

May 5, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

**THE DEPARTMENT OF ENERGY'S BRIEF ON APPEAL
FROM THE PAPO BOARD'S APRIL 23, 2008 ORDER**

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The Department of Energy (DOE) submits this brief in support of its appeal from the decision of a majority of the PAPO Board, *U.S. Dep't of Energy* (High Level Waste Repository: Pre-Application Matters), LBP-08-05, 67 NRC ____ (April 23, 2008), denying DOE's motion to strike the State of Nevada's January 17, 2008 Licensing Support Network (LSN) certification. That decision is erroneous and should be reversed. That decision adopts an interpretation that is contrary to the LSN regulations, has the effect of establishing one document production standard for DOE and another for Nevada, and is not consistent with the schedule established by the Commission for completion of the licensing proceeding in a timely manner pursuant to the statutory direction in § 114 of the Nuclear Waste Policy Act (NWPA).

I. Preliminary Statement

This appeal concerns Nevada's failure to make its documentary material available on the LSN, as required by 10 C.F.R. Part 2, Subpart J. Those regulations, in particular § 2.1003, require each potential party to the Yucca Mountain licensing proceeding to make its documentary material available on the LSN no more than 90 days after DOE's initial LSN certification.¹ Those regulations additionally require each potential party to "establish procedures to implement the requirements in § 2.1003."² A potential participant must certify within the 90-day deadline that it has implemented those procedures and that its documentary material "has been identified and made electronically available" on the LSN.³

Nevada failed to comply with these requirements because, without regulatory authorization, it has unilaterally deferred complete production of two of the three categories of

¹ 10 C.F.R. § 2.1003(a).

² 10 C.F.R. § 2.1009(a).

³ 10 C.F.R. § 2.1009(b).

its documentary material required to be on the LSN. The Commission defined documentary material in terms of three categories of information. Those categories are: (1) any information upon which a potential party “intends to rely and/or to cite in support of its position” in the licensing proceeding [“supporting” or “DM1” information]; (2) any information “that is known to, and in the possession of, or developed by the party that is relevant to, but does not support, that information or that party’s position” [“non-supporting” or “DM2” information]; and (3) certain reports and studies prepared by or on behalf of the potential party.⁴

Nevada has failed to make a substantial, good-faith production of information within the first and second of those categories. Nevada has done so on the asserted ground that it currently has no positions regarding Yucca Mountain and that it “cannot possibly know for the most part what it will cite or intend to rely upon” in the licensing proceeding.⁵ Nevada further claims its purported inability to identify either supporting or non-supporting information will continue at least until it files contentions.

Nevada asserts this “No-Position Premise” even though it has (1) vigorously opposed the proposed repository for decades, (2) had a team of lawyers and experts developing positions for the licensing proceeding for years, and (3) participated in numerous public meetings discussing its positions on technical and scientific issues regarding the repository. Nevada’s No-Position Premise is not valid in light of this record.

A majority of the PAPO Board, in a divided opinion, upheld Nevada’s No-Position Premise and excused Nevada’s failure to make a complete production of documentary material.

⁴ 10 C.F.R. § 2.1001 (definition of “documentary material”).

⁵ The State of Nevada’s Notice of Appeal from the PAPO Board’s January 4, 2008 and December 12, 2007 Orders (January 15, 2008) [Nevada Appeal Brief] at 25.

Central to the majority’s decision is its holding that, “*as a matter of law*, Nevada need not at this time produce material that either does or does not support a position.”⁶ Continuing, the PAPO Board held that “Nevada is not legally obligated to produce reliance material, including supporting and non-supporting DM,” until it files contentions.⁷ “If there are no final contentions,” the PAPO Board held, “then *as a matter of law*, there will be no supporting or non-supporting information.”⁸

As the well reasoned dissent explains in detail, the majority’s holding and the No-Position Premise underlying it are “legally incorrect.”⁹ Contrary to the Commission’s regulations, that holding “suspends the production of Supporting and Non-supporting DM 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.”¹⁰

Moreover, the majority’s holding is inconsistent with the Commission’s intent in adopting the LSN regulations to complete the parties’ document production during the pre-license application phase and very likely will defeat its efforts to meet the NWPA’s three-year deadline for adjudication of DOE’s License Application (LA). If the majority’s holding were allowed to stand, it would delay Nevada’s obligation to produce its supporting and non-

⁶ LBP-08-05, 67 NRC at _____, slip op. at 11 (emphasis added).

⁷ *Id.*, 67 NRC at _____, slip op. at 13.

⁸ *Id.*, 67 NRC at _____, slip op. at 15 (emphasis added).

⁹ *Id.*, 67 NRC at _____, slip op. at 34.

¹⁰ *Id.*, 67 NRC at _____, slip op. at 34-35 (emphasis in original).

supporting information by several months after the time the Commission's regulations prescribe. This delay not only would greatly complicate DOE's ability to meet the Commission's schedule for responding to proposed contentions within 25 days, but also would defer potential challenges to the completeness of Nevada's document production until after the proceeding had commenced.

That schedule disruption would be exacerbated still further if the Commission were to grant Nevada's pending motion to extend the deadline for contentions. Nevada seeks to extend that deadline from 30 days after publication of the notice of hearing, as long prescribed by 10 C.F.R. § 2.309, to 180 days.¹¹ If that extension were granted, the PAPO Board's decision would postpone the production of supporting and non-supporting information by Nevada and all other potential parties until 180 days after the notice of hearing.

