

**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 STATE OF NEVADA'S BRIEF IN OPPOSITION TO THE
DEPARTMENT OF ENERGY'S APPEAL FROM THE
PAPO BOARD'S APRIL 23, 2008 ORDER**

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INTRODUCTION

The Department of Energy ("DOE") appeals from the April 23, 2008 Order of the Pre-License Application Presiding Officer Board ("PAPO Board" or the "Board") denying DOE's motion to strike Nevada's Licensing Support Network ("LSN") certification. DOE's appeal, however, ignores what the PAPO Board decided.

As the Board made clear, "*[i]n large (if not total) measure*, and in contrast to the recent unsuccessful motion of Nevada to strike the DOE certification, *the motion now in hand seeks to raise purely factual issues.*" April 23, 2008 Order at 6 (emphasis added). The Board noted that "[i]n essence, DOE asks us to conclude that, as a matter of fact, there must be documentary material in Nevada's possession that should have been, but to date has not been, included in Nevada's document collection placed on the LSN." *Id.*

DOE lost its motion because, in the words of the Board, "[a]s the movant seeking an order striking Nevada's certification, DOE bears the burden of supporting all points required for such an order," *id.* (citing 10 C.F.R. §2.325), and "[h]ere, however, *no* such solid evidentiary showing *was even attempted.*" *Id.* (emphasis added). Instead, DOE relied on "little more than the suspicion of DOE counsel" – suspicion that amounted to "little more than rank speculation and conjecture," *id.* at 6-7 – while Nevada provided *evidence* that rebutted the suspicion, speculation and conjecture. *Id.* at 7-9. As the Board found, "[t]he short of the matter is that, once there has been a reasoned refutation of factual claims of a purely conjectural nature, *the need for any further consideration of those claims come to an end.*" *Id.* at 9 (emphasis added).

DOE's appeal depends upon ignoring these factual findings. DOE does not mention that the PAPO Board found that DOE's motion "[i]n large (if not total) measure," raised "purely factual issues." DOE never acknowledges the Board's ruling that "the need for further consideration," came "to an end," when DOE failed to prove its factual allegations or to rebut

Nevada's "reasoned refutation" of DOE's "purely conjectural" claims. *Id.* at 9. DOE does not discuss the standard of review that applies to this appeal (clearly erroneous), much less suggest that this appeal meets that standard.

Instead of appealing from the Board's actual holding, DOE skips to a section of the opinion in which the majority does *not* discuss its holding. In this section, the majority responds to an argument raised by the dissent about a supposed defect in a particular 2007 call memo – *one* of dozens of instructions, memos, explanations, admonitions and materials Nevada gave to the people working on this project to retain, to organize and to produce documents for the LSN. The majority rejected the dissent's argument on several grounds, one of which was the fact that DOE had never properly raised such an argument. April 23, 2008 Order at 9-10 & n.32. And on appeal, even DOE disagrees with the dissent's factual premise.

DOE, however, skips these points as well. DOE fashions this appeal by declaring that "[c]entral to the majority's decision," is what DOE calls the Board's "holding" that "*as a matter of law*, Nevada need not at this time produce material that either does or does not support a position." DOE Appeal at 3 (*italics DOE's*) (quoting April 23, 2008 Order at 11). And DOE devotes almost all of its appeal to arguing about this legal conclusion.

This makes no sense. In essence, DOE is saying that, even though the PAPO Board found that DOE failed, *even to attempt* to prove that Nevada was withholding any material, the Commission should pretend otherwise. DOE asks the Commission to pretend that Nevada has large numbers of documents sitting around that it consciously decided not to put in the LSN. (Nevada's evidence showed this was not true). Then, DOE asks the Commission to pretend further, that Nevada's justification for not putting these existing documents on the LSN was that Nevada maintained, as a matter of law, that it did not have to do so. (This too is untrue; DOE's attempt to imply otherwise relies upon two snippets taken obviously out of context).

Then, DOE asks the Commission to rule that the "No-Position Premise" DOE has ascribed to Nevada would have been mistaken, had Nevada actually relied on it. This is asking the Commission (1) to ignore that PAPO Board's actual holding; and (2) to strike Nevada's LSN (on the theory that Nevada failed to place on the LSN documents that, in fact, do not exist); because (3) *if* DOE had proved the documents did exist (which it did not), and (4) *if* Nevada made a legal argument to justify withholding them (that Nevada did not), (5) *then*, DOE believes it has responses to the legal argument it has erroneously ascribed to Nevada.

