dissenting colleague's extended interrogation of Nevada counsel during the course of that argument.

In our view, it is not this Board's role in passing upon a motion to raise issues on its own that are not presented to it by the moving party. This is particularly the case where, as here, the movant is represented by experienced and clearly competent counsel. Had that counsel thought that there was a genuine issue regarding the failure of the 2007 call memo to have encompassed some class or classes of documentary material, it is reasonable to have expected counsel to have appropriately raised it. Be that as it may, counsel's election not to have properly presented such an issue, either in the motion or in opening oral argument, provided no license to the Board to raise it *sua sponte*.

2. Moreover, the underpinnings of the Dissent's conclusion regarding the 2007 call memo on the grounds that are now offered reflect a crucial misunderstanding of the different responsibilities DOE and Nevada possess at this pre-application stage.[32] Undergirding the Dissent's argument is its premise that Nevada must be deemed to possess at this juncture DM-2 documentary material (*i.e.*, material that does not support its position). Upon a full consideration

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[31] The Dissent's bald assertion that "DOE's Motion *clearly* challenged Nevada's failure to produce Non-Supporting DM" is *clearly* not supported. LBP-08-05, 67 NRC ___ , ___ (slip op. at 34 n.75) (Apr. 23, 2008) (Karlin, J., Dissenting) (emphasis supplied) [hereinafter Dissent].

[32] The Dissent makes an unsupported finding of fact that the call memo was the key instruction Nevada used in identifying documentary material. Neither party before us has claimed the call memo to be the "key instructions" or "centerpiece" document used by Nevada. Dissent at 17, 24. In fact, Nevada has presented extensive evidence detailing the other documents and memos used as guidance for identifying documentary material. *See supra* nn. 16-17, at 5. Nevada, in its response, clearly states that "the written information Nevada provided to its team reminded them about procedures and training Nevada *had been implementing for several years*." Nevada Response at 4.

of what is required of a potential party in advance of the filing and docketing of DOE's license application, it becomes immediately apparent that the premise is unfounded.

The short of the matter is that, under the regulatory scheme, potential parties (such as Nevada) are not now required to possess, let alone to assert, any litigation position. As a consequence, as a matter of law, Nevada need not at this time produce material that either does or does not support a position. Such material will first exist only after the application is filed and then docketed. At that point, Nevada's obligation to file contentions addressed to the application will surface. With it will arise the need to make publicly available any documentary material in its possession that either supports or counters such contentions as, upon review of the license application, Nevada deems warranted in light of its position in the proceeding reflected by its filed contentions.

It would appear that the source of the Dissent's faulty premise is to be found in the failure to give effect to the regulatory definition of both DM-1 (supporting) and DM-2 (non-supporting) documentary material. DM-1 is "[a]ny information upon which a party . . . intends to rely and/or to cite in support of its *position in the proceeding* for a construction authorization."[33] DM-2 refers to "[a]ny information that is known to, and in the possession of, or developed by the party that is relevant to, but does not support, that information or *that party's position [in the proceeding]*."[34] In short, it is only information that either supports or fails to support a party's "position in the proceeding" that comes within the ambit of DM-1 and DM-2. Yet, manifestly, no potential party (*i.e.*, petitioner) has such a position prior to the institution of the proceeding – an event that

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[33] 10 C.F.R. § 2.1001 (emphasis supplied).

[34] *Id.* (emphasis supplied).

necessarily abides the filing and docketing of the license application and the filing of contentions.[35]

On this point, it need be added only that our view is fully supported by the Commission's decision in *U.S. Department of Energy (High-Level Waste Repository)*, CLI-06-5, 63 NRC 143 (2006), holding that the draft license application did not qualify as documentary material. In rejecting this Board's contrary conclusion, the Commission determined that only the information contained in the final version would constitute such material.[36] It stated that:

> since both Class 1 and Class 2 materials are subject to a 'reliance' criterion, it is not reasonable for any participant to be expected to anticipate all documents that will qualify as either Class 1 or Class 2 documentary material prior to the filing of contentions. In fact, the Commission's stated expectation is that Class 1 and Class 2 documentary material will not be completely identified until *after* contentions are accepted. Thus, it is premature to expect any participant to file a complete set of Class 1 or Class 2 documentary material in the pre-application phase, and the sense of urgency Nevada conveys through its efforts to compel production of the draft

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[35] Again deciding an issue not briefed or raised by any party, the Dissent also takes issue with the "relevancy" test that Nevada's call memo applies to all three classes of documentary material. *See* Dissent at 31-33. Specifically, the Dissent disagrees with Nevada's use of the topics included in Regulatory Guide 3.69 as a relevancy standard for DM-1 and DM-2, as well as DM-3, because only the regulatory definition of DM-3 includes a relevancy test incorporating the Regulatory Guide. The Dissent's literalistic argument, however, fails to recognize that Regulatory Guide 3.69 is essentially a soup to nuts compendium of all topics related to a HLW repository and encompasses the NRC Staff's view of the universe of documentary material deemed relevant to Yucca Mountain. The Commission has indicated that "[t]he purpose of the 'Topical Guidelines' is to inform parties, potential parties and interested governmental participants regarding documentary material to be identified . . . or made available . . . via the LSN." Reg. Guide 3.69 (citing 63 Fed. Reg. 71,729, 71,730 (Dec. 30, 1998)). Furthermore, as explained in Regulatory Guide 3.69, the Commission "indicated when revising the definition of documentary material, non-relevant information could affect the responsiveness and usefulness of the LSN by cluttering the system with extraneous material." *Id.*

[36] The Commission explained that,

> Nevada reasons that the information contained in the draft will be "relied" on by DOE during the proceeding since the information contained in the final and draft license applications will overlap. This argument is no more persuasive here than it was before the PAPO Board. Even though language in a draft license application may be carried over into the final license application, should DOE seek to introduce that material in evidence, DOE will "rely" on the final document, not on earlier versions, to set out its position on the issues.

CLI-06-5, 63 NRC at 151.

license application is misplaced.[37]

As the Commission explained, "'[t]he first two classes of documentary material are tied to a 'reliance' criterion. Reliance is fundamentally related to a position that a party in the HLW repository proceeding will take in regard to compliance with the Commission regulations on the issuance of a construction authorization for the repository.'"[38] Stated otherwise, reliance is tied to a party's *litigation* position "in the proceeding." This being so, Nevada is not legally obligated to produce reliance material, including supporting and non-supporting DM, until it has a "position in the proceeding" by filing contentions.[39]

The Dissent's argument disregards the meaning of the word "position" and the phrase "in the proceeding" as used in the regulatory text defining documentary material. The Dissent argues that Nevada has a longstanding position adamantly opposing the construction and operation of a high level waste geologic repository at Yucca Mountain with the consequence that

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[37] *Id.* at 152 (internal citations omitted). The Commission spoke similarly in the regulatory history, stating that "because the full scope of coverage of the reliance concept will only become apparent after proffered contentions are admitted by the Presiding Officer in the proceeding, an LSN participant would not be expected to identify specifically documents that fall within either Class 1 or Class 2 documentary material in the pre-license application phase." 69 Fed. Reg. at 32,843. The Dissent, ignoring the Commission's recent decision, quotes the next sentence of the regulatory history to the effect that the Commission expects parties to produce all documentary material at the time of initial certification. Dissent at 41. Although the Commission's exortation was meant to encourage the parties to produce as much documentary material as practicable upon certification, it is not a regulatory mandate for Nevada to do so.

[38] CLI-06-5, 63 NRC at 151 n.29 (quoting 69 Fed. Reg. at 32,843).

[39] The Commission further stated that,

> while it is not possible to say there are no special circumstances that would necessitate a ruling by the PAPO on the availability of a particular document in the pre-license application stage based on its Class 1 or Class 2 status, disputes over Class 1 and Class 2 documentary material generally would be of a type that would be more appropriately raised before the Presiding Officer designated during the time following the admission of contentions when the NRC staff is working to complete the Safety Evaluation Report in its entirety.

69 Fed. Reg. at 32,843-44.

it must produce supporting and non-supporting DM-1 and DM-2 documents.[40] Nevada's longstanding displeasure with Yucca Mountain, however, is not its litigation position within the meaning of the word "position" in the regulations. Rather, Nevada's litigation position will be reflected only in the issues raised in the contentions challenging various aspects of DOE's license application. Additionally, with respect to a petitioner, "in the proceeding" is a phrase that relates to the licensing proceeding, and not the pre-application phase. [41] The Commission has recognized that "[t]he LSN will continue to be used for document storage and access after the pre-license application phase closes and the actual *proceeding* commences."[42] It may well be, as DOE insists, that Nevada has drafted preliminary contentions; however, Nevada is not required to place those contentions or any supporting or non-supporting information regarding those contentions on the LSN until they are final.