The Commission should reverse the PAPO Board majority's April 23, 2008 order. The Commission's regulations require Nevada to undertake a substantial, good-faith effort to identify and make available during the pre-license application phase all its extant documentary material, including its supporting and non-supporting information. Nevada did not do that. Its certification should be stricken until it completes its production. The regulations do not permit Nevada to defer that production obligation until it files contentions.

¹¹ State of Nevada's Motion to the Commission to Establish a Reasonable Schedule for the Filing of Contentions on Yucca Mountain, Docket No. PAPO-00, PAPO-0001, ASLBP Nos. 04-829-01-PAPO, 08-861-01-PAPO-BD01 (April 28, 2008).

II. Background

This appeal arises from the purported LSN certification by the State of Nevada. DOE made its initial LSN certification on October 19, 2007.¹² This triggered, pursuant to 10 C.F.R. §§ 2.1003(a) and 2.1009(b), an obligation on Nevada, as a potential participant in the Yucca Mountain licensing proceeding, to certify compliance with its LSN obligations within 90 days thereafter. Nevada filed a purported certification to that effect on January 17, 2008.¹³

A. Nevada's No-Position Premise.

Nevada signaled on the eve of its LSN certification that its production of documentary material would be substantially incomplete. On January 15, 2008, two days before that certification, Nevada filed a notice of appeal from the PAPO Board's denial of its motion to strike DOE's initial LSN certification. There, Nevada indicated that it would not make a meaningful production of its supporting and non-supporting information with its upcoming LSN certification. Nevada asserted it "cannot possibly know for the most part what it will cite or intend to rely upon," therefore justifying an incomplete production of its supporting and non-supporting information.¹⁴

Nevada's claim that it "cannot possibly know" what it will cite or rely upon in the licensing proceeding—the basis for its No-Position Premise—is not consonant with Nevada's many representations over the years about its preparation for the licensing proceeding. By its own account, "the State of Nevada, specifically the Nevada Agency for Nuclear Projects, has

¹² The Department of Energy's Certification of Compliance, Docket No. PAPO-00, ASLBP No. 04-829-01-PAPO (Oct. 19, 2007).

¹³ The State of Nevada's Certification of Compliance, Docket No. PAPO-00, ASLBP No. 04-829-01-PAPO (Jan. 17, 2008).

¹⁴ Nevada Appeal Brief at 25 & 26.

been engaged in a comprehensive program for monitoring, overseeing, and intervening in the federal Yucca Mountain project” for over two decades.¹⁵ During that time, the Agency has conducted “[m]ajor technical research” as part of “a sustained and concerted research effort to address key technical and scientific issues that are expected to be important to the State’s licensing intervention.”¹⁶ Nevada had received \$78 million from DOE for those efforts as of 2004 (to say nothing of the State funds expended).¹⁷

Nevada has been specifically preparing positions for the Yucca Mountain licensing proceeding since at least 2001. Nevada hired outside licensing counsel on September 11, 2001, and since then has retained upwards of 45 experts for the proceeding.¹⁸ “These experts come from all parts of the world including China, the United Kingdom, and the United States.”¹⁹

¹⁵ Report and Recommendations of the Nevada Commission on Nuclear Projects (December 2006) [2006 Nev. Comm. Report] at 25 (relevant excerpts at DOE Ex. A). Citations to DOE Ex. ___ refer to exhibits accompanying The Department of Energy’s Motion to Strike the January 17, 2008 Licensing Support Network Certification by the State of Nevada (Jan. 28, 2008) [DOE Motion to Strike].

¹⁶ *Id.* at 25 & 32.

¹⁷ Affidavit of Robert R. Loux (March 14, 2004) at ¶ 11 (DOE Ex. B).

¹⁸ Statement of Joseph R. Egan, before the House Subcommittee on the Federal Workforce and Agency Organization (April 5, 2005) [Egan Statement] at 1 (relevant excerpts at DOE Ex. C); January 15, 2008 Hearing Before Nevada Legislative Committee on High Level Radioactive Waste, Testimony of Robert Loux [Loux Tr.] at 4-5 (DOE Ex. X).

¹⁹ LBP-08-05, 67 NRC at ___, slip op. at 18, citing Petition by the State of Nevada under Atomic Energy Act Section 274 and 10 C.F.R. § 63.63 for Financial Assistance in the Licensing Review of the Yucca Mountain Nuclear Waste Repository (May 10, 2004) [Nevada Petition for Funds] at 6 (DOE Ex. D) & “Nevada’s Scientific Experts,” Attachment 1 to Nevada Petition for Funds (DOE Ex. E).

Nevada says these attorneys and experts have been “diligently” preparing a “rigorous, substantive and effective” opposition to the LA.²⁰ According to Nevada, they have been “performing a thorough evaluation of the scientific and legal integrity of the work done by DOE and its contractors at Yucca.”²¹ They have been reviewing the documents DOE has made available on the LSN starting in 2004.²² They have held “numerous expert ‘summits’ (meetings of the entire consultant team, attorneys, and Nevada staff)” since 2003, and they have conducted weekly telephone conferences during the same period.²³

Nevada says it “intensified its work” in “several key areas” starting in 2004 to get ready for the licensing proceeding.²⁴ That intensified effort includes “assembling data and information on key technical issues that will form the basis of Nevada’s prospective challenge to any license application DOE may submit to the NRC for Yucca Mountain and undertaking new research that may be required to support the State’s licensing contentions”²⁵

Nevada’s counsel told the PAPO Board three years ago that Nevada was already preparing contentions in anticipation of the expected content of the LA.²⁶ In fact, Nevada

²⁰ 2006 Nev. Comm. Report (DOE Ex. A) at 31.

