

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket No. PAPO-00, PAPO-0001
	)	
U.S. DEPARTMENT OF ENERGY	)	ASLBP No. 04-829-01-PAPO
	)	ASLBP No. 08-861-01-PAPO-BD01
(High Level Waste Repository:	)	
Pre-Application Matters)	)	May 8, 2008

**U.S. DEPARTMENT OF ENERGY ANSWER OPPOSING  
THE STATE OF NEVADA’S MOTION TO ESTABLISH  
A SCHEDULE FOR FILING CONTENTIONS**

The State of Nevada has requested a six-fold extension of the 30-day period set forth in 10 CFR § 2.309(b)(2) and 10 CFR Part 2 (Appendix D) to file petitions to intervene and contentions in the licensing proceeding for the U.S. Department of Energy’s (DOE) application to construct a high-level waste (HLW) repository at Yucca Mountain, Nevada. Specifically, Nevada requests that the U.S. Nuclear Regulatory Commission (NRC or Commission) reject its carefully developed regulations and mandatory schedule to permit a period of 180 days to file contentions from publication of the notice of hearing.<sup>1</sup> Under 10 CFR § 2.323(c), DOE opposes Nevada’s Motion.

**I. INTRODUCTION**

Consistent with Congressional intent as reflected in the Nuclear Waste Policy Act, the NRC has established a mandatory schedule to review and hold hearings on the DOE’s license application (LA) for authorization to construct a geologic repository at Yucca Mountain. To meet this mandatory schedule, the NRC has established a first-of-a-kind pre-license application

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<sup>1</sup> 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, at 1 (Apr. 28, 2008) [“Nevada Motion”].

process that includes the Licensing Support Network (LSN) as a substitute for traditional document discovery. DOE is required to produce its extant “documentary material” on the LSN starting six months before DOE files its LA and continue to supplement its production on the LSN through the discovery phase of the proceeding. The LSN provides parties and potential parties to the Yucca Mountain licensing proceeding access to supporting and non-supporting information as well as reports and studies relevant to DOE’s LA well in advance of the proceeding. The Commission worked with stakeholders, including Nevada, to develop the LSN to avoid the need for time-consuming document discovery after the licensing proceeding commences (and most importantly for the purpose of addressing Nevada’s motion) to permit the submission of well-focused contentions within the 30-day time period established by 10 CFR § 2.309(b)(2).

During the pre-application phase, DOE has produced more than 3.5 million documents on the LSN, including technical information that supports and does not support the LA, in advance of DOE tendering the LA to the NRC. The State of Nevada and other potential parties will have had ample time and more than sufficient information to develop challenges to the LA under the existing schedule. Nevertheless, Nevada now moves the Commission to delay the period for filing contentions by 150 days. Nevada contends that anything less than a 150-day extension will violate fundamental principles of fairness and vitiate its right to a hearing under the law.<sup>2</sup>

As set forth below, the Commission should deny Nevada’s request because: (1) the NRC has previously determined that its mandatory schedule provides ample time for the formulation of contentions and Nevada has provided no new information to cause the Commission to reconsider its earlier decision as to schedule; (2) DOE’s production of documentary material on

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<sup>2</sup> *Id.* at 8.

the LSN has provided Nevada with unprecedented early access to information to use in formulating contentions under the existing schedule; and (3) Nevada's request would unnecessarily and substantially delay this proceeding at its very outset. The Motion should be denied.<sup>3</sup>

## **II. BACKGROUND**

Because the pre-license application process provides the backdrop for Nevada's request, DOE briefly outlines the relevant statutory and regulatory background.

### **A. The Nuclear Waste Policy Act**

The Nuclear Waste Policy Act of 1982, as amended (NWPA), establishes a comprehensive program for identifying, licensing, constructing, operating and regulating a geologic repository for disposing of HLW.<sup>4</sup> One of the purposes of the NWPA was "to establish a *schedule* for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by [HLW] . . . ."<sup>5</sup> The NWPA charges the NRC with the responsibility for reviewing DOE's application to construct and operate a HLW disposal facility.<sup>6</sup> More specifically, the NWPA *mandates* that the Commission issue a final decision on construction

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<sup>3</sup> On May 3, 2008, Nye County, Nevada, filed a Response to Nevada's Motion. Nye County requests that the Commission *deny* Nevada's request. Nye County Response to State of Nevada's Motion for Schedule for Filing Contentions at 2 (May 3, 2008). As an alternative, Nye County proposes that "the Commission provide the parties 180 days to file their contentions, but instead of starting the clock running with the Staff's docketing decision, [the Commission] use the date that DOE actually files the LA." *Id.* Although Nye County's response provides a more reasonable approach than Nevada's request, the Commission should nevertheless deny it in light of the arguments set forth in this Answer. DOE continues to believe that the potential parties to the proceeding must meet the established regulatory milestones as a matter of law and policy.

<sup>4</sup> Nuclear Waste Policy Act, 42 U.S.C. §§ 10101 (2006).

<sup>5</sup> *Id.* at § 10131(b)(1) (emphasis added).