At bottom, the matter comes down to this: DOE has an obligation to file a license application demonstrating compliance with all the requirements of 10 C.F.R. Part 63 (Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada) and NUREG 1804 (2003) (The Yucca Mountain Review Plan) and to place all three classes of documentary material on the LSN with respect to its licensing application. DOE is required to produce all documentary material necessary to support its burden of meeting all points of the license application. This Board has previously discussed the breadth of DOE's obligation and determined that, "DOE bears the burden to support all points required for a license, and DOE's certification initiates the entire licensing process."[43] On the other hand, Nevada will be

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[40] Dissent at 18, 35.

[41] 10 C.F.R. § 2.1001.

[42] CLI-06-5, 63 NRC at 147 (emphasis supplied).

[43] LBP-04-20, 60 NRC at 315.

filing contentions in response to the license application. Its litigation position in this proceeding will not be determined until it formulates and files its contentions. If there are no final contentions, then as a matter of law, there will be no supporting or non-supporting information. DOE seemingly acknowledged this fact in its 2004 Answer to Nevada's initial motion to strike, noting that disputes over document production are likely and stating that "no rote or formalistic process can identify documents as documentary materials, especially documents that might contain non-supporting information in the absence of concrete contentions – and judgment calls have to be made."[44]

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[44] Answer of the [DOE] to [Nevada's] Motion to Strike at 2 (July 22, 2004). The Dissent also indicts the majority for "using a double standard." Dissent at 25 n.62. As the Dissent would have it, the Board apparently must respond to DOE's instant motion regarding Nevada's certification in the identical manner it responded to Nevada's 2004 motion challenging DOE's initial LSN certification even though their respective responsibilities for producing documentary material are legally distinct. In any event, as even a cursory review of the factual circumstances surrounding DOE's 2004 LSN document collection and initial certification reveals, the situations are a comparison between apples and oranges. *See* Tr. at 1380-83.

Similarly, the Dissent, quoting without attribution one member of the Board from an earlier 2007 argument on an unrelated motion that "[w]hat's sauce for the goose is sauce for the gander," also claims that the regulatory phase "position in the proceeding" must be read to apply identically to DOE and Nevada to avoid the "perverse result" of DOE not having to produce any supporting or non-supporting documentary material until it files its license application because DOE may never file an application. Dissent at 44. As support, the Dissent points to Section 113(c)(3) of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10133(c)(3) (2006) that the Dissent states prohibits DOE from filing a license application if it determines the site is unsuitable for a repository. *Id.* at 43. The Dissent's argument, however, misapprehends the carefully crafted statutory scheme and timing of that statute. Section 113, like its title states, addresses *site characterization*, not the filing of the license application, as the Dissent would have it. The site characterization process to which Section 113 speaks long precedes the site approval process and construction authorization (*i.e.*, license application) that is addressed in Section 114. Under the statutory scheme of the Waste Policy Act, the scheme upon which the Commission's Subpart J regulations are footed in assigning legally distinct responsibilities to DOE and Nevada, the site characterization process must be completed before the site approval process begins and once the site approval process is completed, Section 114(b) mandates that DOE must submit its license application within 90 days. *See* 42 U.S.C. § 10134(b)(2) (2006). Thus, under the sequential process prescribed in the Waste Policy Act, and contrary to the Dissent's assertion, DOE is statutorily required to file a license application once the site approval process has been completed. That action occurred in July 2002, years before DOE certified its document collection under the Commission's regulations. Hence, the Dissent's "perverse result" can only occur with the Dissent's perversion of the provisions of the Waste Policy Act.

IV. CONCLUSION

For the foregoing reasons, the Department of Energy's motion to strike the January 17, 2008 certification by the State of Nevada is *denied*.

It is so ORDERED.

The Pre-License Application
Presiding Officer Board

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

/RA/

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland

April 23, 2008

Further, there are sound practical reasons underlying the regulation's differing treatment of DOE and Nevada at the pre-license application phase. In formulating initial contentions meeting the rigorous schedule set by 10 C.F.R. Part 2, Appendix D, a potential party may be able to make substantial use of DOE supporting and non-supporting documentary material. Conversely, and contrary to the Dissent's unfounded allegations that the proceeding will be delayed and DOE's answers will be stunted, Dissent at 18, 41, such material from a petitioner is unnecessary in opposing the admission of contentions because factual disputes cannot be resolved at the contention admissibility stage. Thus, if a proffered contention is properly supported, other contradictory, non-supporting documentary material is irrelevant to the contention admissibility determination. To be sure, such documents may be highly relevant to the later merits determination but, as we have stated the regulations require that Nevada produce such material after filling its contentions. *See supra* III.B.2., at 11, 14.

Dissent of Judge Karlin

The question presented by the Department of Energy's (DOE's) Motion[45] is a straightforward one: whether the State of Nevada's (Nevada's) January 17, 2008 document production satisfied Nevada's obligation to make "all documentary material" available as required by 10 C.F.R. § 2.1003(a). As the PAPO Board stated in 2004 when it struck DOE's initial document production, this regulation imposes a "rigorous" and "good faith standard," "requiring [each participant] to make every reasonable effort to gather . . . and produce all documentary material at the outset." LBP 04-20, 60 NRC 300, 315 (2004). On the basis of the relevant undisputed facts, I conclude that Nevada failed to comply with 10 C.F.R. § 2.1003(a) and that DOE's Motion should be granted.

As discussed more fully below, the factual basis of Nevada's failure to comply with the regulatory requirement is most clearly illustrated by its "June 2007 Call Memo"[46] – the key instructions that Nevada employed in collecting and producing its documentary material (DM). The June 2007 Call Memo is defective because Nevada used an incorrect, narrow definition of DM that categorically excluded both supporting documentary material (Supporting DM) and *non-supporting* documentary material (Non-supporting DM) – two of the three categories of "documentary material" as that term is defined in 10 C.F.R. § 2.1001.[47] Thus, Nevada's June 2007 Call Memo fails to capture the DM that Nevada should have produced on January 17, 2008.

In addition, Nevada's document production was based on the erroneous premise that

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[45] [DOE] Motion to Strike the January 17, 2008 Licensing Support Network [LSN] Certification by [Nevada] (Jan. 28, 2008) [Motion].

[46] Motion, Exh. H, Call Memo: Important Instructions for Your Compliance with LSN Regulations [June 2007 Call Memo].

[47] DOE raises the under-inclusiveness of the June 2007 Call Memo in its Motion. *Id.* at 31. *See also* Tr. at 1344, 1362-64.

unless and until Nevada submits its final contentions, Nevada has "no position" regarding Yucca Mountain, and therefore Nevada has no documents that "support . . . its position" (Supporting DM) and no documents that "do not support" its position (Non-supporting DM).[48] *See* 10 C.F.R. § 2.1001. As will be shown in Section II.C. below, the No-Position Premise is legally invalid.

Nevada's June 2007 Call Memo and its No-Position Premise render the duty to produce Supporting DM and Non-supporting DM essentially meaningless during the pre-license application phase and will make the contention admissibility phase even more difficult. Any suggestion that Nevada, which has actively opposed Yucca Mountain for more than 20 years and has employed scores of experts to develop its case, has no position in this matter is absurd. The No-Position Premise makes a mockery of the pre-license application discovery period and allows Nevada and all other potential intervenors to stall this proceeding by delaying any disclosure of two-thirds of their DM until after they have filed their contentions.

I. UNDISPUTED FACTS

The relevant facts are not in dispute. Nevada has been involved in opposing the siting of a high-level radioactive waste geologic repository at Yucca Mountain since at least 1985.[49] Some members of the Nevada team have been working on this matter for more than 20 years. Loux Tr. at 3. During the last few years, Nevada has been "getting ready for potential licensing proceedings" and it currently has a team consisting of five lawyers and "40 to 45 scientists and experts in various disciplines." *Id.* at 4-5. These experts come from all parts of the world, including China, the United Kingdom, and the United States.[50] Nevada's team has prepared at

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[48] Motion at 32-34. *See also* Tr. at 1344, 1370, 1375.

[49] Motion, Exh. X, January 15, 2008 Hearing Before Nevada Legislative Committee on High Level Radioactive Waste, Testimony of Robert Loux at 3 [Loux Tr.].