²¹ Egan Statement (DOE Ex. C) at 1.

²² *Id.* at 3.

²³ LBP-08-05, 67 NRC at ____, slip op. at 5 n.17, citing Nevada’s Response to DOE’s Motion to Strike Nevada’s LSN Certification (Feb. 8, 2008) [Nevada Response] and accompanying declarations of C. Fitzpatrick and S. Lynch.

²⁴ 2006 Nev. Comm. Report (DOE Ex. A) at 25.

²⁵ *Id.*

²⁶ May 18, 2005 Tr. at 400 (“Judge Karlin: Well, let me ask: are you working on your draft contentions? Mr. Fitzpatrick: We’re trying to do so in anticipation of what’s likely to be suggested.”); *see also* July 27, 2004 Tr. at 29 (Judge Karlin: . . . the State of Nevada has had 15
(continued))

presented a petition for funds to the Commission in 2004. That petition contained a nearly 20-page detailed discussion of positions on a wide range of subject matters that Nevada intends to raise in the licensing proceeding.²⁷ On January 15, 2008—the same day that Nevada argued in its appeal to the Commission that it “cannot possibly know” its positions in the licensing proceeding—the head of the Nevada Agency for Nuclear Projects testified that Nevada already had prepared “a couple thousand” contentions.²⁸

The No-Position Premise is also belied by Nevada’s public participation before technical bodies reviewing the development of the Yucca Mountain repository. Between 2004 and 2006, representatives of Nevada made five technical presentations, complete with PowerPoint slides, to the Nuclear Waste Technical Review Board (NWTRB) on matters relevant to the Yucca Mountain licensing: waste package environments, the proposed EPA radiation standard, drip shields, near-field environments, and container surface corrosion.²⁹ Each of them purported to

years to know that it would be gathering these documents together. It’s not like you’re surprised that you’ve got 90 days to produce these documents. Mr. Egan: That’s correct. . . .”).

²⁷ Nevada Petition for Funds (DOE Ex. D) at 10-30.

²⁸ Loux Tr. (DOE Ex. X) at 7. Nevada tried to minimize Loux’s testimony by arguing that it has not yet finalized contentions in the “official” format required by 10 C.F.R. § 2.309, such as providing citations to the LA. Feb. 28, 2008 Tr. at 1406. That argument misses the significance of Loux’s testimony (as well as the representation by Nevada’s counsel to the PAPO Board three years ago that Nevada was already preparing contentions). Regardless of whether Nevada has fully formatted contentions, Loux’s testimony confirms that Nevada has unquestionably developed an extensive number of positions for the licensing proceeding as a consequence of the work it has done over the years. Loux’s full testimony recited at LBP-08-05, 67 NRC at _____, slip op. at 19, makes this plain.

²⁹ See Morgenstein, “Update of State of Nevada Research on Waste Package Environments in Yucca Mountain” (19 pp.), 25 September 2006, on the NWTRB web site at <http://www.nwtrb.gov/meetings/2006/sept/morgenstein.pdf>; Gilinsky, “Proposed EPA Yucca Mountain Radiation Standard -- Nevada’s Views”, 8 November 2005 (18 pp.), <http://www.nwtrb.gov/meetings/2005/nov/gilinsky.pdf>; Kendorski, Review And Critique Of Drip Shield Concept And Retrieval Concept Planned For The Yucca Mountain Project, Nevada, (continued)

convey Nevada's position, generally critiquing DOE's position. Such presentations axiomatically depend on the existence of relevant "information" as well as a "position." Nevada representatives have also regularly attended NRC-DOE quarterly management meetings and meetings of the Advisory Committee on Nuclear Waste (ACNW). There, Nevada's participation is more typically in the form of stakeholder questions or comments, but those questions and comments reflect, again, a "position" on the issues being discussed.³⁰

Nevada's No-Position Premise is also inconsistent with its internal instructions. Nevada used two "call memos" to internally collect documentary material from its personnel, experts, consultants and contractors. These call memos did not maintain that Nevada had no positions and cannot identify its supporting and non-supporting information until contentions are filed. Rather, they directed Nevada's personnel, experts, consultants and contractors to submit without qualification "*all* of their relevant documentary material There is no discretion in this requirement."³¹ The additional LSN training materials that Nevada says it provided its personnel, experts, consultants and contractors, and that Nevada attached to its response to

8 November 2005 (34 pp.), <http://www.nwtrb.gov/meetings/2005/nov/kendorski.pdf>; Shettel, Evolution of Near-Field Environments (Alternative Models) (16 pp.), 18 May 2005, <http://www.nwtrb.gov/meetings/2004/may/shettel.pdf>; Staehle et al., Bases for Predicting Occurrences of Rapid Corrosion on the Surfaces of Containers of C-22 at Yucca Mountain (48 pp.), <http://www.nwtrb.gov/meetings/2004/may/staehle.pdf>.