The Commission should reject this appeal. The PAPO Board did not resolve this motion on an issue of law; it resolved it on issues of fact, with findings so obviously correct that DOE has no response except to ignore them. Moreover, even if the Commission were to reach DOE's legal issue (and there is no reason why it should), DOE would *still* be mistaken: what DOE is attacking is not Nevada's position, but the Commission's own statements about how the LSN certification was supposed to work.

Factual Background

I. DOE SEEKS TO STRIKE NEVADA'S LSN CERTIFICATION.

In this appeal, DOE seeks to strike a certification that the State of Nevada filed concerning its production of documents on the Licensing Support Network ("LSN"). The LSN is "a Web-based system for making documents electronically available to all participants." *In the Matter of U.S. Dep't of Energy (High-Level Waste Repository)*, 60 N.R.C. 300, 304 (Aug. 31, 2004) (citing 10 C.F.R. §§2.1001 and 2.1011), *appeal on other issues held in abeyance*, Docket No. PAPO-00, CLI-04-32, 2004 NRC LEXIS 253 (N.R.C. Nov. 10, 2004). DOE's motion asserts that Nevada had withheld "documentary material" that it was obliged to put on the LSN.

Title 10 C.F.R. §2.1001(1) and (2) respectively describe the two categories of documentary material to which DOE directs its appeal. What DOE calls "DM-1" (and the

Commission has referred to as "Class 1" material) is information "upon which a party, potential party, or interested governmental participant *intends to rely and/or to cite in support of its position in the proceeding* for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area pursuant to parts 60 or 63 of this chapter...." Section 2.1001(1) (emphasis added).

What DOE calls "DM-2" (or "Class 2" material) is "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*." Section 2.1001(2) (emphasis added).

Although DOE throughout its brief repeatedly attempts to ascribe to Nevada what DOE calls a "No-Position Premise," in fact, what DOE really seems to be characterizing are words the Commission, *itself*, used to explain its LSN requirements and expectations years before Nevada's certification. The *Commission* explained both in proposing these rules, and in approving them, that these two classes of documentary material "are tied to a 'reliance' criterion." 68 Fed. Reg. 66372, 66376 (November 26, 2003) (proposing rule); 69 Fed. Reg. 32836, 32843 (June 14, 2004) (issuing final rule). Class 1 consists of information a potential party "intends to rely and/or cite in support of its position in the proceeding for a construction authorization," and Class 2 is "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." The "position" in the definition of Class 2 is the same "position" in the definition of Class 1, that is, the potential party's "*position in the proceeding* for a construction authorization." §2.1001(1) (emphasis added).

In issuing these regulations, the *Commission* also explained that it did not expect a potential party (which, unlike DOE, has yet to see the licensing application, much less to propose contentions or to have them approved), to place "reliance" upon documents for a yet-to-be-asserted position. The Commission noted that "[r]eliance is fundamentally related to a position

that a party in the [high-level waste] licensing proceeding will take in regard to compliance with the Commission's regulations on the issuance of a construction authorization," and that [t]hese compliance issues take the form of 'contentions' of law or fact that a party has successfully had admitted for litigation...." 68 Fed. Reg. at 66376 (proposed rule); 69 Fed. Reg. at 32843 (final rule). *See also* 10 C.F.R. §2.309(f)(1)(v) (using "position" for a potential party interchangeably with "contention").

Accordingly, the Commission explained that, "because the full scope of coverage of the reliance concept will only become apparent after proffered contentions are admitted...*an LSN participant would not be expected to identify specifically documents that fall within either Class 1 or Class 2 documentary material in the pre-license application phase.*" 69 Fed. Reg. at 32843 (emphasis added). The Commission, however, also said that it "*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 or Class 2 documentary material by the date specified for initial compliance...." *Id.* (emphasis added).

II. NEVADA PRESENTS EVIDENCE TO SHOW THAT IT PROVIDED ITS DOCUMENTS ON THE LSN, IN GOOD FAITH, WITHOUT LIMITING ITSELF OR RELYING UPON ANY "NO POSITION" PREMISE.

Before the PAPO Board, Nevada presented "extensive evidence detailing the ... documents and memos used as guidance for identifying documentary material." April 23, 2008 Order at 10 n.32. Indeed, these written documents reminded its team members "about procedures and training Nevada *had been implementing for several years.*" *Id.* (emphasis in the Order).