<sup>6</sup> *Id.* at § 10134(d), 10141(b) (specifying NRC requirements in connection with approving or disapproving DOE's LA).

authorization within *three years* after DOE submits its LA, with a possible extension to four years.<sup>7</sup>

## **B. NRC Regulations Implementing the NWPA's Schedule**

Because the NRC “perceived” the NWPA’s 3-year schedule “to be tight,” it promulgated Subpart J to 10 CFR Part 2.<sup>8</sup> “Recognizing the enormous amount of documentary material related to the site, and the substantial national, state, and local interest in this matter, Subpart J includes several provisions designed to expedite and to assist the Commission in achieving the 3-year deadline for the Yucca Mountain licensing proceeding.”<sup>9</sup> With this objective, “the regulations establish a ‘pre-license application’ process for efficiently accomplishing the extensive discovery required in a proceeding of this type.”<sup>10</sup>

Subpart J creates the LSN, a web-based information system intended to facilitate the pre-hearing discovery process. Subpart J “uniquely” requires DOE to make available on the LSN its documentary materials in existence at least six months *before* the DOE files the LA.<sup>11</sup> This requirement is unique in the sense that the time-consuming document discovery process normally begins *after* the NRC staff docket an application, the parties have proffered contentions and the ASLB has ruled on the admissibility of those contentions. In short, the scope of discovery under NRC practice normally is only to *probe* admitted contentions, not to *aid* in formulating proposed contentions. In promulgating Subpart J, the Commission reasoned that producing documents during the pre-license application phase would facilitate compliance with

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<sup>7</sup> *Id.* at § 10134(d).

<sup>8</sup> *See Nevada v. U.S. Dep’t of Energy*, 517 F. Supp. 2d 1245, 1249 (D. Nev. 2007) (summarizing regulatory history of pre-application process).

<sup>9</sup> *U.S. Dep’t of Energy* (High-Level Waste Repository), LBP-04-20, 60 NRC 300, 304 (2004).

<sup>10</sup> *U.S. Dep’t of Energy* (High-Level Waste Repository; Pre-Application Matters), CLI-06-5, 63 NRC 143, 146 (2006).

<sup>11</sup> *Nevada*, 517 F. Supp. 2d at 1249.

the NWPA schedule by eliminating the need for the time-consuming and cumbersome process of document production after admission of contentions. Indeed, as envisioned, this process would allow “parties to get off to a running start before the statutory 3-year period begins.”<sup>12</sup>

In various settings, the Commission has addressed the purposes and expectations underlying the LSN:

[T]he history of the LSN and its predecessor, the Licensing Support System, makes it apparent 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. These objectives are *still* operational.<sup>13</sup>

The Commission’s regulations also establish a mandatory schedule, based upon the time period prescribed by the NWPA, for the adjudication arising from challenges to DOE’s application. This schedule is set forth in Appendix D and associated Part 2 regulations. Appendix D, among other things, provides initial deadlines for filing of contentions, answers to those contentions, and replies to answers. 10 CFR § 2.1026 mandates that licensing boards in the HLW proceeding “shall” meet the milestones set forth in Appendix D.<sup>14</sup>

In this Motion, Nevada asks the Commission to revisit the carefully considered framework and schedule for the Yucca Mountain proceeding without providing any new information justifying the proposed 150-day extension. 10 CFR § 2.309(b) and Appendix D

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<sup>12</sup> U.S. Dep’t of Energy (High-Level Waste Repository), CLI-04-32, 60 NRC 469, 471 (2004).

<sup>13</sup> Final Rule, Licensing Proceeding for a High-Level Radioactive Waste Geologic Repository; Licensing Support Network, Submissions to the Electronic Docket, 69 Fed. Reg. 32,836, 32,843 (June 14, 2004) (emphasis added).

<sup>14</sup> See 10 CFR § 2.1026(a) (“Subject to paragraphs (b) and (c) of this section, the Presiding Officer shall adhere to the schedule set forth in appendix D of this part.”).

provide that potential parties to the Yucca Mountain licensing proceeding must file contentions within 30 days of the date of the notice of hearing in the Federal Register.<sup>15</sup> In 2004, the Commission could have extended this period for filing contentions when it amended its regulations concerning its Rules of Practice. At that time, the Commission revised its regulations to provide a 60-day period for filing petitions and proposed contentions *except* in two types of proceedings:

[T]he Commission has decided to provide a sixty (60) day period for filing requests for hearing/petitions to intervene and proposed contentions. The limited exceptions involve facility license transfer proceedings . . . and the proceeding on a HLW geologic repository where the Commission *will retain the thirty (30) day period* for filing requests for hearing/petitions to intervene and contentions (*in view of the ample pre-application document disclosures provided by the LSN*).<sup>16</sup>

With this statutory and regulatory background in mind, DOE next addresses Nevada's proposed extension of 150 days to file contentions.

### **III. NEVADA'S MOTION SHOULD BE DENIED**

#### **A. Applicable Legal Standard for Granting Extensions of Time**

The Commission has a long-standing policy that parties to an adjudicatory proceeding are expected to adhere to the time frames specified in the Rules of Practice in 10 CFR Part 2.<sup>17</sup> Nevertheless, under 10 CFR § 2.307(a), the Commission may grant extensions of time for good cause:

Except as otherwise provided by law, the time fixed or the period of time prescribed for an act that is required or allowed to be done

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<sup>15</sup> 10 CFR § 2.309(b)(2).

<sup>16</sup> Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,199 (Jan. 14, 2004) (emphasis added).