³⁰ NRC-DOE quarterly management meeting summaries can be located both on ADAMS and on the LSN. Nevada participated actively in meetings of the ACNW for several years, into mid-2005. The State's final substantive presentation of note took place at the June 23, 2004 meeting and involved 3.5 hours of presentations and panel discussions on geosphere radionuclide transport issues, by two Nevada experts and several other experts from other organizations. <http://www.nrc.gov/reading-rm/doc-collections/acnw/agenda/2004/151.pdf>.

³¹ July 29, 2004 Call Memo (DOE Ex. G) at 1 (emphasis added); *accord* June 5, 2007 Call Memo (DOE Ex. H) at 1 ("all those working for the State of Nevada as experts or consultants" must provide "*all* of their relevant Documentary Material") (emphasis added).

DOE's Motion to Strike, also nowhere give evidence of the existence of a "No-Position Premise."³²

B. Nevada's LSN Collection.

The document production that Nevada made on the LSN is an apparent result of its newly devised No-Position Premise. Nevada's LSN collection consists of only 4,800 documents.³³ Many of those documents were not authored by or sent to Nevada's personnel, experts, consultants and contractors, contrary to what would be expected if Nevada were making a substantial, good-faith production of its supporting and non-supporting information that it generated over the last 20 years. Rather, a large percentage of Nevada's LSN collection consists of the following types of documents:

- Transcripts of meetings of the NWTRB, and correspondence between the NWTRB and DOE.
- Transcripts of ACNW proceedings.
- Transcripts of hearings before various Senate and House committees, and related correspondence and pre-filed testimony.
- Documents prepared by DOE or DOE contractors. Half or more of these documents concern industrial hygiene, and dust and silica exposure issues, in tunnels at Yucca Mountain, and are materials that Nevada's counsel obtained in connection with a personal injury lawsuit against DOE's M&O contractor for the Yucca Mountain Project and are not self-evidently germane to the licensing proceeding.

³² Nev. Exs. 16, 19, 20 & 21. Citations to Nev. Ex. ___ refer to exhibits accompanying The State of Nevada's Response to DOE's Motion to Strike Nevada's LSN Certification (Feb. 8, 2008).

³³ DOE Motion to Strike at 11.

- Documents prepared by federal agencies other than DOE, including responses to Freedom of Information Act requests by Nevada's counsel.³⁴

The limited nature of Nevada's LSN collection is especially pronounced with respect to information created since Nevada's licensing counsel was retained in September, 2001. Of the 4,800 documents in Nevada's LSN collection, the bibliographic headers for these documents indicate that approximately 3,200 pre-date September, 2001.³⁵ Of the balance, only a couple hundred represent documents authored by Nevada's personnel, experts, consultants and contractors. A substantial number of these are duplicates, so the true amount of information that Nevada has made available from the period it has been especially preparing for the licensing proceeding is even less.³⁶ As the dissent recounts, "Nevada's document production also reflects a very small number of documents of any kind (not just emails) to or from Nevada's large team of experts, scientists, attorneys, and others."³⁷

The virtual absence of emails in Nevada's LSN collection is particularly notable. In 2004, in successfully opposing DOE's then initial LSN certification, Nevada argued that "[e]mails are relevant to the Yucca Mountain licensing proceeding" because "[e]-mails tell the truth a lot."³⁸ Nevada insisted that DOE could not make a substantial, good-faith production

³⁴ DOE Motion to Strike at 12, nn. 34-39 (providing LSN accession numbers for these categories of documents in Nevada's LSN collection).

³⁵ Feb. 28, 2008 Tr. at 1342; DOE Ex. Z. The number of pre-September, 2001 documents in Nevada's LSN collection is actually higher. A significant number of documents in Nevada's LSN collection do not have dates in their bibliographic headers. An examination of these "undated" documents shows that many of these too pre-date September, 2001.

³⁶ DOE Motion to Strike at 12-13.

³⁷ LBP-08-05, 67 NRC at ____, slip op. at 21.

³⁸ July 24, 2004 Tr. at 181 (statement of Joseph Egan).

unless it reviewed literally millions of emails authored by Yucca Mountain Project personnel and made available those with non-supporting information.

The PAPO Board agreed, holding: “Such e-mails are often the source of unvarnished information that can be invaluable to the parties and the decision-makers.”³⁹ The PAPO Board accordingly directed DOE to complete the review of some 10 million emails, pointedly noting that even though DOE “is not planning to cite or rely on” them, the emails 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.”⁴⁰

Yet, Nevada’s LSN collection includes only a handful of emails. The dissent recounts the undisputed facts:

In stark contrast [to DOE], 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. Even an additional search of Nevada’s LSN collection using the word ‘e-mail’ or ‘electronic mail’ in the *title* file revealed only two additional e-mails, and a single ‘document’ consisting of a compilation of less than 100 e-mails from Aaron Barkatt, one of Nevada’s experts. 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.⁴¹

The shortcomings in Nevada’s LSN collection are also not limited to emails. Nevada’s LSN collection is largely devoid of documents of any kind generated by its personnel, experts, consultants and contractors since the retention of Nevada’s licensing counsel. In short, Nevada

³⁹ LBP-04-20, 60 NRC 300, 322 (2004).

⁴⁰ *Id.*, 60 NRC at 323.