Nevada submitted three declarations. Two of these declarations (that of Susan Lynch, the Administrator of Technical Programs in Nevada's Agency for Nuclear Projects, and Charles J. Fitzpatrick, one of Nevada's counsel), attested to the work they had done to ensure that Nevada's

team provided all Documentary Material for the LSN, and to the instructions Nevada had given concerning the documents to be placed on the LSN. As they explained:

- Beginning in 2003 or 2004 and continuing to the present, Nevada conducted numerous expert ‘summit’ meetings, in which the entire Nevada licensing team (consultants, Nevada staff, and attorneys) all participated. "At each one of these ‘summit’ meetings, a block of time was reserved for a presentation that was made concerning the requirements and obligations for LSN compliance." Lynch Dec. ¶8; Fitzpatrick Dec. ¶¶5-7.
- Since at least 2004, Nevada conducted *weekly* telephone conferences with the key members of its team, at which it "frequently" discussed LSN compliance issues. Lynch Dec. ¶9; Fitzpatrick Dec. ¶8.
- Nevada had indeed, for years, circulated numerous written instructions, call memos, and information, including the regulations themselves, *DOE’s own* instructions, and numerous other documents to ensure that the members of its team would retain and produce all Documentary Material. Fitzpatrick Dec. ¶9, 11. *See, e.g.*, Nev. Exhs. 20, 21.

At every stage, Nevada urged the members of its licensing team to "err in the direction of inclusion" in any instance in which there was any question whether something constituted Documentary Material or not. Fitzpatrick Dec. ¶11. Even though the Commission did not "expect[]" Nevada "to identify specifically documents that fall within either Class 1 or Class 2 documentary material in the pre-application phase," 69 Fed. Reg. at 32843, Nevada advised its experts to go further. Nevada "repeatedly cautioned" the expert consultants on its licensing team "that they had the responsibility of ensuring that anything *they might possibly eventually rely on* in forming opinions or writing reports or testifying in connection with the licensing proceeding must be on the LSN at the time of Nevada’s certification." *Id.* ¶12 (emphasis added).

Thus, as *DOE concedes*, Nevada’s "call memos did not maintain that Nevada had no positions and cannot identify its supporting or 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.*’" DOE Br. at 9 (citing several of Nevada’s documents).

Nevada's third declarant was Mike Thorne, who is the expert in charge of coordinating the work of all of the experts Nevada has retained for this project. Thorne Dec. ¶1. Dr. Thorne explained that, although DOE asserted that Nevada "must" have more LSN-material because it supposedly had been working on the licensing proceeding for many years, DOE's assertions about the time involved were misleading, and DOE's speculation about what Nevada supposedly had in hand was untrue. For example, DOE asserted below that "Nevada having assembled a special team of lawyers and experts in 2001 to prepare for the Yucca Mountain licensing proceeding." And, on this appeal, DOE embellishes this statement to declare that "Nevada has been *specifically preparing positions* for the Yucca Mountain licensing proceeding since at least 2001." DOE Br. at 6) (emphasis added).

As Dr. Thorne pointed out, such statements are extremely misleading. Among other things, there were *no* documents on the LSN until June 30, 2004; 2.1 million documents were not made available to any experts until April 2007; Thorne Dec. ¶13. (In fact, DOE identified these 2.1 million documents as LSN relevant long before then, but intentionally held them back for years before dumping them, *en masse*, on the LSN in the middle of last year).

Moreover, as of the time of Nevada's January 2008 LSN Certification, DOE had *still* failed to produce:

- *Any* of the pre-closure safety analysis.
- The Total System Performance Assessment for the license application ("TSPA-LA") upon which DOE is going to base its entire Post-Closure Performance assessment.
- The features, events and processes ("FEPs") that identify what the scenarios are that the TSPA is going to attempt to analyze in order to determine the safety risk.
- The outputs to the TSPA-LA that allow Nevada to determine what the TSPA-LA will have to say about the risks associated with those scenarios DOE analyzed.
- Any plan, *at all*, for meeting the statutory requirement that DOE be able safely and successfully for 100 or more years to go back into tunnels filled with canisters of

radioactive waste at high temperatures, and retrieve the canisters. *See* 42 U.S.C. §10161(b)(1)(C).

Thorne Dec. ¶¶4, 5, 7, 8.

As Dr. Thorne explained, these deficiencies made it impossible for Nevada to draft documents such as meaningful contentions, ¶¶3, 12, and Nevada had not, *in fact*, drafted any meaningful contentions. *Id.* ¶12. *See also* Fitzpatrick Dec. ¶¶2-3. The closest Nevada had been able to come to contentions were rudimentary ideas that might, or might not, ripen into contentions. *See* DOE Ex. P at 19-24.

Nevada, however, *did* produce substantial numbers of documents under Classes 1 and 2. As Nevada's Response explained, "[w]hile it is difficult at this stage to pinpoint Nevada's licensing positions, it is telling that a search of its LSN database by subject discloses these "hits": TSPA – 380; corrosion – 701; LA – 940." Nevada Response to DOE's Motion to Strike, February 28, 2008, at 4. As explained below, it is mainly by *redacting this* sentence that DOE's Brief (at 13-14) implies that the opposite occurred.