<sup>17</sup> Policy on Conduct of Adjudicatory Proceedings; Policy Statement, CLI-98-12, 48 NRC 18, 21 (1998) ["Statement of Policy"].

at or within a specified time, may be extended or shortened either by the Commission or the presiding officer for *good cause* . . . .<sup>18</sup>

In 1998, the Commission made it clear in a policy statement that the standard for granting extensions of time requires a demonstration of “unavoidable and extreme circumstances.”<sup>19</sup> Thus, the Commission interpreted “good cause” to require a showing of “unavoidable and extreme circumstances.”<sup>20</sup> This proceeding is precisely the type of case in which the rigorous “unavoidable and extreme circumstances” standard is particularly apt. The schedule for this proceeding, including the appropriate time intervals, has been the subject of careful consideration by the Commission and the overall schedule is dictated by statute.<sup>21</sup> There should be no changes to the schedule absent the most compelling of reasons—and Nevada has offered none.

Nevada argues that anything short of the 150-day extension to file contentions will deny the State a fair opportunity to make its case against Yucca Mountain. Characterizing the Commission’s regulations as “grossly inadequate,” Nevada claims, for various reasons, that it cannot adequately review DOE’s documentary material and develop contentions within the timeframe set forth in Appendix D. As explained below, the Commission has previously considered the State’s “fairness” concerns and determined that they lack merit.

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<sup>18</sup> 10 CFR § 2.307(a) (emphasis added). Nevada also makes its Motion under 10 CFR § 2.1026, which provides in relevant part that extensions beyond 15 days in the HLW proceeding must be “referred” to the Commission. 10 CFR § 2.1026(b)(2).

<sup>19</sup> Statement of Policy at 21.

<sup>20</sup> See, e.g., *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 342 (1998).

<sup>21</sup> The structure of Section 2.1026 suggests that the Commission believes that any extensions of time beyond 15 days—much less 150 days—could adversely impact the NRC’s ability to meet the Appendix D milestones. Under 10 CFR § 2.1026(b)(2), requests for extensions of time beyond 15 days must be “referred” to the Commission.

**B. Nevada’s Challenge to the Commission’s Mandatory Schedule Raises *No* New Issues**

Fundamentally, Nevada’s Motion directly challenges the NWPA and the Commission’s schedule set forth in Appendix D and the associated Part 2 regulations. In doing so, Nevada seeks to raise issues that the Commission previously considered and rejected during the rulemaking proceeding to establish Appendix D.

In 1989, the Commission announced that it was amending its Rules of Practice for the HLW proceeding to, among other things, promulgate a compulsory hearing schedule.<sup>22</sup> In the Commission’s view, the revised regulations, including a new Appendix D, would “enable the Commission to conduct the HLW licensing proceeding in the most efficient manner possible and to facilitate compliance with [the NWPA] . . . while still providing for a thorough technical review of the license application and *equitable participation in the HLW proceeding by affected parties*.”<sup>23</sup>

During the rulemaking proceeding, Nevada (and others) objected to the Commission’s proposed schedule:

Nevada finds it unreasonable for the Commission to commit to the three year time frame . . . . Nevada asserts that this timetable may compromise the NRC’s statutory obligation to protect the public health and safety against undue radiological risk *and may also preclude effective public participation*.<sup>24</sup>

In issuing the final rule, the Commission considered Nevada’s comments and “reject[ed] the assertions that the schedule is unrealistic or inconsistent with its NRC’s statutory obligations”:

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<sup>22</sup> Proposed Rule, Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository, 54 Fed. Reg. 39,387, 39,387 (Sept. 26, 1989).

<sup>23</sup> *Id.* (emphasis added).

<sup>24</sup> Final Rule, Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository, 56 Fed. Reg. 7,787, 7,791 (Feb. 26, 1991) (emphasis added).



This schedule was discussed by the Negotiating Committee with the participation of a full range of the parties that are likely to be affected by the HLW licensing proceeding. The schedule illustrates how the statutory deadline can be met. The Commission has reviewed the schedule and finds that it balances the need to comply with the statutory deadline with the need to *insure effective public participation* and a thorough technical review of the application. The Commission has determined that this schedule should be adhered to unless special circumstances dictate otherwise.<sup>25</sup>

Seventeen years later, Nevada now raises precisely the same type of issues in its Motion, namely that the Appendix D schedule will preclude effective public participation in the licensing proceeding. Put simply, Nevada's Motion raises no issues that were not raised and fully considered in the rulemaking on Appendix D, nor, as explained below, does it present any special circumstances for the Commission to reexamine the basis of that rulemaking. Accordingly, the NRC should deny Nevada's Motion for an extension of time.

**C. A 150-Day Extension Is *Not* Warranted Under the Present Circumstances**

The tenor of Nevada's Motion erroneously suggests that it will have had only a very limited time period to access DOE's documentary material and develop contentions before the submittal due date. Yet, Nevada is not as uninformed or unprepared for the licensing proceeding as it depicts. As explained in this section, Nevada has had significant and continuing access to both supporting and non-supporting information relevant to DOE's LA for years. As a result, Nevada has no reason not to be well-positioned to file focused and meaningful contentions within the 30-day period.

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<sup>25</sup> *Id.* (emphasis added).