[50] Motion, Exh. E, Nevada's Scientific Experts; *id.*, Exh. D, Petition by the State of Nevada Under Atomic Energy Act Section 274i and 10 C.F.R. § 63.63 for Financial Assistance in the Licensing Review of the Yucca Mountain Nuclear Waste Repository.

least 2000 draft contentions, challenging various aspects of DOE's potential license application. Loux Tr. at 7. As Mr. Robert Loux, the Executive Director of the Nevada Agency for Nuclear Projects, recently stated to the Nevada Legislature:

> [We are] developing the framework for challenges or in the NRC parlance, contentions, if you would, which are the challenges to major assumptions or other assumptions by DOE in the project. . . . We're also developing contentions or challenges to DOE's conclusions or assumptions on the whole gamut of various technical issues. These contentions generally are developed in a way that not only has to put forward what our concern or our critique of what DOE's information or position is on an issue, but we also have to reinforce that with our own references, our own research, our own documentation, peer-review journals that we have been published in and the like. . . . These contentions . . . have to be detailed enough so that the reviewers can see exactly what we're challenging, what background information or other information we're using to do that and what information of DOE's we believe is not accurate or incomplete or otherwise not correct in terms of what it's trying to portray or prove. *We currently probably have in the neighborhood drafted a couple thousand contentions, if you would, many more to come*.

Id. at 6-7 (emphasis added). As of 2004, Nevada had spent at least $78 million in its efforts related to Yucca Mountain.[51]

Against this very substantial effort, however, Nevada produced fewer than 4800 documents on the LSN.[52] Although this may seem like a significant number, many hundreds of these documents are unnecessary duplicates and/or non-Nevada documents serving as filler.[53] For example, 153 documents are publicly available transcripts of the NRC Advisory Committee on Nuclear Waste, 68 are publicly available transcripts of proceedings in the U.S. House and Senate, 260+ are documents prepared by DOE and DOE contractors, 389 are publicly available

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[51] Motion, Exh. B, Aff. of Robert R. Loux at 6.

[52] Motion at 1. A March 6, 2008 search of the LSN revealed that Nevada's document production totaled 4758.

[53] Nevada's inclusion of unnecessary duplicates and non-DM would be unremarkable, except for the fact that Nevada spent a major portion of its Response attacking the over-inclusiveness of DOE's October 19, 2007 document production. *See* State of Nevada's Response to DOE's Motion to Strike Nevada's LSN Certification at 5-11, 22-26 (Feb. 8, 2008) [Response].

documents from a separate lawsuit, and 130 are documents from other federal agencies. Motion at 12.

More specifically, it is edifying to review the undisputed facts relating to Nevada's production of e-mails. First, it should be remembered that in 2004, Nevada insisted that DOE review 10 million e-mails and produce the hundreds of thousands of them that met the definition of DM. *See* LBP-04-20, 60 NRC at 321-24. Nevada asserted that such e-mails might reveal difficulties in DOE's position and would produce the unvarnished truth.[54] The PAPO Board granted Nevada's motion, noting pointedly that, although DOE "is not planning to cite or rely on" these e-mails, they could very well be "'nonsupporting' documentary material" that "might very well be of the most importance to persons who may want to question or to challenge" an adversary's position. *See* LBP-04-20, 60 NRC at 323. Indeed, our ruling resulted in DOE's production of some e-mails that Nevada, and some members of Congress, deemed interesting and important.[55]

In stark contrast, Nevada produced an infinitesimal number of e-mails on January 17, 2008. Nevada produced 54 documents that it classified as e-mails, and of these, *only 12 were authored by Nevada* personnel, experts, consultants, and contractors.[56] Even an additional

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[54] *See* Tr. at 18 (quoting Nevada's counsel, Joseph Egan: "[W]e don't care that DOE's not going to cite these emails. . . . We want to cite those emails. The few emails that we've been able to find so far have been incredibly damning to DOE. . . . We want those emails. They're extremely relevant to this proceeding.").

[55] Motion, Exh. C, Statement of Joseph R. Egan Before the House Subcommittee on the Federal Workforce and Agency Organization at 2 ("On August 31 of last year, NRC's Licensing Board granted our request to strike DOE's certification on three separate grounds. Among other things, the Board required DOE to produce all of its "archival" e-mails and perhaps millions of additional withheld records. It is only because of our motion to strike and the Board's inquiry that the e-mails that are the subject of this hearing came to light.").

[56] *See* Motion, Exh. M, Nevada Documents Coded as Doc-Type Email. A March 6, 2008 search of the LSN under the "document type" of "email," "Email," "e-mail," "E-mail," or "electronic mail" and the "information source" of "State of Nevada" produced only these 54 e-mails.

search of Nevada's LSN collection using the word "e-mail" or "electronic mail" in the *title* field revealed only two additional individual e-mails, and a single "document" consisting of a compilation of less than 100 e-mails from Aaron Barkatt, one of Nevada's experts.[57] In short, Nevada's document production included fewer than 114 e-mails from its multi-year, multi-disciplinary, multi-million dollar effort. Nevada never controverted these assertions by DOE.

Nevada's document production also reflects a very small number of documents of any kind (not just e-mails) to or from Nevada's large team of experts, scientists, attorneys, and others. For example, DOE lists 41 of the addressees of the June 2007 Call Memo, and provides the following chart reflecting a search of the LSN of Nevada's bibliographic headers for documents authored by, or sent to, these individuals:

Name	Author	Addressee
Marta A. Adams	3	0
Lindsay Audin	5	0
James David Ballard	13	0
Jimmy T. Bell	1	2
Martin Blunt	0	0
William Briggs	2	0
Jacqueline Bromfield	0	0
Vince J. Colatriano	0	0
Hank (Henry) Collins	3	1
Norma Conway	0	0
Robert J. Cynkar	2	1
Fred Dilger	24	0
Charles J. Fitzpatrick	8	26
Steve Frishman	2	2
Jim Hall	3	0
Robert Halstead	49	5
Judy Hilton	0	0
Merril Hirsh	2	0
Hugh Horstman	0	0
Martin Kelly	0	1
Francis S. Kendorski	2	0
Paul H. Lamboley	1	0
Robert R. Loux	77	33

[57] These facts were easily confirmed by a March 6, 2008 search of the LSN. The two individual e-mails are NEV0002872 and NEV5000009. The compilation of Dr. Barkatt's e-mails is NEV5000105. Motion, DOE Exh. AA, [Series of E-mails from Aaron Barkatt Re: Catholic University Corrosion Data].

Susan Lynch	6	105
Martin G. Malsch	7	5
Simon Mathias	0	0
Stephan Matthai	0	0
Lou McDonald	0	0
Susan Montesi	1	0
Richard C. Moore	3	0
Roger B. Moore	2	0
Michael K. O'Mealia	0	2
Dave Owen	1	0
Jamie Pericola	0	0
Lawrence Phillips	0	0
Marvin Resnikoff	9	0
Antonio Rossmann	2	0
Joe Strolin	1	62
Steve Swanton	0	0
Judy Treichel	3	1
Tom Wigley	0	0

As shown by this chart, it is Nevada's position that *zero* DM of any kind (e-mails, memos, correspondence, or reports) were addressed to 28 of Nevada's team members. Similarly, Nevada indicates that 15 of its team members authored *zero* DM. Eighty percent of the 478 DM listed on the chart is associated with only six of the 41 individuals (Dilger, Fitzpatrick, Halstead, Loux, Lynch, Strolin). Nevada did not dispute the above-referenced facts, and simple searches on the LSN confirm the basic accuracy of DOE's chart.

One example from the above referenced chart is Mr. Steve Frishman. Mr. Frishman, a geologist, is the Technical Policy Coordinator for the Nevada Nuclear Project Agency. Tr. at 1477-78. This is an important position on Nevada's team. *Id.* at 1478. He has served in that position for over ten years and has represented Nevada at LSN-related meetings for twenty years. Motion at 27. Yet according to Nevada, during the last *twenty years*, Mr. Frishman has authored or received *only four documents* that Nevada deems to be DM. Nevada did not dispute this astounding fact.[58] Tr. at 1478.

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[58] DOE's motion is replete with examples of other categories of materials (*e.g.*, graphically oriented materials) where Nevada's document production contains only a tiny number of documents.

Nevada responds not by challenging DOE's factual allegations (*e.g.*, numbers of e-mails, numbers of DM addressed to a specific individual), but by asserting two propositions. First, Nevada asserts that DOE's arguments that there "should be" more e-mails and DM are "pure speculation about Nevada's intentions and missing categories of documents." Response at 1. Nevada argues that, in order to sustain its motion, DOE must cite to specific items of documentary material that Nevada has failed or refused to produce. *Id.* at 12. Nevada asserts that there is "a total absence of *any* evidence or proof" that Nevada failed to produce all of its documents, and that DOE's arguments about the dearth of virtually any documents in major categories (such as e-mails) are speculative and conclusory statements. *Id.* at 26.