III. DOE DOES NOT REBUT NEVADA'S EVIDENCE.

At oral argument before the PAPO Board, DOE's counsel admitted that DOE had no evidence to rebut any of the evidence Nevada had put forth explaining its process of production for the LSN. In counsel's words:

we would need to develop a factual record to respond to those issues or concerns or to their purported denials of our *prima facie* case, which obviously, before filing the motion we have no means available for us to do that.

Transcript of February 28, 2008 PAPO Hearing at 1350. In fact, DOE never sought to conduct any discovery either. April 23, 2008 Order at 9.

Instead, DOE has relied on announcement and speculation. First, it announces that Nevada has "newly devised" a "No-Position Premise." DOE Br. at 10. Then, DOE speculates that Nevada did something very strange: Nevada *first* engaged in an intensive process designed

to get its experts, employees and consultants to bend over backwards to preserve, to isolate and to provide anything that might even arguably be Documentary Material; then, says DOE, Nevada, for some unexplained reason, filtered the documents out to make sure that the materials it carefully preserved and gathered were not produced. *Id.*

In fact, there is no truth to either of these assertions, nor evidence to support them:

A. DOE Uses Two Quotes To Ascribe to Nevada a "No-Position Premise" for Which Nevada Never Argued.

Although DOE's brief repeatedly declares there to be a "Nevada No-Position Premise," DOE's basis for ascribing this position to Nevada consists of two quotes taken obviously out of context. The first quote does not even come from Nevada's brief on this motion. DOE maintains (Brief at 5) that Nevada "signaled" that it was adopting a "No-Position" Premise when, *prior to Nevada even filing its LSN Certification, much less DOE challenging it*, Nevada *agreed* with both DOE and the PAPO Board on one aspect of argument DOE made in response to Nevada's Motion to Strike DOE's LSN Certification. The second "quote" is a phrase that DOE extracts from a paragraph that, in context, says *the opposite* of what DOE implies:

1. One quote comes from an earlier motion in which Nevada was agreeing with DOE and the PAPO Board.

Even to understand DOE's point about the earlier briefing requires some background. As the PAPO Board has recognized, whereas "the motion now in hand seeks [in large, if not total measure] to raise purely factual issues," April 23, 2008 Order at 6, Nevada's motion to strike DOE's LSN certification *does* turn on an issue of law. *Id.* The issue in Nevada's motion (and its pending appeal) is: Do the LSN Regulations permit DOE knowingly (and arbitrarily) to advance its certification so as not to afford Nevada and other interested parties a regulatory six-month period to review documents "of critical importance to DOE's license application." *U.S. Dep't of Energy (High Level Waste Repository: Pre-Application Matters)*, LBP-08-01, ("*Slip Op.*") at 11

(PAPO Board, Jan. 4, 2008). In connection with Nevada's motion and appeal, DOE maintains that it has that right; Nevada believes DOE violated the regulations.

As part of defending its certification, DOE argued that the Commission's regulations could not actually require DOE to have even one document available at the time it made its certification. As one argument, DOE urged that it could not be required to have any documents at the time of certification because such a requirement would *also* necessitate Nevada and other potential parties to have completed all of their Class 1 and Class 2 documents by 90 days later when their initial certifications are due. This, DOE maintained, **could not be** the law because the other potential parties could not possibly have all their Class 1 and 2 documents 90 days after DOE's certification. As DOE put it **then** (unlike now):

There is **nothing** in the text, structure or logic of Subpart J that indicates that the Commission intended Nevada and all other potential participants to have completed their review of DOE's documentary material and have finished their opposing analyses within 90 days of DOE's certification.

DOE November 9, 2007 Response to Nevada's Motion to Strike at 14 (emphasis added).

Below, the PAPO Board agreed with this point. It concluded that expecting Nevada or other potential parties to complete analyses within 90 days would be an "unreasonable result[]," because these parties cannot possibly "finish and freeze their core technical documents 90 days after a date chosen by someone else (*i.e.*, DOE's certification date)." *U.S. Dep't of Energy (High Level Waste Repository: Pre-Application Matters)*, LBP-08-01, Slip Op. at 12 (PAPO Board, Jan. 4, 2008), *appeal pending*.