**1. *Nevada Has Had Unprecedented Advance Access to DOE's  
Documentary Material Relevant to the Licensing Proceeding***

Unlike any potential intervenor before it, Nevada has had an unprecedented opportunity to review the applicant's documentary material *before* the licensing proceeding commences. Through the LSN, DOE has produced over 3.5 million documents.<sup>26</sup> At least 1.1 million documents have been available on the LSN since 2004.<sup>27</sup> DOE made another 2.1 million documents available in April 2007.<sup>28</sup> DOE has regularly added new documents to the LSN each month since April 2007. DOE's production of this "massive amount of documentary material"<sup>29</sup> well in advance of the proceeding, indeed, well in advance of its LSN initial certification, has achieved the Commission's objective for the LSN of avoiding the time consuming process of document discovery during the licensing proceeding.

Additionally, much of the technical information and modeling basis information that will support the LA has been available to Nevada, in many cases for years. For example, Nevada has

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<sup>26</sup> *U.S. Dep't of Energy* (High Level Waste Repository; Pre-Application Matters), LBP-08-01, Slip Op. at 11 (Jan. 4, 2008).

<sup>27</sup> The LSN Administrator made a presentation to the PAPO Board on March 5, 2007. As a part of that presentation, the LSN Administrator submitted an exhibit, "LSN Load Statistics, DOE Collection," which showed no less than 1.1 million documents loaded onto DOE's LSN collection by September 2004. A copy of this exhibit was submitted in connection with Nevada's Motion to Strike DOE's LSN recertification. *See* Motion to Strike DOE's October 19, 2007 LSN Recertification and to Suspend Certification Obligations of Others Until DOE Validly Recertifies, (Oct. 29, 2007) ["Nevada Motion to Strike"] at Ex. 62.

<sup>28</sup> SECY-07-0130, Policy Issue Information Memorandum from D. Graser to the Commissioners, Licensing Support Network Program Administration—Semiannual Report at 5 (Aug. 7, 2007) (reporting that "DOE opened a second collection of materials comprised of 2,130,340 documents (roughly 20 million pages) on April 30, 2007"). A copy of SECY-07-0130 is attached to the Nevada Motion to Strike as Exhibit L. DOE released these documents several months before its initial certification in response to a request by Nevada. Nevada stated that it wanted access to these documents so that the State could begin reviewing them. Letter from Charles J. Fitzpatrick to Administrative Law Judge Thomas S. Moore, PAPO Board Chairman (Feb. 26, 2007).

<sup>29</sup> *U.S. Dep't of Energy* (High Level Waste Repository; Pre-Application Matters), LBP-08-01, Slip Op. at 11 (Jan. 4, 2008).

been able to identify and review key Analysis Model Reports (AMRs) that support the LA.<sup>30</sup> By Nevada's own admission, the "importance of the AMRs . . . cannot be overstated." They are "critical elements" of the LA and "critical aspects" of DOE's compliance with the Yucca Mountain Review Plan.<sup>31</sup> Each AMR is assigned a unique document number, which enables Nevada to use the LSN to access the AMR, including any subsequent revisions.<sup>32</sup>

DOE has made its AMRs publicly available over the years, including initial issuances and revisions. Even before DOE made these reports available on the LSN, DOE made its AMRs available on its website.<sup>33</sup> DOE continued to produce the newly issued and revised AMRs on its website into 2007. Documents in Nevada's LSN collection reveal that Nevada's experts have regularly monitored and reviewed the AMRs since at least 2004.<sup>34</sup>

Nevertheless, Nevada alleges that it cannot adequately review these documents *and* file contentions in a timely fashion. As support for this allegation, Nevada points out that it only recently received some of DOE's technical information, including DOE's *final* Total System Performance Assessment (TSPA), the computer model that projects how the repository will perform safely in the post-closure period. According to Nevada, it will take too long to review the TSPA and prepare contentions by the submittal date. This allegation overstates the record and erroneously implies that Nevada only recently became familiar with the TSPA.

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<sup>30</sup> See Nevada Motion to Strike, Ex. 38 (identifying list of key AMRs that DOE provided Nevada in March 2007, along with a unique document number for each and estimated completion date). All but three of these AMRs were available on the LSN at or around the time of DOE's LSN certification. See DOE Response to the State of Nevada's Motion to Strike DOE's October 19, 2007 LSN Recertification and to Suspend Certification Obligations of Others Until DOE Validly Recertifies (Nov. 9, 2007) at 25–26, Exs. G, H & I (e-mail correspondence between DOE and Nevada counsel confirming presence of all but 3 AMRs on the LSN).

<sup>31</sup> Nevada Motion to Strike at 28–29.

<sup>32</sup> See, e.g., *id.* at Ex. 38 (list of AMRs with tracking numbers).

<sup>33</sup> See *id.* at Ex. 39 (screen shot of DOE website with link to AMRs).

<sup>34</sup> See DOE Motion to Strike the January 17, 2008 Licensing Support Network Certification by the State of Nevada (Jan. 28, 2008), at Ex. O, pages 0-54, 0-56 and 0-58.