⁴¹ LBP-08-05, 67 NRC at ____, slip op. at 21 (emphasis in original).

said before it certified that it did not intend to make a meaningful production of its supporting and non-supporting information, and its LSN collection is consistent with that expressed intent.

C. DOE's Motion To Strike.

DOE moved to strike Nevada's LSN certification on January 28, 2008. Nevada confirmed when it conferred with DOE about that motion that it had employed its No-Position Premise to limit its LSN collection. Nevada maintained that it would have no positions until it had final contentions and thus did not need to make available any more documents.⁴²

DOE expressly challenged in its motion Nevada's position that it could not identify its supporting and non-supporting documentary material.⁴³ That position, DOE argued, is inconsistent with the extensive record of Nevada's preparation for the licensing proceeding.⁴⁴ DOE further argued that Nevada's position "is not consistent with the plain meaning of the Commission's regulations."⁴⁵ "Were Nevada's contrary position accepted," DOE argued, the LSN regulations would be essentially meaningless as applied to everyone but DOE. Under Nevada's view, the only documents it would have to make available now are final versions of reports and studies. Nevada would not have to make available its supporting and non-supporting documentary material until—or maybe even after—it files contentions.⁴⁶

Nevada responded to DOE's motion on February 8, 2008. Nevada acknowledged in its response that it followed the No-Position Premise to limit its LSN collection. Nevada wrote that

⁴² *Id.*, 67 NRC at ____, slip op. at 35, citing Feb. 28, 2008 Tr. at 1360-61.

⁴³ DOE Motion to Strike at 32-35.

⁴⁴ DOE Motion to Strike at 33.

⁴⁵ DOE Motion to Strike at 34.

⁴⁶ *Id.*

it did not have to make available supporting and non-supporting information because “it is difficult at this stage to pinpoint Nevada’s licensing position.”⁴⁷

Nevada’s response was otherwise largely devoted to irrelevant criticisms of DOE’s LSN collection. Nevada also maintained that DOE could not complain unless it could identify specific documents absent from the LSN (overlooking the fact that DOE does not have access to the documents Nevada withheld from the LSN and that DOE’s challenge went to the improper standard Nevada used to filter its documents, not to the omission of individual documents).

The PAPO Board heard argument on DOE’s motion to strike on February 28, 2008. DOE reiterated at the hearing its challenge to Nevada’s position that it did not have to identify and make available its supporting and non-supporting information.⁴⁸

D. The PAPO Board Decision.

The PAPO Board ruled on DOE’s motion to strike on April 23, 2008. In a split decision, two members of the PAPO Board voted to deny DOE’s motion. They held that DOE did not carry its burden of proving that Nevada did not make all its documentary material available, because DOE did not show the specific documents withheld.⁴⁹ They also held that Subpart J does not require potential parties other than DOE to make available their supporting and non-supporting information until they submit contentions, and otherwise upheld Nevada’s No-Position Premise.⁵⁰ The majority did not address the extensive record regarding Nevada’s preparation for the licensing proceeding and its ability in fact to identify supporting and non-

⁴⁷ Nevada Response at 4.

⁴⁸ *E.g.*, Feb. 28, 2008 Tr. at 1344.

⁴⁹ LBP-08-05, 67 NRC at ____, slip op. at 7.

⁵⁰ *Id.*, 67 NRC at ____, slip op. at 11-12.

supporting information (although the majority did hold erroneously that the dissent, and not DOE, had raised the No-Position Premise challenge).⁵¹

One member of the PAPO Board dissented. The dissent first addressed various aspects of Nevada's "call memos." The dissent identified several respects in which those call memos impermissibly narrowed the scope of documents Nevada to be collected for potential production on the LSN, thus exacerbating the effect of Nevada's No-Position Premise.⁵²

Turning to the No-Position Premise, the dissent noted that "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."⁵³ The dissent rejected that premise both as a matter of law and as a matter of fact.

The dissent reasoned that the No-Position Premise is incorrect as a matter of law because it "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. The No-Position Premise results, categorically, in no Supporting DM and no Non-supporting DM. This flies in the face of the

⁵¹ *Id.*, 67 NRC at ____, slip op. at 10-12.

⁵² *Id.*, 67 NRC at ____, slip op. at 26-33.

⁵³ *Id.*, 67 NRC at ____, slip op. at 34.

Commission’s statement that ‘the LSN will be populated [with Non-supporting DM] during the pre-application phase.’”⁵⁴

The dissent also rejected the No-Position Premise as a matter of fact in light of the undisputed record regarding Nevada’s extensive preparation for the proceeding. “[G]iven Nevada’s long and substantial opposition to Yucca Mountain and the fact that it has already drafted 2000 contentions,” the dissent reasoned, “the No-Position Premise is factually absurd.”⁵⁵

Echoing DOE’s arguments, the dissent elaborated:

As an initial matter, Nevada’s assertion that it currently has no positions with respect 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 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 proposal.⁵⁶

Continuing, the dissent rejected Nevada’s claim that it has no positions and cannot identify supporting and non-supporting information:

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 draft

⁵⁴ *Id.*, 67 NRC at ____, slip op. at 40, quoting 66 Fed. Reg. at 29,460 n.3 (May 31, 2001). In fact, the quoted statement of consideration expressly notes as well that “the LSN will be populated during the pre-application phase of the proceeding *before there are any party ‘contentions’* defining the matters in controversy” 66 Fed. Reg. at 29,460 n.3 (May 31, 2001) (emphasis added).