On that appeal, Nevada agreed with both the PAPO Board **and** DOE that potential parties could not be expected to complete analyses within 90 days. Nevada, however, disagreed with the premise that preventing DOE from advancing its certification so as to avoid providing

documents that it *knows* it will rely upon in license application, would require potential parties to identify documents they did *not* know they would be relying upon. As Nevada put it:

Nevada is not arguing that the regulation imposed upon DOE (or Nevada or anyone else) the obligation to *know* at any point in time what documents that party is going to rely upon. ***The Board is correct in the sense that Nevada, who has not been working for years on a license application, cannot possibly know for the most part what it will cite or intend to rely upon. Nevada's certification, which must be made 90 days after DOE's, can only attest to its then-current intent, which itself is entirely dependent on what DOE has certified.*** And Nevada will not advance its certification in an effort to prevent DOE from finding out information.

Nevada's Brief on Appeal from the PAPO Board's January 4, 2008 and December 12, 2007 Orders, filed January 15, 2008, at 25 (bold emphasis added).

Nevada was not "signaling" anything about what it was or was not providing in its LSN database. Nevada was simply agreeing with DOE, that potential parties cannot, for the most part, know what they are going to rely upon at the time of an arbitrary certification date set months before the license application is even filed. DOE's Brief neither explains this context, not reflects the bolded language above.

2. DOE extracts its second "quote" from a paragraph that actually says the opposite.

The only other quote DOE cites as support for its assertion that Nevada adopted a "No-Position Premise" is even more startling. In its appeal, DOE concedes that Nevada's call memos required its experts to produce "*all* of their relevant documentary material," "without qualification," or "discretion," DOE Br. at 9, and that "[t]he additional training materials that Nevada says" (actually attested) "it provided its personnel, experts, consultants and contractors, and that Nevada attached to its response to DOE's Motion to Strike, also nowhere give evidence of the existence of a 'No-Position' Premise." *Id.* at 9-10.

On pages 13-14 of its Brief, however, DOE represents to the Commission that Nevada, in the state's February 8, 2008 response to DOE's Motion to Strike, "acknowledged ... that it followed the No-Position Premise to limit its LSN collection." DOE says that, "Nevada wrote that 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.'" *Id.*

These statements, however, are not even close to fair. In fact, Nevada's full paragraph reads:

Among the information provided by Nevada to its licensing team for guidance in their review and designation of Documentary Material were DOE's own publicly promulgated Frequently Asked Questions and DOE's own November 2006 Memorandum (Ex. 1) articulating to DOE and its contractor personnel the prerequisites of LSN compliance. At every stage, members of Nevada's licensing team were urged to "err in the direction of inclusion" in any instance in which there was any question whether something constituted Documentary Material or not (Fitzpatrick Declaration). In addition, the expert consultants were repeatedly cautioned that they bore the responsibility of ensuring that anything which they might possibly eventually rely upon in forming opinions or writing reports or testifying in connection with the licensing proceeding **must** be on the LSN at the time of Nevada's certification or risk that it might not be available to them. *Id.* ***While*** it is difficult at this stage to pinpoint Nevada's licensing positions, ***it is telling that a search of its LSN database by subject discloses these "hits": TSPA – 380; corrosion – 701; LA – 940.***

Nevada Response at 3-4 (emphasis added) (italic emphasis added). Nevada did not "acknowledge" that it somehow limited its production based upon some premise the DOE is now articulating. Nevada said that ***notwithstanding*** the difficulty at this stage in pinpointing positions, it ***provided*** documents, even those it ***might possibly eventually*** rely upon.

B. DOE Relies on Conjecture from Its Counsel.

Having posited from these two quotes that (contrary to all of the evidence about what Nevada requested its personnel, experts, consultants and contractors to provide) Nevada has embraced a "No-Position Premise," DOE then represents as if it were a fact that "[t]he document

production that Nevada made on the LSN is an apparent result of its newly devised No-Position Premise." DOE Brief at 10.

Thus, DOE speculates that Nevada (1) engaged in an admittedly elaborate, thorough, detailed and careful program involving dozens, if not scores of conversations, memos, emails, and mailings designed to ensure that its experts erred on the side of retaining and producing anything that might conceivably constitute "documentary material," so that (2) Nevada could then withhold the documents based upon the premise that DOE ascribes to Nevada. There is no evidence that this occurred. All the declarations before the PAPO Board swear otherwise, and DOE provided no evidence to contradict them.

IV. THE PAPO BOARD DECIDES THAT DOE NOT ONLY FAILED TO PROVE THAT NEVADA WITHHELD DOCUMENTS, DOE FAILED MEANINGFULLY TO TRY.

Writing for the majority of the PAPO Board, Judges Moore and Rosenthal found that DOE had simply failed to prove the facts it had alleged. As they pointed out:

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

April 23, 2008 Order at 6.