In reality, Nevada should be very familiar with the TSPA. In October 2007—in support of its Draft Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada (DOE/EIS-0250FS1D) (SEIS)—DOE made available to Nevada and on the LSN the then current version of the TSPA as well as detailed technical information. Nevada’s TSPA expert reviewed the information “reasonably fully” and concluded that “DOE has done a pretty good job in providing information to underpin the TSPA-SEIS calculations.”<sup>35</sup> This information, Nevada’s expert determined, was “very recent,” and “it is reasonable to suppose that it resembles closely the version that will become the TSPA-LA [the TSPA model that supports the LA].”<sup>36</sup> He further averred under oath that the TSPA information that DOE provided in October 2007 “will be fundamental” to “scrutinizing the adequacy of the TSPA-LA.”<sup>37</sup>

When DOE made the TSPA-LA available on the LSN in early March 2008, therefore, Nevada was not starting from scratch and did not need to undertake a full and complete review of it.<sup>38</sup> Instead, Nevada needed only to review those portions of the model that had changed since October 2007.<sup>39</sup> Furthermore, Nevada representatives attended public meetings concerning

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<sup>35</sup> M. Thorne to M. Malsch, “TSPA-SEIS and LSN,” (Oct. 10, 2007) (LSN No. NEV000004306).

<sup>36</sup> M. Thorne, “Meeting with NRC Staff on TSPA and TPA,” (Oct. 8, 2007) (LSN No. NEV000004285) at 1.

<sup>37</sup> Declaration of M. Thorne ¶ 5 (attached to the Nevada Motion to Strike as Ex. A). Apparently in response to DOE’s recognition of this concession, Dr. Thorne prepared a second affidavit (Supplemental Declaration of Mike Thorne, dated February 1, 2008, and attached it to the State of Nevada’s Response to DOE’s Motion to Strike Nevada’s LSN Certification (Feb. 8, 2008). That second litigation affidavit emphasizes, naturally, the gap between what Dr. Thorne learned from the initial TSPA documentation and what he would like ultimately to know, but nowhere does it disavow the statements cited by DOE from his first affidavit nor claim that DOE misquoted him.

<sup>38</sup> *U.S. Dep’t of Energy* (High Level Waste Repository: Pre-Application Matters, Advisory PAPO Board), Slip Op. at 5 n.15 (noting that TSPA is available on the LSN and providing its LSN accession number).

<sup>39</sup> *See* Declaration of M. Thorne ¶ 9 (attached to the Nevada Motion to Strike as Ex. A) (noting that mechanisms exist for recording changes between TSPA-SEIS and TSPA-LA).

the TSPA-LA over the week of March 31, 2008.<sup>40</sup> Unquestionably, Nevada has a better understanding of the TSPA-LA than its Motion suggests.

Similarly, the Commission should also disregard Nevada's argument that it cannot formulate contentions without first reviewing the LA. As the Commission observed in a 2006 opinion rejecting Nevada's Motion to compel production of the draft LA, the LA constitutes a derivative document. The LA will cite and rely on technical information, and it is that underlying technical information that should form the basis for the State's contentions. The Commission recognized this point in its 2006 decision:

[A]ny radical shift in position between the draft and final versions [of the LA] will be based upon information that DOE has in its possession *independent* of the text of any version. This *independent* information is documentary material and belongs on the LSN. Both the old information initially relied upon and the new information supporting the revised position *will* be available on the LSN. *Thus, the information needed by participants intending to challenge the license application will be readily available* during the six-month post-certification period, during the period for NRC Staff review of the DOE application to determine whether to docket the application, and during the 30-day contention preparation period that follows docketing of the license application.<sup>41</sup>

Thus, Nevada should be well-positioned to determine on the basis of documents and presentations made available to it over the years, virtually all, if not all, of its areas of disagreement with DOE over the LA, and very specific documentary bases on which to frame those disagreements. It is simply not the case that Nevada cannot and should not have been

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<sup>40</sup> On March 31, 2008, DOE and NRC held an Appendix 7 meeting on the TSPA-LA. *See* Meeting Notice, dated Mar. 11, 2008, "Forthcoming U.S. Nuclear Regulatory Commission and U.S. Department of Energy Appendix 7 Meeting on Total System Performance Assessment," scheduled for Mar. 31, 2008, Las Vegas, Nevada. On April 3–4, 2008, DOE and NRC held a two-day technical exchange on the TSPA-LA. *See* Meeting Agenda, "NRC/DOE Technical Exchange: Total System Performance Assessment for Yucca Mountain," Las Vegas, Nevada (Apr. 3–4, 2008).

<sup>41</sup> *U.S. Dep't of Energy*, CLI-06-5, 63 NRC at 151 (emphasizing "independent" and "will" in original; emphasis added).

developing the substance of, and most if not all of the specific wording for, virtually all of its contentions over the past several months and years. And while Nevada may wish (and will have) an opportunity to review the final LA text to check the contentions so developed, insert citations and perform other ministerial tasks, there is absolutely no reason, as Nevada suggests, that such a check need take half a year or, indeed, anything beyond the time provided under the regulations.

## **2. *Nevada Has Had An Unprecedented Opportunity to Develop Contentions***

Nevada's claim that it needs additional time to develop contentions also is not consonant with its many representations over the years about its preparation for the licensing proceeding:

- ◆ By its own description, “the State of Nevada, specifically the Nevada Agency for Nuclear Projects, has been engaged in a comprehensive program for monitoring, overseeing, and intervening in the federal Yucca Mountain project” for over two decades.<sup>42</sup> 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.”<sup>43</sup> Nevada has received \$78 million from DOE for those efforts as of 2004, to say nothing of the State funds expended or further federal funds received since that date.<sup>44</sup>
- ◆ Nevada has been preparing for the Yucca Mountain licensing proceeding since at least 2001. Nevada hired outside licensing counsel on September 11, 2001, and

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<sup>42</sup> Report and Recommendations of the Nevada Commission on Nuclear Projects (Dec. 2006) [“2006 Nev. Comm. Report”] at 25.