The second component of Nevada's response is in the nature of a rebuttal and consists of Nevada's declarations that it has "implemented a good faith effort to create an accurate and complete LSN database." *Id.* at 1. Nevada asserts that "[s]ince 2003, there have been numerous expert 'summits' (meetings of the entire consultant team, attorneys, and Nevada staff); at every one of those meetings a block of time was set aside for the conduct of instruction on the requirements and definitions associated with the LSN and the provision of Documentary Material." *Id.* at 3; Decl. of Susan Lynch ¶ 8 [Lynch Decl.]. Nevada held conference calls and answered questions from its team-members, Lynch Decl. ¶ 9, gave its team-members a copy of the federal regulations, Tr. at 1427, and even gave them a copy of a DOE memorandum concerning its document production. Response at 3.

Nevada's document production effort was anchored by two call memos issued by Joe Egan, one of Nevada's attorneys. The first, entitled "*Important Instructions for Your Compliance with LSN Regulations*," was a short memo issued in July 2004.[59] It consisted of three pages, plus a one-page attachment (a certification form) and directed all distributees to gather and produce their DM.

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[59] Motion, Exh. G, Important Instructions for Your Compliance with LSN Regulations.

The second call memo, entitled "*Call Memo: Important Instructions for Your Compliance with LSN Regulations*," dated June 5, 2007, was much longer and more substantive.[60] It consisted of 23 pages, including a five-page cover memo and four attached exhibits: Exhibit A (a copy of NRC's Regulatory Guide 3.69), Exhibit B (Egan's "Guidelines for Inclusion of Documents in the LSN"), Exhibit C (Egan's "LSN: Specific Examples to Analyze LSN-Worthiness of Documentary Material"), and Exhibit D (a one-page certification). The June 2007 Call Memo was addressed to 64 individuals and was Nevada's most extensive set of instructions on identifying and producing DM. In the next few months, Nevada redistributed the June 2007 Call Memo, and Exhibit C thereto, several times, describing Exhibit C as "a good 'decision tree' tool for determining LSN inclusion or exclusion."[61] It was clearly the centerpiece of Nevada's document collection and production effort.

II. ANALYSIS

The Majority is confounded by what it sees as a factual impasse. *See* Tr. at 1343, 1347, 1349, 1371, 1399, 1400, 1407, 1484-85. On the one hand, the Majority posits that DOE may have made a prima facie case that Nevada's document production was non-compliant. This is shown, *inter alia*, by the fact that, after opposing Yucca Mountain for more than 20 years, Nevada's document production includes only an infinitesimal number of e-mails and a tiny number of any kind of DM to or from its large, and geographically dispersed team of scientists, experts, and lawyers. On the other hand, Nevada submitted written declarations that it

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[60] Motion, Exh. H, Call Memo, Important Instructions for Your Compliance with LSN Regulations; Response, Exh. 18, Call Memo, Important Instructions for Your Compliance with LSN Regulations.

[61] Response, Exh. 19, E-mail from Susan Montesi to Nevada Licensing Team [Montesi E-mail]. *See also* Response, Exh. 20, Nevada [LSN] Procedures at 1 ("Detailed memoranda detailing LSN compliance requirements were sent by Mr. Joe Egan on July 29, 2004 and June 5, 2007. 'Decision tree' and question and answer documents were circulated to every member of the team."); Response, Exh. 21, Memorandum from Charles J. Fitzpatrick to Area Certification Managers of Nevada's Licensing Team (re-circulating the 2004 and 2007 call memos and the "Decision Tree analysis tool" (Exh. C to the June 2007 Call Memo)).

conducted a good faith search for documents it intends to rely on. The Majority thinks that this rebuts DOE's case and concludes that it must deny DOE's motion on the ground that it failed to carry its burden of persuasion.[62]

I respectfully disagree. In my opinion, there is no factual impasse because Nevada's rebuttal is completely off the mark. The undisputed facts show that Nevada's search, training, instructions, and production, and thus its entire rebuttal, are founded upon Nevada's definition of "documentary material," which, as a legal matter, is fundamentally flawed. Nevada's June 2007 Call Memo, Nevada's Response, and the declarations of Mr. Fitzpatrick and Ms. Lynch, systematically exclude entire categories of Non-supporting DM and Supporting DM. In addition, there is no dispute that Nevada's document production is based on its No-Position Premise that, until it files contentions, Nevada has No-Position and therefore it can have no DM that supports its (non-existent) position and no DM that does not support its (non-existent) position. For the reasons stated below, the No-Position Premise is legally incorrect.

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[62] Assuming arguendo that the pleadings and exhibits present certain factual issues, there is no reason why this should paralyze the Board. We were not supine in 2004, when Nevada's July 2004 motion to strike DOE's initial certification raised numerous factual issues. Instead, within 48 hours, and without waiting for DOE's answer, the Board issued a set of factual interrogatories to DOE. Memorandum and Order (Regarding State of Nevada's July 12, 2004 Motion) (July 14, 2004) (unpublished). Five days later, the Board fired off another set of factual interrogatories to the LSN Administrator. Memorandum and Order (Directing [LSN] Administrator to Respond to Questions) (July 19, 2004) (unpublished). Next, the Board ordered the LSN Administrator to attend the oral argument on Nevada's initial motion to strike, and we interrogated and took factual testimony from the LSN Administrator. Tr. at 91.

Today, in stark contrast, the Majority chooses not to pursue numerous and readily available avenues to help resolve the supposed factual issues that stymie it. A short set of interrogatories could be sent to Nevada. Two or three of Nevada's key team members could be questioned under oath, either by this Board or by DOE. Instead, the Majority does nothing except to suggest that DOE could have pursued some form of discovery and having failed to do so, DOE failed to satisfy its burden of persuasion. This is erroneous on several levels. First, the regulations *plainly prohibit the parties from using interrogatories and depositions* (the discovery tools used *by the Board* in 2004) during the pre-license application period, absent special dispensation (which could not have been obtained within the 10 days that DOE's motion to strike was due). *See* 10 C.F.R. § 2.1018(a). Second, if the Board had taken this laissez-faire attitude in 2004, we certainly would never have discovered the significant gaps in DOE's 2004 document production and our ruling would have been very different. The Majority is using a double standard.

If the net is torn, then, even if it is cast in good faith, most of the fish will escape. Just so, since Nevada's net for gathering and producing "documentary material" is inconsistent with the regulatory definition, it allowed large swaths of DM to escape. Under its misguided legal interpretations, Nevada produced virtually no e-mails nor any document (other than Class 3 DM) that it did not affirmatively intend to cite. Nevada's earnest declarations of instructions, meetings, and document gathering are for naught if Nevada used the wrong criteria. Nevada's declarations of compliance do not rebut DOE's prima facie case. A document production based on a fundamentally flawed definition of "documentary material," even if is implemented in good faith, simply does not comply with 10 C.F.R. § 2.1001.

A. *Deficiencies in Nevada's June 2007 Call Memo*[63]

The best way to illustrate the significant legal errors in Nevada's document production is to compare Nevada's June 2007 Call Memo to the regulatory definition of "documentary material." The regulation states, in pertinent part:

> Documentary material means:
> (1) 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 [Supporting DM]
> (2) Any information . . . that is relevant to, but does not support that information or that party's position, [Non-supporting DM] and
> (3) All reports and studies . . . relevant to both the license application and the issues set forth in the Topical Guidelines in Regulatory Guide 3.69, regardless of whether they will be relied on and/or cited by a party [Reports and Studies DM].

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[63] Rather than confronting the legal defects in Nevada's June 2007 Call Memo, the Majority dismisses these considerations on the grounds that I have raised these matters *sua sponte*. This concern is misplaced. First, these issues are not raised *sua sponte* because DOE certainly challenged Nevada's exclusion of non-supporting material, its overly narrow criteria for DM, and its No-Position Premise. *See e.g.*, Motion at 31, 32-34. Second, the Board's reticence seems inconsistent with our approach in 2004 when critical portions of our decision to grant Nevada's motion to strike were based on regulatory analyses never mentioned in Nevada's motion (*e.g.*, LBP 04-20, 60 NRC at 316-24 [Sect. III. C. 1 "Document Texts Withheld Pending DOE's Unfinished Privilege Review" and Sect. III. C. 2 "Archival E-mails"]).

10 C.F.R. § 2.1001. Each party and potential party is required to produce all of its extant documentary material on the LSN when it initially certifies. 10 C.F.R. § 2.1003(a); *see also* LBP-08-01, 67 NRC __ (slip op.) (Jan. 4, 2008).

1. *Call Memo Exclusion of Non-Supporting DM*

Nevada's June 2007 Call Memo is riddled with errors in its interpretation of Non-supporting DM. All of these errors serve to omit and categorically exclude Non-supporting DM.