They reasoned that, "[p]ursuant to 10 C.F.R. §2.325, the burden of proof rests on the movant" – DOE. *Id.* "As the movant seeking an order striking Nevada's certification, DOE bears the burden of supporting all points required for such an order. *Id.*

The problem was that "[h]ere, however, no such solid evidentiary showing was even attempted." *Id.* Instead, DOE provided "little more than the suspicion of DOE counsel, based upon what is offered as circumstantial evidence, that Nevada necessarily must be deemed to have withheld from its LSN collection documents that it was required to include." *Id.* at 6-7.

The majority found the suspicion of DOE's counsel to be inadequate evidence for two reasons. First, DOE had failed to put forth a *prima facie* case. In the words of the Order, "what we have before us is little more than rank speculation and conjecture." *Id.* at 7.

Second, even if the Board "were to assume that the circumstantial presentation of counsel was sufficient to constitute a *prima facie* case on the otherwise unsupported DOE proposition that Nevada defaulted in carrying out its LSN responsibilities ... [a]ny such *prima facie* case has been satisfactorily rebutted in Nevada's response to the motion." *Id.*

Contrary to DOE's assertion that Nevada's Response somehow relied on a "No-Position Premise" to withhold documents that Nevada had required to be collected, the majority noted that Nevada had actually "insist[ed] that it had fully complied with its regulatory obligation to make, in [Nevada's] words, 'a good faith effort to create an accurate and complete LSN database.'" April 23 Order at 7 (quoting Nevada's Response at 1). And the majority found Nevada's evidence, and, in particular, Ms. Lynch's declaration, to be "adequate support for Nevada's rejoinder to the DOE attack upon the Nevada certification that, once again, has a wholly circumstantial foundation." *Id.* at 8.

The majority also rejected DOE's assertion that "Nevada's LSN is missing certain types of documentary material, including work product from Nevada's experts." *Id.* It found that "Nevada has sufficiently rebutted DOE's speculation that certain document "types" are missing from the LSN collection by pointing out problems with the search methods used and the absence of any evidence to prove DOE's claims." *Id.* The Board also noted that DOE's search could only identify *three documents* as supposedly missing; and, in fact, these *were* on the Nevada LSN database. *Id.* at 7, 8 n.27.

The majority concluded that:

The short of the matter is that, once there has been a reasoned refutation of factual claims of a purely conjectural nature, *the need for further consideration of those claims come to an end.* [*Id.* at 9 (emphasis added).]

The entire remainder of the decision consists of a dispute between the majority and the dissent. In dissent, Judge Karlin focuses on a particular June 2007 Call Memo that Nevada used, April 23 Order at 26-34 (Karlin, J., dissenting), which, he asserts, had wording problems that could have led experts not to produce Class 1 or 2 materials.

In response, the majority finds it to be "beyond cavil that the dissent's attack on the 2007 call memo raises a host of factual and legal issues that are not encompassed to any extent in the DOE motion." *Id.* at 9. The majority also explains that the dissent's assertion that this call memo was "'the key instruction Nevada used in identifying documentary material,' is an unsupported finding of fact," *id.* at 10 n.32, and that "[n]either party" (*not even DOE*) had claimed this was true. *Id.* Indeed, as noted above, on this appeal, DOE concedes that Nevada had numerous communications and call memos that they required Nevada's various experts, consultants and employees to produce "*all* of their relevant documentary material," and that these documents "nowhere give evidence of the existence of a 'No-Position' Premise." DOE Br. at 9-10.

As part of this debate, however, the dissent and the majority also disagreed over whether potential parties are required to project in advance what the license application will say; posit what position they will take in response; develop documents that might support or oppose those positions; and have them completed at the time of certification that is pegged to take place 90 days after DOE makes its own. The dissent argues that this is an obligation. April 23, 2008 Order at 34-44 (dissent).

The majority rejects the dissent's argument as contradicting the Commission's statement that "because the full scope of coverage of the reliance concept will only become apparent after

proffered contentions are admitted...an LSN participant would not be expected to identify specifically documents that fall within either Class 1 or Class 2 documentary material in the pre-application phase." *Id.* at 13 & n.37 (majority) (quoting 69 Fed. Reg. at 32843).

DOE's appeal from this ruling does not address the dispositive factual ruling that DOE failed to prove its case; or its finding that DOE's speculation was rebutted by Nevada's evidence; or the conclusion that the dissent is based upon an argument DOE failed property to raise about the inadequacy of a single call memo, and does not now agree with. Instead, DOE focuses on the dispute between the majority and the dissent over the question of whether, *if* Nevada had adopted a "No-Position Premise," that position would be legally correct.