⁵⁵ LBP-08-05, 67 NRC at ____, slip op. at 34.

⁵⁶ *Id.*, 67 NRC at ____, slip op. at 36.

2000 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 [sic], represent their good faith *current* position.⁵⁷

This timely appeal followed.

III. Argument

A. **Subpart J Does Not Allow Potential Parties To Defer Production Of Their Supporting And Non-Supporting Information Until They File Contentions**

The PAPO Board's majority wrongly held that, as a matter of law, Nevada is not required to make available its supporting and non-supporting information until it files contentions. That holding is inconsistent with the plain text of Subpart J.

Subpart J provides a mandatory production obligation. It provides that within 90 days after DOE's initial LSN certification, "each other potential party, interested governmental participant or party *shall* make available" on the LSN an electronic file including bibliographic header "for *all* documentary material."⁵⁸ The reference to "all" encompasses all three categories of documentary material, including supporting and non-supporting information.

That obligation is clear and unambiguous. It does not provide that potential parties, interested governmental participants and parties need make available in the pre-license application phase only the third category of documentary material, *i.e.*, reports and studies, and that they can defer production of the other two categories until they file contentions. Rather, it obligates them to make available *all* their documentary material 90 days after DOE's initial LSN certification.

⁵⁷ *Id.*, 67 NRC at ____, slip op. at 39 (emphasis in original).

⁵⁸ 10 C.F.R. § 2.1003(a)(1) (emphasis added).

When the Commission promulgated this requirement, the Commission obviously knew that the 90-day deadline would occur before the LA was submitted and contentions filed. Had the Commission believed that Nevada and other potential parties could not identify supporting and non-supporting information until contentions were filed, or had it intended that they need not make such production until then for any other reasons, the Commission presumably would not have required them to make all their documentary material available 90 days after DOE's initial LSN certification. It would have written § 2.1003(a) to require of them only the production of reports and studies in the pre-license application phase and deferred their production of the other categories of documentary material to contention submittal.

That plain meaning is consistent with the rulemaking history of Subpart J. Faced with the need to adjudicate the LA within the NWPA's mandated schedule, the Commission devised the LSN as a substitute for traditional document discovery. Central to that construct was the production of documentary material during the pre-license application phase. The production of that information during the pre-license application phase, the Commission explained, would facilitate compliance with the NWPA schedule by eliminating "the traditional, and potentially time-consuming, discovery process associated with the physical production of documents after a license application is submitted."⁵⁹ The majority's decision eviscerates that intent, by allowing

⁵⁹ 68 Fed. Reg. at 66,372-73 (Nov. 26, 2003); *see also id.* at 66,376 ("The Commission also notes that the history of the LSN and its predecessor, the Licensing Support System, makes it apparent that it was the Commission's expectation that the LSN, among other things, would provide potential participants with the opportunity to frame focused and meaningful contentions *and to avoid the delay potentially associated with document discovery*, by requiring parties and potential parties to the proceeding to make *all* their Subpart J-defined documentary material available through the LSN *prior to* the submission of the DOE application.") (emphasis added).

Nevada has recognized this intent. In its comments on the last proposed rulemaking on Subpart J, in 2004, Nevada recited its understanding that the Commission intended the production of documents on the LSN "to be *complete well before* the time of DOE's License
(continued . . .)

potential participants to defer production of their most critical documentary material until after the LA is docketed.

While a potential party may not be able to identify in the pre-license application phase every document it may eventually cite or rely on in the licensing proceeding, that does not entitle a potential participant to throw up its hands in the pre-license application period and declare it has no positions, and will have no positions, until it files contentions. A potential party has an obligation in the pre-license application phase to make a *good-faith* effort to identify its supporting and non-supporting information in light of all the circumstances then known to it.

The Commission acknowledged this in the rulemaking. As the Commission noted, while the “full scope” of supporting and non-supporting information may not be apparent until admission of contentions, that does not mean that a participant is absolved from making available all its documentary material in the pre-license application phase. “[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* documentary material [referred to by the PAPO Board as DM1 and DM2] *by the date* specified for initial compliance in section 2.1003(a) of the Commission’s regulations.”⁶⁰

The Commission has additionally explained that because such production will occur “during the pre-application phase of the proceeding before there are any party ‘contentions’ defining the matters in controversy,” the potential parties’ pre-license application production should err on the side of over-inclusiveness. They should make available all information that

Application, and was intended to expedite the licensing process by supplanting what otherwise could be lengthy document production initiatives between and among the parties” Jan. 9, 2004 letter from R. Loux to NRC at 2 (emphasis added).

⁶⁰ 69 Fed. Reg. at 32,843 (June 14, 2004) (emphasis added).

“has any possible bearing” on a position for which it “intends to provide supporting information.”⁶¹

The majority opinion turns the Commission’s intent on its head. The majority reasons that since the “full scope” of supporting and non-supporting information may not be apparent until the contention period, potential participants are excused from any effort in the pre-license application phase to identify such information. That is not what Subpart J allows, and it contradicts the Commission’s expressed intent as to how potential participants must approach their LSN obligations in the pre-license application period.