First, the June 2007 Call Memo uses an overly narrow "relevance standard" for Non-supporting DM because it instructs that the Non-supporting DM must be "*relevant under Reg. Guide 3.69*."[64] This is incorrect and contrasts sharply with the plain words of the regulation, which call for the production of any document that contains information that is "*relevant to*, but does not support, [Nevada's] *information or . . . position*."[65] It would be an easy matter for Nevada's experts to follow the simple regulatory language and to identify documents that are relevant (pro or con) to their *positions*. Instead the June 2007 Call Memo obscures the situation by referring to Reg. Guide 3.69. This is not what the regulation states, not what was intended, and substantially narrows the universe of Non-supporting DM.

The Commission has clearly stated that the "broad scope" of the term documentary material is "intended to provide document discovery rights similar to that normally available in NRC licensing proceedings." 66 Fed. Reg. 29,453, 29,460 (May 31, 2001). The LSN must be populated with Non-supporting DM "*during the pre-application phase*." *Id.* at 29,460 n.3. Contrary to Nevada's June 2007 Call Memo, the Commission says that Non-supporting DM is relevant if it has "*any possible bearing*" on a party's supporting information or a party's position:

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[64] Response, Exh. 18B, Guidelines for Inclusion of Documents in the LSN [Nevada's Guidelines].

[65] 10 C.F.R. § 2.1001 (emphasis added). Non-supporting DM is a document that contains information that does not support the producing party's position or *does not support its information*. LBP 04-20, 60 NRC at 312 n.22.

> DOE and the other participants remain responsible for incorporating all their "documentary material" that meets the requirements of that definition in § 2.1001, including material that is relevant to, but does not support, DOE positions in the high-level waste repository proceeding . . . Because the LSN will be populated during the pre-application phase of the proceeding before there are any party "contentions" defining the matters in controversy, whether this section 2.1001 "documentary material" is "relevant" *must necessarily be defined in terms of whether it (1) has any possible bearing on a party's supporting information or a party's position* for which the party intends to provide supporting information.

Id. (emphasis added). The June 2007 Call Memo uses a relevance standard for Non-supporting DM that clearly fails to meet the regulatory requirements.

The June 2007 Call Memo's treatment of Non-supporting DM is too limited for other reasons as well. For example, the memo only calls for documents that contain information "which does not support Nevada's *position*." Nevada's Guidelines at 2 (emphasis added). In contrast, the regulation defines Non-supporting DM as documents containing information that does not support Nevada's *information* or position. Calling for documents that are relevant to A, is *necessarily* more restrictive and narrower than calling for documents that are relevant to A or B.

The phrase "that information" in the regulatory definition of Non-supporting DM must be given meaning and cannot be presumed to be superfluous. Nevada's omission of the phrase "that information," improperly narrows the scope of its net.

Perhaps the most obvious legal defects in Nevada's call for Non-supporting DM are found in the ten examples that Nevada provides in Exhibit C to its June 2007 Call Memo. Nevada calls these examples its "'decision tree' tool for determining LSN inclusion or exclusion." Montesi E-mail; *supra* note 17, at 8. In each example, Nevada gives hypothetical facts relating to a given situation or document, and then Nevada applies its criteria for determining whether the document constitutes DM.

Example D from Nevada's decision tree illustrates the problem. The assumed facts of Example D are as follows: "Mike Thorne is asked to give his opinion regarding the likely criticality factors involved with a nuclear waste rail cask which falls off a bridge and is submerged in the

Mississippi River."[66] Dr. Thorne gives his opinion in a "final report." *Id.* Nevada's entire analysis as to whether the hypothetical report qualifies as Non-supporting DM is as follows: "There is nothing substantive in the document which does not support Nevada's position or is likely to be used by DOE or another party. Therefore, not DM-2." *Id.* This is a non-sequitur, because the hypothetical facts do not indicate the contents of Dr. Thorne's report. *Nothing* in the Example D hypothetical provides a basis to conclude that "there is nothing substantive in the document which does not support Nevada's position." Dr. Thorne's report may contain information that supports Nevada's position. It may contain information that non-supports Nevada's position. We do not know. Therefore, Nevada's answer regarding Non-supporting DM is *necessarily* wrong. The only correct answer to Example D is that, from the facts provided, it *cannot be determined* whether Dr. Thorne's report qualifies as Non-supporting DM. Nevada's fiat that Dr. Thorne's report contains no non-supporting information would cause the 64 distributees of the call memo to fail to identify and produce Non-supporting DM.[67]

The problem is compounded by the fact that all ten of the examples in Nevada's decision tree repeat the same error. In all ten examples, the hypothetical facts are silent as to the contents (supporting or non-supporting) of the document. Yet in all ten, Nevada categorically concludes that "there is nothing substantive in the document which does not support Nevada's position" therefore it is "not DM-2."[68] This is logically and legally erroneous.

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[66] Response, Exh. 18C, LSN: Specific Examples to Analyze LSN-Worthiness of Documentary Material at 2 [Documentary Material Examples].

[67] Note that the June 2007 Call Memo operates on the assumption that Nevada has a position. This is inconsistent with its later, No-Position Premise and the Majority's conclusion that, until Nevada files its contentions, it has no "position in the proceeding."

[68] *See* Documentary Material Examples at 1-5. The ten examples use virtually the same language in their conclusory statement that none of them constitute Non-supporting DM. For example, Example C states "There is nothing in the emails which is not supportive of Nevada's position or is likely to be used by DOE or another party. Therefore not DM-2." Example D is cited above. Example E states "There is nothing in the document which is not supportive of Nevada's position or is likely to be used by DOE or another party. Therefore not DM-2."

The result of these errors is clear. *All* of Nevada's examples *exclude* Non-supporting DM. Apparently, Nevada can conceive of no example where a document contains information "which does not support Nevada's position." The June 2007 Call Memo, both by its methodology and results, categorically concludes that Nevada has no Non-supporting DM. This categorical exclusion goes a long way toward explaining why Nevada's document production contains so few e-mails or other documents from its large team.

2. *Call Memo Omissions of Supporting DM*

The ten examples in Exhibit C to the June 2007 Call Memo also significantly misconstrue the definition of Supporting DM. Again consider Nevada's *Example D*: "Mike Thorne is asked to give his opinion regarding the likely criticality factors involved with a nuclear waste rail cask which falls off a bridge and is submerged in the Mississippi River." *Id.* at 2. Dr. Thorne expresses his opinion in a "final report." *Id.* Applying its test as to whether the final report is Supporting DM, Nevada's analysis is as follows: "Nevada will rely on Dr. Thorne's final reports or contentions in the licensing proceeding, as well as his oral testimony, but *not* this *document*. Therefore not DM-1." *Id.* (first emphasis in original, second emphasis added).

The flaw in Nevada's logic is immediately obvious. The regulation defines Supporting DM (or, as the June 2007 Call Memo refers to it, "DM-1") as *information* that the party will rely on. *See* 10 C.F.R. § 2.1001. If a final document contains *information* that Nevada will rely on, then it is DM even if Nevada does not intend to cite or rely on that particular *document*.

Nevada makes the same error with regard to its e-mails. In *Example G*, the hypothetical facts are "Bob Loux asks Steve Frishman to comment on Mike Thorne's criticality report, and he does so by email." Documentary Material Examples at 3. Applying its test as to whether Mr. Frishman's e-mail is Supporting DM, Nevada states: "Nevada will not rely on Steve's email in the licensing proceeding. Therefore not DM-1." *Id.*

Example F is identical to the conclusion for Example C.

Again, incorrect. The question is not whether Nevada will cite or rely on the specific document, *i.e.*, the e-mail itself. A party almost never cites its own e-mails as documentary support for its litigation position (and any such criterion would operate to exclude all e-mails).[69] The question is whether the e-mail *contains information* that Nevada intends to rely on.[70] If so, the e-mail is Supporting DM and must be produced. The error in Example G would cause Nevada to fail to produce any e-mails that contain information that support its position. This also helps to explain the infinitesimal number of e-mails in Nevada's document production.

3. *Call Memo Imposition of Additional Exclusionary Criterion*

The June 2007 Call Memo suffers from another defect: it excludes *all* documents (not just Non-supporting DM as discussed above) unless they are deemed relevant to Reg. Guide 3.69. Nevada imposes this test as one of its three mandatory tests for *all* DM[71] and repeatedly states that unless a document meets all three tests, it must be excluded from Nevada's document production.[72] However, the regulation only uses this test – relevance to Reg.

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[69] When DOE consulted Nevada about the dearth of e-mails, Mr. Shebelskie stated that Nevada's "responses were invariably, *e-mails are not documentary material*, we are not citing or relying on e-mails, and we don't have to give you any further information. We are not here for you to conduct discovery." Tr. at 1356 (emphasis added).

[70] If, as the Majority concludes, Nevada has no position in the proceeding because (a) there is no "proceeding" and (b) Nevada has not filed any contentions, then the documents it intends to rely on should also be a null set.