ARGUMENT

I. THE PAPO BOARD'S DECISION MUST BE UPHELD BECAUSE IT WAS NOT CLEARLY ERRONEOUS FOR THE BOARD TO RELY ON THE EVIDENCE TO REBUT THE DOE'S SPECULATION THAT NEVADA FAILED TO PRODUCE LSN MATERIAL.

A. DOE Does Not Even Try To Meet Its Burden of Showing that the Board's Factual Findings Are "Clearly Erroneous."

In accordance with its well-established precedent, the Commission reviews factual findings under a "clearly erroneous" standard, and reverses only when findings are "not even plausible in light of the record viewed in its entirety":

We ordinarily defer to our licensing boards' fact findings, so long as they are not clearly erroneous. A clearly erroneous finding is one that is not even plausible in light of the record viewed in its entirety.... Although the Commission has the authority to reject or modify a licensing board's factual finding, it will not do so lightly. We will not overturn a hearing judge's findings simply because we might have reached a different result.

In the Matter of Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), 61 N.R.C. 129, 174 (2005) (quoting *Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1 Sequoyah Nuclear Plant, Units 1 & 2 Browns Ferry Nuclear Plant, Units 1, 2 & 3*, 60 N.R.C.

160, 189 (2004)). *Accord In the Matter of Louisiana Energy Services, L.P. (National Enrichment Facility)*, 64 N.R.C. 37, 40 (2006) (citations omitted).

Here, DOE's motion "[i]n large (if not total) measure," raised "purely factual issues." April 23, 2008 Order at 6. DOE asserted that Nevada had documentary material that it failed to place on the LSN. But, as the Board found, DOE did not even "attempt" to meet its burden to provide a sufficient evidentiary basis to show this was true. *Id.* Instead, DOE relied on "little more than the suspicion of DOE counsel" – suspicion that amounted to "little more than rank speculation and conjecture." *Id.* at 6-7. And *Nevada* responded with detailed evidentiary material explaining what it did and how it complied in every respect with the regulations in creating its LSN database. *Id.* at 7-9.

In its appeal, DOE does not even mention the standard of review, much less begin to meet the heavy burden it must meet to overturn the Board's factual findings. DOE restates its views of the facts. But it does not argue how the Board's factual conclusions could be so unreasonable that they "are not even plausible in light of the record viewed in its entirety." *Private Fuel Storage L.L.C.*, 61 N.R.C. at 174. The Board's ruling was not only plausible it was correct. Nevada did not withhold documents.

DOE's failure on appeal is dispositive. DOE has no more right, on appeal, to overlook its obligation to show that the Board's factual findings were "clearly erroneous," than it did below, to rely on conjecture instead of proof. The Commission need not reach *any* legal issue.

B. DOE Could Not Meet Its Burden Had It Tried.

Had DOE argued that the Board somehow failed plausibly to evaluate the evidence, that argument would have been totally unconvincing regardless. In fact, the Board did not merely rely on DOE's failure to provide evidence, it noted that Nevada *had* provided *contrary* evidence. Nevada submitted three declarations that detailed both its extensive efforts to ensure that it

obtained and provided LSN material; and the reason why DOE's own failure to produce critical documents in its LSN limited what could be available to Nevada.

II. DOE IS INCORRECT ABOUT THE LAW, TOO.

Because DOE cannot overturn the factual conclusions upon which the Board decided DOE's motion, its appeal should end here. However, because DOE devotes so many pages to fabricating a "No-Position Premise," ascribing that premise to Nevada, and then attacking the premise, it is worth noting that DOE's legal argument is *also* incorrect. First, although DOE asserts (dozens of times), that Nevada came up with the idea that Class 1 and Class 2 material was not going to exist until contentions had been admitted, in truth, the premise that DOE ridicules is a 2004 statement *by the Commission itself*. Second, the Board *also* found, as a matter of fact, that Nevada did *not* follow a "No-Position Premise." Indeed, Nevada made every good faith effort to provide material that it legally was *not* required to provide.

A. The Commission Neither Expected Nor Required Potential Parties To Have in Advance of the Licensing Proceeding the Materials upon Which They Would Rely or the Materials that Would Contradict Those Materials.

As noted above, the Commission was very clear about its expectations concerning Class 1 and Class 2 material. The Commission noted that of these classes of documentary material "are tied to a 'reliance' criterion." 68 Fed. Reg. 66372, 66376 (November 26, 2003) (proposing rule); 69 Fed. Reg. 32836, 32843 (June 14, 2004) (issuing final rule). Class 1 consists of information a potential party "intends to rely and/or cite in support of its position in the proceeding for a construction authorization." 10 C.F.R. §2.1001(1). Class 2 is "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." *Id.* §2.1001(2).