<sup>43</sup> *Id.* at 25 & 32.

<sup>44</sup> Affidavit of Robert R. Loux (Mar. 14, 2004) at ¶ 11.

since then has retained upwards of 45 experts for the proceeding.<sup>45</sup> Nevada says these attorneys and experts have been “diligently” preparing a “rigorous, substantive and effective” opposition to the LA.<sup>46</sup> Nevada states that they have been “performing a thorough evaluation of the scientific and legal integrity of the work done by DOE and its contractors at Yucca . . . .”<sup>47</sup>

- ◆ Nevada’s lawyers and experts have been reviewing the documents DOE has made available on the LSN starting in 2004.<sup>48</sup> 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.<sup>49</sup>
- ◆ Nevada states that it “intensified” its work in “several key areas” starting in 2004 to prepare for the licensing proceeding.<sup>50</sup> 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 . . . .”<sup>51</sup>

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<sup>45</sup> Statement of Joseph R. Egan, before the House Subcommittee on the Federal Workforce and Agency Organization (Apr. 5, 2005) [“Egan Statement”] at 1; January 15, 2008 Hearing Before Nevada Legislative Committee on High Level Radioactive Waste, testimony of Robert Loux [“Loux Tr.”] at 4–5; Petition by the State of Nevada under Atomic Energy Act Section 274i and 10 CFR § 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); and “Nevada’s Scientific Experts,” Attachment 1 to Nevada Petition for Funds.

<sup>46</sup> 2006 Nev. Comm. Report at 31.

<sup>47</sup> Egan Statement at 1.

<sup>48</sup> *Id.* at 3.

<sup>49</sup> *U.S. Dep’t of Energy* (High Level Waste Repository: Pre-Application Matters), LBP-08-05, Slip Op. at 5 n.17 (Apr. 23, 2008) (quoting Nevada submittals) (internal quotations omitted).

<sup>50</sup> 2006 Nev. Comm. Report at 25.

<sup>51</sup> *Id.*

- ◆ *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.*<sup>52</sup> In fact, Nevada 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.<sup>53</sup> On January 15, 2008, the head of the Nevada Agency for Nuclear Projects testified that Nevada already had prepared “a couple thousand” contentions.<sup>54</sup>
- ◆ Nevada has made no fewer than five technical presentations to the Nuclear Waste Technical Review Board on matters affecting the Yucca Mountain licensing: waste package environments, the proposed Environmental Protection Agency radiation standard, drip shields, near-field environments, and container surface corrosion.<sup>55</sup> Each of these presentations purported to convey Nevada’s views or position, generally critiquing DOE’s position. These presentations reveal that Nevada has a robust understanding of DOE’s technical analyses.

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<sup>52</sup> 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.”).

<sup>53</sup> Nevada Petition for Funds at 10–30.

<sup>54</sup> Loux Tr. at 7. In that testimony, he said Nevada has “drafted a couple thousand contentions with many more to come” as Nevada continues its review of DOE’s LSN collection.

<sup>55</sup> 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, “The 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, 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>.



- ◆ Nevada representatives also have attended and participated regularly and substantially at NRC-DOE quarterly management meetings, NRC-DOE technical exchanges and at meetings of the Advisory Committee on Nuclear Waste (ACNW).<sup>56</sup>

### **3. *Nevada Will Have Had Ample Time to Finish Drafting Contentions***

In addition to the years Nevada has already spent preparing its challenge to Yucca Mountain, several months *remain* after DOE files its LA before contentions must be submitted. Nevada contends that the Commission should not consider this additional time for two reasons.

First, Nevada argues that it cannot be sure when contentions will actually become due. DOE disagrees. As it has previously indicated, DOE will file its LA in June. According to its review plan, the NRC Staff will then take three months to conduct its review to determine if the LA contains enough information for the NRC to formally docket the application.<sup>57</sup> Once the NRC dockets the LA, it will publish a Federal Register notice announcing the docketing and an opportunity for potential parties to file petitions to intervene. Potential parties will then have 30 days from the date of the Federal Register notice to file contentions. Accordingly, the amount of time available for Nevada to finish drafting and file contentions consists of: (1) the three months for NRC Staff review and (2) the 30-day period to file contentions. Nevada can safely assume that it will have had no less than 4 months from the date of DOE's filing the LA to finish drafting and file its contentions.

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<sup>56</sup> Summaries for (1) NRC-DOE quarterly management meetings and (2) NRC-DOE technical exchanges 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>.

<sup>57</sup> Yucca Mountain Review Plan, NUREG-1804 (Rev. 2), Executive Summary at p. xv (2003).

Second, Nevada speculates that DOE may submit LA amendments during the NRC Staff's docketing review and, as a result, the Commission should increase the time for filing contentions to account for this possibility. DOE has no plans to submit LA amendments during the docketing review. Even assuming the NRC Staff requests additional information prior to its docketing decision, this should not affect the State's ability to file timely contentions. Under long-standing Commission policy, contentions "must rest on the *license application*, not on NRC staff reviews."<sup>58</sup> Furthermore, should LA amendments be necessary and trigger additional contentions or issues, the Commission's regulations already provide that under appropriate circumstances new or amended contentions may be filed after the initial 30-day submittal period. No purpose is served by extending the time for contentions based on nothing more than sheer speculation about possible amendments.