[71] Nevada's three tests are: (1) Is the document relevant to Reg. Guide 3.69? (2) Does the document meet the definition of documentary material? And (3), is it (not) a preliminary draft? Nevada's Guidelines at 1-2.

[72] The "Guidelines which we have prepared . . . articulate three practical tests of LSN-worthiness, *all three* of which must apply or else the document in question may be omitted from the LSN." June 2007 Call Memo at 2 (emphasis in original). "Please bear in mind that any documents you have . . . will *only* be required to be sent to Susan Lynch for inclusion on the LSN if they first *pass all three* of the tests." *Id.* (emphasis in original), "The document must be included in the LSN only if it passes all three of the following tests." Nevada's Guidelines at 1 (emphasis in original).

Guide 3.69 – with regard to the third category of DM and plainly it is not used for the other two categories of DM.

The third part of the definition of DM covers "[a]ll reports and studies . . . *relevant to* both the license application and the issues set forth in the Topical Guidelines in *Regulatory Guide 3.69*, regardless of whether they will be relied on and/or cited by a party." 10 C.F.R. § 2.1001 (emphasis added). This is the only place where Reg. Guide 3.69 is cited. In contrast, the first part of the definition of DM contains *no* relevance standard, and needs none. The first part of the definition of DM – Supporting DM – requires the production of all documents that contain information upon which the party "intends to rely and/or to cite in support of its position." *See* 10 C.F.R. § 2.1001. If it meets this criterion, it is DM and must be produced, regardless of whether it is relevant to Reg. Guide 3.69. While there is an overlap between information that a party "intends to rely and/or to cite" and information that is "relevant to Reg. Guide 3.69," these tests are not identical. Nevada's interpretation (and by extension, the Majority's acceptance thereof) makes a hash out of the regulatory language. It moots most of the definition of Supporting DM. This is inconsistent with the plain language of the regulation and is contrary to proper rules of regulatory construction.

As discussed above, Nevada's imposition of "relevance to Reg. Guide 3.69" as a universal criterion for its document production makes even less sense when compared to the second category of DM – Non-supporting DM – which has its own, entirely different relevance standard. The regulation specifies that the document must contain information that is "relevant to, but does not support, that information or that party's position." 10 C.F.R. § 2.1001. This plain language is broader than, and clearly not the same as, "relevant to Reg. Guide 3.69,"[73] and

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[73] Again, while information that is "relevant to, but does not support, that information or that party's position," 10 C.F.R. § 2.1001, may also be "relevant to Reg. Guide 3.69" (Nevada's substitute relevance standard), these criteria are clearly not identical and the difference is not innocuous. The regulatory language is the lodestar, and it is clearly broader.

violates the Commission's instruction that Non-supporting DM includes documents containing information that has **"***any possible bearing* on a party's supporting information or a party's position." 66 Fed. Reg. at 29,460 n.3 (emphasis added). In contrast, Nevada's mis-interpretation narrows the universe of DM and makes the regulatory language concerning Non-supporting DM superfluous.[74]

B. *Nevada's Declarations Omit All Reference to Non-Supporting DM*

Having concluded that Nevada's June 2007 Call Memo leaves gaping holes in Nevada's document collection criteria, instructions, and document production, it is clear that Nevada's declarations in rebuttal miss the central point.

The inadequacy of the rebuttal is demonstrated by the narrow and carefully caged wording of Nevada's declarations. Nevada declares that its expert consultants were repeatedly cautioned that "anything they might possibly eventually *rely on* in forming opinions or writing reports or testifying in connection with the licensing proceeding must be on the LSN." Response, Charles J. Fitzpatrick Decl. ¶ 12 [Fitzpatrick Decl.] (emphasis added). Likewise, Ms. Lynch speaks only of DM that Nevada's experts might "*rely on*." Lynch Decl. ¶ 6 (emphasis added).

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[74] The June 2007 Call Memo suffers from additional legal errors that result in the improper narrowing of the scope of Nevada's search for, and production of, DM. For example, Nevada over excludes certain "duplicates." Although Nevada submits hundreds of duplicates of DOE documents (*e.g.*, violates its own warning against loading the LSN with unnecessary duplicates), when it comes to *documents created by Nevada's own experts*, it fails, in violation of the regulations, to include them in Nevada's document production. The regulations allow a party to exclude duplicates *only in one circumstance*, where the DM "has *already been made available by the potential party . . . that originally created the document*." 10 C.F.R. § 2.1003(a)(1) (emphasis added). But when DOE pointed out that Nevada had only produced 34 documents authored by Nevada's expert, Dr. Aaron Barkatt, Nevada responded that since DOE had already produced another 70 documents authored by Dr. Barkatt, Nevada was not required to produce these "duplicates" on the LSN. Response at 30. This is plainly incorrect and not what the regulation says. A party cannot decline to produce a document that it "originally created" on the ground that some other party has already produced it. One good reason for this rule is to double-check the diligence of a party's production of its *own* documents, and to provide some assurance that the party indeed produced all of its DM. Nevada's failure to produce all of the documents generated by its expert, Dr. Barkatt, violated the plain language of 10 C.F.R. § 2.1003(a)(1).

Nevada's Response alleges that it repeatedly instructed its experts to gather and produce "anything which they might possibly eventually *rely upon*." Response at 3.

Conspicuously absent from Nevada's Response and declarations is any suggestion that it gathered and produced Non-supporting DM. Nevada's counsel acknowledged that his declaration did not address Non-supporting DM.[75] Tr. at 1452.

The conspicuous failure of Nevada's Response and declarations to assert that Nevada gathered and produced all of its Non-supporting DM is understandable, perhaps even necessitated, given that Nevada's June 2007 Call Memo categorically excluded Non-supporting DM, and, as discussed below, Nevada's No-Position Premise would free Nevada of the duty to file any Non-supporting DM until Nevada files it contentions.

The point is simply that Nevada's Response and declarations miss the boat. They focus solely on what Nevada intends to rely on, and scrupulously avoid any mention of Non-supporting DM. Nevada fails to address, much less rebut, a most critical part of DOE's Motion.

C. *Nevada's No-Position Premise*

In addition to the above-stated errors in the June 2007 Call Memo and the glaring omissions in Nevada's rebuttal declarations, it is not disputed that Nevada's document production was based on the No-Position Premise, *i.e.*, that unless and until Nevada submits its final contentions, Nevada "cannot possibly" know what its "position" is regarding Yucca Mountain, and therefore Nevada has no Supporting DM and no Non-supporting DM. This premise is legally incorrect. In addition, given Nevada's long and substantial opposition to Yucca Mountain and the fact that it has already drafted 2000 contentions, the No-Position Premise is factually absurd. This premise suspends the production of Supporting and Non-supporting DM

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[75] Counsel for Nevada stated that Nevada's declarations only focused on DOE's "accusations" and that DOE had not accused Nevada of failing to produce Non-supporting DM. This is incorrect. DOE's Motion clearly challenged Nevada's failure to produce Non-supporting DM. Motion at 31.

until after contentions are filed. Such *suspended animation* is inconsistent with the language and history of the regulation. Acceptance of the No-Position Premise vitiates pre-license application discovery against any party except DOE, and creates a fundamentally unfair double-standard for document production.

Nevada raises the No-Position Premise in several ways. Nevada first raised this premise in its appeal of the PAPO Board's denial of Nevada's motion to strike DOE's October 19, 2007 document production.[76] In that pleading, Nevada contrasted itself with DOE, "who has . . . been working for years on a license application," and thus should be required to produce documents it intends to rely on. Nevada Appeal Brief at 25. Nevada (disregarding the fact that it, also, has been working on its position for years) asserted that it "cannot possibly know for the most part what it will cite or intend to rely upon." *Id.* Nevada adds that "it has not even seen critical documents upon which DOE will rely and so cannot possibly identify what it will rely upon." *Id.* at 26. The necessary corollary to Nevada's theory is that it "cannot possibly" identify and produce any Non-supporting DM.

Nevada's Response to DOE's Motion reiterates the No-Position Premise: "it is difficult at this stage to pinpoint Nevada's licensing position." Response at 4. Further, when DOE attempted to consult with Nevada before it filed its motion, Nevada's response was reported as "because we have nothing finalized [*i.e.*, the 2000 draft contentions], we don't know what our positions are until we have the license application." Tr. at 1360-61.