Nor is there any weight to Nevada’s argument that this determination cannot be made until the LA is submitted. As the Commission described in its opinion rejecting Nevada’s motion to compel production of the draft LA, the LA is a derivative document. The LA will cite and rely on technical information, and it is that underlying technical information, and not the LA, that constitutes documentary material.⁶²

Much of that underlying technical information has been available to Nevada, in many cases for years. That information has been available not only on the LSN starting in 2004, but has been the subject of extensive discussion in public meetings over the years with the NRC, the

⁶¹ 66 Fed. Reg. at 29,460 (May 31, 2001).

⁶² CLI-06-05, 63 NRC 143, 151-52 (2006). The majority erroneously seeks to use this decision as support for its ruling. The majority notes the Commission’s discussion in the opinion that all documents that will qualify as Class 1 or Class 2 documentary material “will not be completely identified until *after* contentions are accepted” and that parties cannot be expected to file a “complete” set of documentary material in the pre-license application phase. LBP-08-05, 67 NRC at ___, slip op. at 12. Those comments, however, are consistent with the Commission’s statements of intent in the rulemaking and do not justify the majority’s extreme view that, *as a matter of law*, potential parties can have *no* supporting or non-supporting information before contention submittal. To say that a “complete” production may not be possible until contentions does not mean potential parties are excused from a good-faith production of all their extant documentary material in the pre-license application phase.

TRB, the ACNW and others. Nevada, as shown above, has participated actively and pointedly in those meetings. For Nevada to maintain against that backdrop that it “cannot possibly” begin to know what its positions will be in the licensing proceeding lacks credibility.

Nevada has presently identified an extensive number of issues that, in any reasonable and common sense meaning, it presently intends to raise in the licensing proceeding. These constitute Nevada’s intended positions, and they provide the framework for identifying its supporting and non-supporting information. Nevada can and must consider in good faith whether all the emails, comments, and other final documents its personnel, experts, consultants, and contractors have generated could be considered non-supporting information in light of these intended positions.

If Nevada’s No-Position Premise was applied to DOE, then DOE would not be required to produce any supporting and non-supporting information until it files its final LA. But that interpretation is fundamentally inconsistent with the plain language of the Subpart J regulations and the Commission’s stated intent of facilitating a timely final Commission decision on the LA. It is equally inconsistent when applied to Nevada.

In sum, the PAPO Board has created a double standard, contrary to the letter and spirit of the LSN regulations. In effect, the decision assumes DOE must know the positions it expects to take in the licensing proceeding six months before it files its LA, but establishes as a matter of law and contrary to the historical record, that Nevada cannot know what positions it intends to take until after it files contentions (or perhaps not even until they are admitted).

That is not how Subpart J works. Nevada has an obligation to make its documentary material available in the pre-license application phase just as DOE had an obligation to do so,

and the regulations clearly direct that Nevada's obligation must be met within 90 days after DOE's initial certification. Nevada has not met that obligation.

The PAPO Board's contrary decision sanctions Nevada's circumvention of the plain language of the Subpart J regulations and frustrates the Commission's stated intent for the LSN. The PAPO Board has excused Nevada from making the good-faith effort that DOE made to determine what documentary material—supporting and non-supporting—had to be produced to the LSN. In practice, the PAPO Board's decision allows Nevada access to DOE's documentary material months before Nevada has to file contentions, while DOE will have at most only 25 *days* to review Nevada's supporting and non-supporting information before it answers Nevada's contentions (assuming Nevada produces its supporting and non-supporting information when it files contentions). This is neither supported by the regulations nor is it fair. Fundamental fairness requires that Nevada's certification be stricken until Nevada complies with the LSN regulations and certifies that it has identified and made available all its documentary material without the use of constraining contrivances such as the No-Position Premise.

B. DOE Met Its Burden Of Proof

The PAPO Board incorrectly held also that DOE did not meet its burden of proof. There was no material dispute about the number and nature of the documents in Nevada's LSN collection. There also was no dispute that Nevada employed the erroneous No-Position Premise to limit its production of documentary material. As such, there was nothing else that DOE needed to prove.⁶³

⁶³ In this regard, the majority wrongly faulted DOE for not having sought discovery. Apart from the fact that Subpart J does not permit such discovery in the pre-license application phase, there are no disputed facts involved in determining whether Nevada applied an incorrect standard in developing its LSN collection. It is also the case that the majority has not hesitated to resort, *sua sponte*, to fact-finding tools when it found resolution of factual issues necessary to
(continued . . .)

Admittedly, DOE does not know how Nevada internally implemented the deferral of its production obligation. DOE does not know, for instance, whether Nevada's personnel, experts, consultants and contractors were told among the many oral instructions they assertedly received from Nevada's counsel to curtail the documents they submitted for potential production on the LSN, or whether all their documents were collected internally and then subsequently filtered.⁶⁴

Resolution of that question, however, does not matter. Nevada's certification is invalid because Nevada followed an erroneous legal standard to limit its LSN production. It does not matter where or how Nevada implemented that erroneous standard.