To summarize, under the present circumstances, Nevada has worked for years preparing its legal challenges to the LA and a significant amount of time remains for Nevada to complete its work. Under these circumstances, Nevada has failed to show that the NRC's mandatory schedule precludes it from fully participating in the Yucca Mountain proceeding or filing contentions consistent with Appendix D.

#### **D. Granting Nevada's Request Would Unnecessarily Delay the Proceeding**

Nevada insists that granting a 150-day extension of time does not present a danger of delay, even suggesting that it "may well expedite the proceeding."<sup>59</sup> According to Nevada, an additional 150 days would allow it to focus and narrow the issues:

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<sup>58</sup> *Balt. Gas & Elec. Co.*, CLI 98-25, 48 NRC at 349–50 (rejecting party's request to postpone contentions deadline to allow party to examine NRC Requests for Additional Information and applicant's responses) (emphasis in original).

<sup>59</sup> Nevada Motion at 7.

Nevada would be willing to meet with DOE and NRC Staff during the requested 180-day period with a view toward focusing and narrowing the issues, especially to the extent some of Nevada's contentions may otherwise result from a misreading of DOE's safety case and NEPA documents or constitute matters that may be subject to early resolution or stipulation.<sup>60</sup>

In truth, Nevada's reasoning makes little sense. Discussions regarding the potential narrowing of issues can be undertaken during the 120 days after DOE files its LA. Nothing is gained by extending the deadline by 5 months, except delay.

Furthermore, as a matter of policy and practicality, it seems inappropriate for the Commission, *at the very outset of the proceeding*, to immediately and substantially modify the schedule that was set forth in the regulations and that was carefully crafted to achieve the NWPA milestones. Such action would send a strong signal to the parties and potential parties that the NWPA and regulatory milestones are not to be taken seriously and would create significant uncertainty as to the need for future adherence to these milestones.

**E. Nevada's Cited Legal Authority Also Does Not Support An Extension of 150 Days**

Nevada's Motion identifies two Commission decisions that allegedly support the State's request for an extension of time. As explained below, Nevada is wrong in both instances.

Nevada first cites *Nuclear Fuel Services, Inc.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975), and states as follows in its Motion:

Finally, granting such an extension of time [150 days] would be in accord with Commission practice and precedent. . . . In *Nuclear Fuel Services, Inc.* . . . , the Commission *granted a nine-month extension of time* to file petitions to intervene in a proceeding far less complicated and far less affected by the public interest than Yucca Mountain. Granting the request in West Valley but denying Nevada's more modest request could not be reconciled.<sup>61</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 6 (citation and grammatical error omitted) (case name emphasized in original and emphasis added).

Contrary to Nevada’s Motion, *Nuclear Fuel Services* did not involve a request for an extension of time. Rather, it addressed late-filed petitions to intervene. In that case, the Commission considered whether to allow Erie County’s petition to intervene in the West Valley proceeding, even though the petition was untimely by nine months.<sup>62</sup> The Commission—“albeit with some reluctance”—allowed the petition.<sup>63</sup> In making its decision, the Commission focused heavily on “the extent to which the petitioner’s participation [would] broaden the issues or *delay the proceeding*.”<sup>64</sup> According to the Commission, this was a “particularly weighty consideration.”<sup>65</sup> Recognizing that the hearing was *not* scheduled to begin for several months and allowing the late intervention would *not* disrupt established schedules and other preparations for hearing, the Commission reluctantly allowed the petition.<sup>66</sup>

In this case—unlike in *Nuclear Fuel Services*—an extension of 150 days would significantly disrupt the established milestones in the Yucca Mountain proceeding, substantially delaying answers, replies, the first prehearing conference, the Licensing Board’s admissibility determinations, and permissible Commission interlocutory appeals. Furthermore, in this case—unlike Erie County in *Nuclear Fuel Services*—the State of Nevada has had the benefit of reviewing DOE’s documentary materials for the past several months and making preparations for the licensing proceeding for even longer. *Nuclear Fuel Services* provides no support for Nevada’s lengthy extension request and, in fact, provides justification for denying Nevada’s Motion.

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<sup>62</sup> *Nuclear Fuel Servs.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 274–75 (1975).

<sup>63</sup> *Id.* at 275.

<sup>64</sup> *Id.* at 276 (emphasis added).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

Similarly, Nevada's reliance on *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325 (1998), is misplaced. Nevada states in its Motion:

*See also Baltimore Gas & Electric Company . . . , where the Commission provided for contentions to be filed over four months after docketing of the application in a reactor license renewal proceeding described as "limited in scope." The scope of potential issues in Yucca Mountain is easily a factor of ten greater than in the Calvert Cliffs case. Therefore, Calvert Cliffs suggests that a reasonable contention filing period for Yucca Mountain is forty months. The instant request is modest in comparison.*<sup>67</sup>

Nevada again misconstrues a Commission decision. Nevada's Motion erroneously suggests that the NRC made an affirmative decision in the Calvert Cliffs proceeding that parties would have "over four months" from application docketing to file contentions. That simply is not the case. Rather, the petitioner at issue ultimately had more than four months to file contentions in *Calvert Cliffs* largely as a result of several procedural delays, including at least two appeals to the Commission and two limited extensions of time (a three-week extension and a one-day extension).