1. *Nevada's Draft Contentions Constitute "Positions" Sufficient for Identification of Supporting DM and Non-Supporting DM*

As an initial matter, Nevada's assertions that it currently has no position or positions with regard to the DOE plan to license and operate a high level radioactive waste disposal facility at Yucca Mountain, Nevada is not credible. Nevada has been involved in, and opposed to, DOE's

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[76] *See* Motion at 32 (citing [Nevada's] Notice of Appeal from the PAPO Board's January 4, 2008 and December 12, 2007 Orders (Jan. 15, 2008) [Nevada Appeal Brief]).

plan for more than 20 years. Nevada has a team of "40 to 45 scientists and experts" working on this matter. Nevada's experts have drafted at least 2000 contentions which constitute positions challenging various aspects of DOE's technical approach and impending license application. Each of these draft contentions represents some degree of analysis, investigation, and/or research by Nevada and its team into some aspect of DOE's plan. Each draft contention necessarily represents a position challenging some aspect of DOE's proposal.

The record illustrates that Nevada's draft contentions are not vague and idle musings, but instead reflect that Nevada's experts have studied DOE's science, assumptions, models, or positions and has developed specific and substantive challenges to them. The following is a representative sample of Nevada's draft contentions (as revealed by the 37 that are in the record):

> 1. DOE has failed to consider the genetic mutations of microbiological organisms by radiation in the near-field environment outside of the zone of radiation-induced sterility. This zone of sterility is relatively large at first, but decreases as waste radionuclides decay over time. The radiation field will likely allow specific species to metabolize that might thrive in less aggressive environments. [Brenda Little is providing some literature on this, especially from Three Mile Island.] Changes in the microbiological community due to near field environmental conditions may contribute to MIC reactions and may contribute to abnormal hydrogeochemistry.
>
> * * * * *
>
> 7. DOE's current testing of EBS materials (specifically alloy C-22) under submerged and sub-boiling conditions in ground water (J-13) is non-conservative and unrealistic. Poor choice of environmental conditions used for C-22 testing.
>
> * * * * *
>
> 15. Diffusion in the vadose zone as calculated by the DOE is based upon a dual permeability system in the welded tuffs, upon porous flow characteristics of the matrix using a sand aquifer model, and is not site specific. It is wrong. Radionuclide retardation, as a function of diffusion, has been calculated by the State of Nevada to be orders of magnitude less than calculated by the DOE.
>
> * * * * *
>
> 31. Measured Eh's of saturated zone waters are non-representative because they

> may represent an average or mixed state or only the dominant redox couple. This arises due to the diluteness of the solutions and for kinetic reasons.[77]

Even though these are only draft contentions, two things are clear. First, each draft contention reflects a concrete position. Second, each draft contention is founded upon some supporting information, analysis, or scientific theory.[78] For example, draft contention 1 asserts that the "zone of sterility is relatively large at first" and that the "radiation field will likely allow specific species to metabolize that might not thrive." Documents containing information that support these assertions would be Supporting DM. Documents that contain information that undermines or tends to contradict these assertions would be Non-supporting DM. It is ludicrous to suggest that these draft contentions are so vague that Nevada "cannot possibly identify what it will rely upon," Nevada Appeal Brief at 26, and cannot identify information that supports and non-supports these draft contentions.

Nevada emphasizes that its 2000 draft contentions are not final contentions or even circulated draft contentions. Response at 18; Fitzpatrick Decl. ¶¶ 2, 3. This is a red herring. DOE is not asserting that the draft contentions are, themselves, DM that must be produced under 10 C.F.R. § 2.1001. *See* Tr. at 1361. The point is *whether the draft contention, in its current form, is sufficient to allow a party to identify* those documents that contain information that supports the draft contention and documents that do not support the draft contention. There can be no doubt that Nevada's 37 draft contentions contained in DOE Exhibit P meet this criterion.

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[77] Motion, Exh. P, Progress Reports at P18-23 (listing "Contentions" by "GMII and Dr. R. W. Staehle" from the Nov. 2003 Progress Report) (emphasis in original deleted).

[78] Counsel for Nevada characterizes the 37 draft contentions as "pure off the hip shot[s]" and a mere "afternoon's work" for one person. Tr. at 1471. Perhaps so. Nevertheless, even if the drafting of these 37 contentions may only have taken a day, they appear to represent a considerable amount of prior analysis and thought and imply the existence of supporting scientific work, documents, and information.

Nor is it relevant that Nevada's 2000 draft contentions are not accompanied by a substantiation of the six elements required by 10 C.F.R. § 2.309(f)(1)(i)-(vi). It is clear that Nevada's 37 draft contentions are as "specific" as many contentions that have been regularly admitted by Licensing Boards in the past.[79] They satisfy the only regulatory requirement that is even remotely relevant here, the requirement to provide a "specific statement of the issue of law or fact to be raised or controverted." 10 C.F.R. § 2.309(f)(1)(i). While Nevada cannot put the final touches on its contentions (*e.g.*, provide "references to specific portions of the application" per 10 C.F.R. § 2.309(f)(1)(vi)) until DOE submits its license application, these details are irrelevant for purposes of Nevada's production of DM, so long the draft contentions are clear enough to permit the identification of Supporting and Non-supporting DM. *See* Tr. at 1492-93.

[79] Examples of admitted contentions that satisfied the requirement to provide a "specific statement of the issue of law or fact to be raised or controverted," per 10 C.F.R.§ 2.309(f)(1)(i), and that are equivalent to, or less specific than, the 37 Nevada contentions, include the following: *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 77-80 (2004); *Exelon Generation Company, LLC* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 252 (2004); *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 276 (2004); *Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station) [Uprate], LBP-04-28, 60 NRC 548, 580 (2004); *Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), LBP-06-7, 63 NRC 188, 211 and 217 (2006); *Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station) [Renewal], LBP-06-20, 64 NRC 131, 183, 187, and 192 (2006); *Shieldalloy Metallurgical Corporation* (Licensing Amendment Request for Decommissioning of the Newfield, New Jersey Facility), LBP-07-05, 65 NRC 341, 357-58 (2007).

2. *Nevada's Document Production Should Not Be Held in Suspended Animation Until Nevada's Contentions are Filed (and Admitted)*

Given that the current drafts of Nevada's contentions (a) represent specific positions, and (b) are clear enough to allow the identification of DM that supports and non-supports those positions, it is necessary to address what I refer to as the "suspended animation" argument. This is the argument that, despite the fact that Nevada has drafted "a couple thousand contentions" with "many more to come," Loux Tr. at 7, Nevada still does not have a position or positions in this matter because each draft contention is subject to change and may not even be filed in this proceeding. Under this theory, Nevada's position(s) is suspended *until* it files its contentions.[80] The suspended animation approach is inconsistent with the reality of Nevada's active involvement in this matter, inconsistent with the language and purpose of the regulations, and imposes a double-standard.

In reality, Nevada has been opposing and working on its positions concerning Yucca Mountain for many years and it is highly unlikely that, after 20 years, there will be some startling new science, assumptions, or information that causes Nevada to significantly change its positions on these issues. Nevada's 2000 draft contentions are based on a multi-year, multi-million dollar effort by many experts. Nevada is not an uninvolved bystander who simply wandered into the Yucca Mountain proceeding with no opinion or no position in this matter. Nevada's 2000 draft contentions, as of January 15, 2007, represent their good faith *current* position.

The fact that change happens, *e.g.*, that Nevada's 2000 draft contentions are subject to change, does not vitiate Nevada's initial duty to produce Supporting and Non-supporting DM based on its position(s) as of the initial certification. Certainly, the draft contentions need not remain static and Nevada is currently drafting "many more." Loux Tr. at 7. The scope of

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[80] Another version of this argument is that a party has no Supporting or Non-supporting DM until its contentions are *admitted* by the Presiding Officer.

Nevada's document production will grow. Likewise, if Nevada decides not to proceed with some contentions, or a contention is not admitted, the scope of Nevada's document production can be narrowed. The required production of DM is a function of the potential party's position(s) *as of the date that the production occurs*. *See* Tr. at 1370, 1493. If a position changes, the document production changes. Thus, Nevada's initial document production should have been based on the 2000 contentions it had drafted as of January 17, 2008. Its subsequent document productions may be based on the additional contentions that it develops later. Change does not suspend document production.

As a legal matter, the suspended animation approach violates the letter and spirit of the regulations and the pre-license application discovery period. If Nevada has no position until it files its final contentions, then two of the three categories of DM are utterly meaningless, as applied to Nevada (or any other party, including DOE) during the entire pre-license application phase. *See* Tr. at 1367-68. The No-Position Premise results, categorically, in no Supporting DM and no Non-supporting DM. This flies in the face of the Commission's statement that "the LSN will be populated [with Non-supporting DM] during the pre-application phase." 66 Fed. Reg. at 29,460 n.3.