Similarly, it is not incumbent on DOE to identify specific documents that Nevada omitted as a consequence of its erroneous standard. Nevada is required to make a good faith production of all its extant documentary material 90 days after DOE's initial certification. Nevada's use of the No-Position Premise makes its production deficient, without any further showing. As the dissent notes, "If the net is torn, even if it is cast in good faith, most of the fish will escape."⁶⁵

decide matters raised by Nevada—issuing detailed questions that it required DOE to answer in writing. *See* Memorandum and Order (Regarding State of Nevada's July 12, 2004 Motion), Docket No. PAPO-00, July 12, 2004, at 2-3; Memorandum and Order, (Directing the Licensing Support Network Administrator to Respond to Questions), Docket No. PAPO-00, July 19, 2004, at 1-3.

⁶⁴ For example, Nevada's initial "call memo" directed Nevada's personnel, experts, consultants and contractors to submit all of their Yucca Mountain-related emails to Susan Lynch, an official designated as Nevada's internal LSN point of contact. *See* July 29, 2004 Call Memo (DOE Ex. G) at 1. ("The following are among the types of documents you must provide Susan. 1. *All emails* in your possession or archives related to Yucca Mountain or your work for Nevada.") (emphasis added). Assuming the recipients of the call memos complied with that direction, this would suggest Ms. Lynch's office whittled down the emails to the handful Nevada produced.

⁶⁵ LBP-08-05, 67 NRC at ____, slip op. at 26.

This is no different than the situation the PAPO Board faced when it struck DOE's LSN certification in 2004. In striking that certification, the PAPO Board did not require Nevada to identify specific documents that qualified as documentary material that DOE omitted from the LSN. It struck DOE's certification because DOE had not completed its review and made available all extant documentary material. Nevada has similarly failed to complete a good-faith review and production of its documentary material through application of the No-Position Premise.

It is likewise no answer that Nevada could point to a few instances of documents in its LSN collection that could be construed as supporting or non-supporting information. Again, DOE's certification in 2004 was stricken even though DOE had made available extensive supporting and non-supporting information. In fact, DOE made more than 1 million documents available. The problem was DOE had not made available all its extant documentary material. By the same token, Nevada cannot support its certification because it has made available *some* of its extant documentary material.

Finally, the declarations of Charles Fitzpatrick and Susan Lynch that Nevada submitted and that the PAPO Board majority emphasized were no meaningful rejoinder. Those declarations addressed, at most, whether Nevada had preserved and internally collected the appropriate documents. They did not deny that Nevada had used the No-Position Premise to screen out the documents it ultimately made available on the LSN. And even with respect to document collection, those declarations omitted reference to collection of non-supporting information, as the dissent notes.⁶⁶

⁶⁶ LBP-08-05, 67 NRC at ____, slip. op at 33-34.

C. **The PAPO Board Decision Will Likely Create Schedule Delays.**

Nevada has argued strenuously that it needs *all* of DOE's documentary material as early as possible so it can finalize contentions and otherwise prepare for the proceeding. DOE has been producing this material for the past couple of years, and continues to do so even since its LSN certification as new material is created.

Just as Nevada needs DOE's documentary material so it can prepare for the licensing proceeding, DOE needs the documentary material of Nevada and the other potential parties for its preparation (*e.g.*, witness preparation, evaluating the strengths and weaknesses of Nevada's positions). At a minimum, the PAPO Board majority's decision will make it more difficult for DOE to timely respond to Nevada's contentions within the 25 days allowed under the regulations, since DOE will not gain access to Nevada's supporting and non-supporting information before Nevada files its proposed contentions.

If Nevada still does not make all its documentary material available when it submits contentions, DOE will be put to an exceedingly unfair choice. Either it will be forced to challenge Nevada's document collection and delay the proceeding, or it will be forced to proceed without timely access to the documentary material relevant to Nevada's positions, and find itself penalized in defense of its case. In short, the PAPO Board's ruling denying DOE's motion to strike and permitting Nevada to defer production of its supporting and non-supporting information will not allow DOE and other parties to effectively and timely review Nevada's technical information—and will undermine the Commission's ability to timely complete the licensing proceeding—and accordingly Nevada should be required to produce its documentary material according to the schedule established in 10 C.F.R. § 2.1003.

IV. Conclusion

Nevada, by its own admission, has been working for many years on information to support contentions and already has prepared thousands of potential contentions. Fundamental fairness requires that the documentary material (including emails and graphic-oriented materials) developed as part of these efforts by Nevada (including its contractors, consultants, experts and lawyers) be made available on the LSN on the same basis as DOE has made and is still making its documentary material available. Because Nevada has not made available its documentary material consistent with the applicable regulations, its certification should be stricken, and it should be required to remedy its production.

DOE is not seeking to bar Nevada from participating in the upcoming licensing proceeding on the basis of a technicality. Rather, DOE is seeking to ensure that Nevada and all other parties comply with the regulations established for the licensing proceeding and thereby permit the LSN to achieve its intended purpose of minimizing the need for traditional discovery while making available all documentary material to support the making of licensing decisions in a transparent manner on the basis of sound science.

U.S. DEPARTMENT OF ENERGY

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May 5, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

**THE DEPARTMENT OF ENERGY'S BRIEF ON APPEAL
FROM THE PAPO BOARD'S APRIL 23, 2008 ORDER
CERTIFICATE OF SERVICE**

I certify that copies of the foregoing the THE DEPARTMENT OF ENERGY'S BRIEF ON APPEAL FROM THE PAPO BOARD'S APRIL 23, 2008 ORDER in the above-captioned proceeding have been served on the following persons on May 5, 2008 through the Electronic Information Exchange.

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