Moreover, Nevada overlooks the fact that *Calvert Cliffs* ultimately recognized that the intervening party could not meet the "unavoidable and extreme circumstances" standard for additional time to file contentions.<sup>68</sup> There, the intervening party argued that the Commission's efforts to expedite the proceeding resulted in a process that denied it a "fair opportunity to make its case against license renewal."<sup>69</sup> The Commission rejected this assertion, reasoning that the intervening party had more than four months within which to prepare contentions, yet it failed to offer any meaningful explanation of the grounds for its opposition to the license application.

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<sup>67</sup> Nevada Motion at 6 n.13 (case name emphasized in original) (citations omitted and emphasis added).

<sup>68</sup> *Balt. Gas & Elec. Co.*, CLI-98-25, 48 NRC at 342–43.

<sup>69</sup> *Id.* at 340–41.

The same reasoning set forth in *Calvert Cliffs* should apply equally to this case. Nevada has had the distinct advantage of reviewing DOE’s documentary materials *prior* to the licensing proceeding, and will have a substantial period of time to review the LA during pre-docketing review by the NRC Staff. Therefore, Nevada will have had ample opportunity to frame meaningful contentions when they become due 30 days from the notice of hearing. These circumstances preclude any finding that good cause justifies Nevada’s request for an extension of time.

**F. Nevada’s Motion Seeks to Re-litigate (Impermissibly) DOE’s LSN Certification**

As the Commission is well aware, in October 2007, the DOE certified that it had made all its documentary material in existence available on the LSN. In response, Nevada moved the PAPO Board to strike DOE’s certification on the ground that it was incomplete and premature because the certification “omitted numerous critical, core technical documents and modeling basis information necessary for licensing and formulating contentions.”<sup>70</sup> This, Nevada asserted, violated 10 CFR § 2.1003(a)(1), which requires that DOE, in its initial certification, “make available . . . all documentary material . . . generated by or at the direction of, or acquired by [DOE].”<sup>71</sup> Nevada further argued that “[a] principal purpose of the LSN is to provide parties a full and fair *six months’ access* to all of DOE’s core technical documents and modeling basis Documentary Material that it intends to cite and rely on in the licensing proceeding *before* DOE tenders its [license application] to NRC—the ‘Six-Month Rule.’”<sup>72</sup> Nevada insisted that the

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<sup>70</sup> *U.S. Dep’t of Energy* (High Level Waste Repository: Pre-Application Matters), LBP-08-01, Slip Op. at 3 (Jan. 4, 2008) (quoting Nevada position) (internal quotations omitted).

<sup>71</sup> *Id.* (quoting Nevada position) (internal quotations omitted) (ellipses in original).

<sup>72</sup> *Id.* (quoting Nevada position) (internal quotations omitted) (emphasis in original).

purpose of the alleged “Six-Month Rule” “is to provide participants with the opportunity to frame focused and meaningful contentions.”<sup>73</sup>

The PAPO Board denied Nevada’s motion to strike, rejecting the State’s “Six-Month Rule” argument. The PAPO Board concluded that DOE’s duty to produce documentary material applied only to documentary material in existence (with a reasonable lag time for processing) at the moment of certification. Nevada has appealed this PAPO Board decision to the Commission and the parties have briefed the issue.

Nevertheless, Nevada seeks to get a “second bite at the apple” in its Motion for an extension of time. There, Nevada repeats its “Six-Month Rule” claim:

The Commission’s LSN regulations are premised on the concept that Nevada and other potential parties should have a full 180 days (six months) to review the documents underlying the LA on the LSN before the LA is filed (tendered). Indeed, NRC representatives even advised interested members of the public in 2001 that, despite the 30-day period, they would in fact have *ten months* to prepare their contentions, consisting of six months’ review of underlying documents on the LSN, a three-month period for a docketing review, followed by the 30 days established in the notice of hearing.<sup>74</sup>

To the extent Nevada bases its request for more time to file contentions on the need to review documents placed on the LSN after DOE’s initial certification, the Commission should view it as nothing more than an attempt to reargue a point already decided by the PAPO Board and on appeal to the Commission.

More importantly, under the NRC’s schedule, Nevada will receive more than the *ten months* that Nevada bases its 150-day extension upon: the seven-month period between LSN

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<sup>73</sup> *Id.* at 4 (quoting Nevada position) (internal quotations omitted).

<sup>74</sup> Nevada Motion at 5–6 (emphasis added).

certification and filing; the three months for NRC Staff review; and the 30-day period to file contentions. Stated differently, the Commission's current schedule obviates Nevada's concern.

#### **IV. CONCLUSION**

For these reasons, DOE respectfully requests that the Commission deny Nevada's Motion for an extension of time.

Respectfully submitted,

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket No. PAPO-00, PAPO-0001
	)	
U.S. DEPARTMENT OF ENERGY	)	ASLBP No. 04-829-01-PAPO
	)	ASLBP No. 08-861-01-PAPO-BD01
(High Level Waste Repository:	)	
Pre-Application Matters)	)	May 8, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing U.S. DEPARTMENT OF ENERGY ANSWER OPPOSING THE STATE OF NEVADA'S MOTION TO ESTABLISH A SCHEDULE FOR FILING CONTENTIONS have been served upon the following persons on May 8, 2008, through the Electronic Information Exchange.

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