It is certainly true that "the *full scope* of coverage of the reliance concept will only become apparent after proffered contentions are admitted" and that "disputes over Class 1 and Class 2 documentary material *generally* would be of a type that would be more appropriately raised . . . following admission of contentions." 69 Fed. Reg. 32,836, 32,843-44 (June 14, 2004) (emphasis added). But, this does not mean that parties can *categorically refuse* to produce any Supporting or Non-supporting DM at the time of their initial document production.[81]

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[81] In 2004, DOE argued that the quoted language (69 Fed. Reg. 32,843-44 (June 14, 2004)) meant that the PAPO Board lacked jurisdiction to address Nevada's claim that DOE had failed to produce Supporting and Non-supporting DM because all such issues should only be addressed "following the admission of contentions." Answer of [DOE] to [Nevada's] Motion to Strike at 13 (July 22, 2004). We rejected DOE's argument, ruling that disputes over the

> [T]he Commission still expects all participants to make a good faith effort to have made available all of the documentary material that may eventually be designated as Class 1 and Class 2 *by the date specified for initial compliance* in section 2.1003(a).

69 Fed. Reg. at 32,843 (emphasis added). The suspended animation approach contravenes the Commission's instructions and renders Supporting DM and Non-supporting DM a null set until the party files its contentions.

In addition, the suspended animation approach produces bizarre results. Under this approach, the duty to produce all DM *90 days after DOE certifies*, *see* 10 C.F.R. § 2.1003(a), would be meaningless as applied to two of the three categories of DM (Supporting and Non-supporting DM). The duty to produce such DM would not attach until *at least ten months later*, when all potential parties file their contentions (and the pre-license application phase is over).[82] If Nevada does not provide its Supporting and Non-supporting DM until it files its 2000 contentions, then DOE's answers will be stunted and substantially delayed, because 25 days will not be enough to allow DOE or any other party the opportunity to review all of the new DM and incorporate it into the answers.[83]

The suspended animation approach throws 10 C.F.R. § 2.1012(b) into substantial confusion. Under the regulation, a person may not be granted party status "if it cannot demonstrate substantial and timely compliance with the requirements of 2.1003 *at the time it*

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availability of Supporting and Non-supporting DM are proper during the pre-license application period. LBP-04-20, 60 NRC at 310. Nevada's attempt to use the same language to avoid production of Supporting or Non-supporting DM (on the ground that it does not exist yet) should likewise be rejected.

[82] DOE cannot submit its license application until 6 months after its initial certification. The NRC Staff will then take between 3 to 6 months to docket the application. Potential parties will then have 30 days within which to file their contentions. Six + 3 + 1 = 10 months. If the trigger for producing Supporting and Non-supporting DM is the *admission* (not just the filing) of contentions, then the duty to produce Supporting and Non-supporting DM is postponed even further.

[83] Answers to requests for hearing and petitions to intervene are due 25 days after service of the request for hearing. 10 C.F.R. § 2.309(h).

requests participation in the HLW licensing proceeding under § 2.309." 10 C.F.R. § 2.1012(b)(1) (emphasis added). A potential party must be in "substantial and timely compliance" with its duty to make all DM available *when* it files its contentions and "requests participation." But if a potential party's duty to produce two-thirds of its DM is postponed until it files its contentions, then it is difficult to see how 10 C.F.R. § 2.1012(b)(2) will operate. Instead of addressing and resolving the adequacy of a party's document production and its "substantial and timely compliance" at the PAPO stage, the issue will arise *after* the contentions are filed, at the contention admissibility stage.

It is already very clear that the 70 days allocated by the Commission for decisions on the admission of contentions, 10 C.F.R. Pt. 2, App. D., will be an extraordinarily, if not impossibly, short time period for this task.[84] In this respect, the Majority's decision runs counter to the main purpose of the pre-license application discovery phase – to get the DM on the table and resolve documentary production issues early. The Majority's decision exacerbates the severe time constraints already imposed on the post-PAPO contention admissibility Licensing Board(s).

The Majority endorses Nevada's suspended animation approach by focusing on the definition of Supporting DM as "any information upon which a party . . . intends to rely and/or to cite in support of its *position in the proceeding* for a construction authorization." 10 C.F.R. § 2.1001. The Majority says that "the proceeding" relates to the licensing proceeding not the pre-license application phase, and that "under the regulatory scheme, potential parties (such as Nevada) are not now required to possess, let alone assert, any litigation position.[85] As a consequence, as a matter of law, Nevada need not at this time produce material that either does

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[84] *See, e.g.*, Nevada Response to the [Advisory PAPO] Board's Notice and Memorandum of March 6, 2008 (Requesting Information from Potential Parties) at 2 (Mar. 24, 2008) (a "good faith estimate of the time realistically required to reply to answers is six months").

[85] I agree that the law does not "require" Nevada to have a position. The point is that Nevada, with 20 years of opposition and 2000 draft contentions, does in fact have a position.

or does not support a position." Majority at 11. In contrast, the Majority states that "DOE has a obligation to file a license application" and "is required to produce all documentary material necessary to support its burden of meeting all points of the license application." Majority at 14.

The flaw in the Majority's logic is that until DOE files a license application, there is no "proceeding for a construction authorization for a high-level waste repository" as specified in the regulation upon which the Majority relies so heavily - 10 C.F.R. § 2.1001. According to the Majority, if no "proceeding," then there can be no "position in the proceeding." During this *pre-license application* phase, DOE has neither filed an application nor "assert[ed] any litigation position" in the non-existent license application proceeding. Indeed, if the advice and urging of Nevada is heeded, DOE will never file an application. More to the point, the law prohibits DOE from filing a license application for Yucca Mountain "[i]f the Secretary [of DOE] at any time determines the Yucca Mountain site to be unsuitable for development as a repository." 42 U.S.C. § 10133(c)(3). Even now, there is no assurance that a license application is inevitable.[86]

If the Majority's reasoning –no position in the proceeding (because there is no proceeding) therefore no Supporting or Non-supporting DM – is to be adopted, then it must be applied to DOE as well as Nevada. "What's sauce for the goose is sauce for the gander." Tr. at 1281.

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[86] The Majority argues, at footnote 44, that section 114(b) of the Nuclear Waste Policy Act, 42 U.S.C. § 10134(b) specifies that, because DOE's recommendation of the Yucca Mountain site was approved in 2002, DOE is legally bound to submit an application, even it DOE were to determine that the Yucca Mountain is not suitable for development as a repository. First, the statute specifies that DOE must take terminate activities if DOE "*at any time* determines the Yucca Mountain site to be unsuitable." 42 U.S.C. § 10133(c)(3). The statute goes on to call for DOE to "remove any high-level radioactive waste . . . at or in such site" and "reclaim the site," 42 U.S.C. § 10133(c)(3)(C) and (D), confirming that DOE's determination to halt can occur at any time, even after the license is issued and waste is emplaced at the Yucca Mountain site. Second, it is simply absurd to suggest, that DOE *must* submit an application for Yucca Mountain *even if concludes that the site is "not suitable*," (*e.g.*, fails to meet EPA's yet to be promulgated standards for Yucca Mountain).

The inescapable and perverse result is that, since there currently is no "proceeding," DOE can have no Supporting DM or Non-supporting DM. The Majority's reasoning just excused DOE from producing any Supporting DM and Non-supporting DM unless and until it files its application.[87]

In addition to gutting DOE's duty to produce DM at its initial certification, the Majority's interpretation moots most of our 2004 ruling concerning Supporting and Non-supporting DM. There was no need for DOE to produce any of the hundreds of thousands of e-mails that Nevada demanded in 2004. Postponing DOE's initial production of Supporting and Non-supporting DM until it filed its application completely frustrates the purpose of the pre-license application phase by seriously undermining the ability of potential parties to formulate contentions during the pre-license application phase. But that is the result of the Majority's interpretation of the definition of DM.

For the foregoing reasons, the No-Position Premise and suspended animation approach should be rejected. If the pre-license application discovery period is to mean anything, it must mean that the initial production by each potential party must include the documents containing information that support and non-support its position, as that position exists at the moment the production occurs. Neither DOE nor Nevada should be allowed to evade or delay the production of Supporting and Non-supporting DM on the ground that it has not yet filed a formal "position in the proceeding," or that its position may change. The LSN is to be populated with Supporting and Non-supporting DM during the pre-license application phase and every participant must

[87] DOE attempted to articulate this position. *See* Tr. at 1366.

make a rigorous good faith effort to produce such DM on the date specified for initial compliance. *See* 69 Fed. Reg. at 32,843. As we enforced this rule against DOE in 2004, we should enforce it against Nevada in 2008.

/RA/

Alex S. Karlin
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 23, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing PAPO BOARD MEMORANDUM AND ORDER (DENYING THE DEPARTMENT OF ENERGY'S MOTION TO STRIKE) have been served upon the following persons by Electronic Information Exchange.

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[Original signed by L. Lewis]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
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