The Commission noted that "[r]eliance is fundamentally related to a position that a party in the [high-level waste] licensing proceeding will take in regard to compliance with the

Commission's regulations on the issuance of a construction authorization," and that [t]hese compliance issues take the form of 'contentions' of law or fact that a party has successfully had admitted for litigation...." 68 Fed. Reg. at 66376 (proposed rule); 69 Fed. Reg. at 32843 (final rule). *See also* 10 C.F.R. §2.309(f)(1)(v) (using "position" for a potential party interchangeably with "contention").

Accordingly, the Commission concluded that "because the full scope of coverage of the reliance concept will only become apparent after proffered contentions are admitted...*an LSN participant would not be expected to identify specifically documents that fall within either Class 1 or Class 2 documentary material in the pre-application phase.*" 69 Fed. Reg. at 32843 (emphasis added).

The majority below is right, April 23, 2008 Order at 10-15: DOE's claim – that it has a legal right to *insist* that Nevada identify and provide this Class 1 or Class 2 material before there are contentions or even a license application – contradicts these words. Under DOE's new legal rule, potential parties would *now* be required to determine in advance of receiving a license application what the potential parties are going to be relying upon to support (or what they will view as opposing) positions they have yet to take, and may or may not be permitted to assert. During the rulemaking, DOE never argued for such a requirement. Nor did it dispute the statements in the Commission's notice of proposed rulemaking in which the Commission explained that it did not expect prospective parties to meet such a test. This is a new requirement DOE would like to impose.

The main "legal" support DOE has for imposing this new requirement is a further statement in which the Commission made clear this was *not* a legal requirement. In its notice of final rulemaking, the Commission went on to state that it "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 or Class 2 documentary material by the date specified for initial compliance...." 69 Fed. Reg. at 32843-44.

As Nevada has explained, it took the Commission's expectations seriously, and absolutely made this good faith effort. Nonetheless, there is a significant difference between stating what the Commission "expects," and imposing an enforceable legal requirement. The Commission commonly uses the term "expects" to denote a *non-enforceable* prediction that is *not* a legal requirement. For example, in its 1985 Policy Statement on "Severe Reactor Accidents" (ML003711521), the Commission stated that it "expects" new power reactor designs to achieve a higher level of protection from severe accidents. In its 1986 Policy Statement on "Regulation of Advanced Nuclear Power Plants" (ML051660651), the Commission stated that it "expects" advanced power reactor designs to have greater safety margins. In a more recent 2007 draft "Final Revision" to its Policy Statement on "Regulation of Advanced Nuclear Power Plants," the Commission stated that it "expects" advanced power reactor designs to include additional safety features described in the Statement.

In all of these examples, the Commission has always recognized a clear distinction between *expecting* something and *requiring* it. For example, in its 2003 notice of proposed rule-making on risk-informed categorization of structures, systems, and components in nuclear power plants (ML030930512), the Commission stated that "the proposed rule permits, but does not require, use of [ASME] code cases," but that it "expects licensees will utilize the ASME code cases as part of their implementation of §50.69." Clearly, the Commission's expectation about a good faith effort here is just that, an expectation or hope, and not a binding legal requirement.

Here, there cannot be a legal requirement. The "reliance" criterion in the definition of Classes 1 and 2 documentary materials cannot be definitively applied until contentions are admitted. Contentions are legal pleadings. A potential party could have endeavored to plan for

and draft preliminary versions of contentions, but these preliminary drafts would constitute privileged litigation work product, and therefore, no potential party could be compelled to disclose its preliminary versions of contentions in the pre-application phase. But without such disclosure, there is no way a potential party's application of the reliance test could be meaningfully challenged or reviewed, and the whole pre-license application inquiry into Class 1 and Class 2 materials would be doomed from the outset.

Even if litigation work product involving the drafting of contentions were to be disclosed, a dispute would require adjudicating unknowns about the status of DOE's plans for the application, a potential party's state of knowledge about DOE's plans, and the potential party's state of preparation of its contentions. The Commission would need to confront when a potential party's thoughts and plans about contentions ripen to the point that Class 1 and Class 2 materials can exist. A potential party's research on a topic relevant to Yucca Mountain will often turn out not to be the basis for a contention. The application could moot the research by deciding *not* to assert a position; or the research may show that the potential party should *not* assert a contention; or the potential party could decide to pick and choose different battles.

Such an inquiry would raise more questions than a party (or the PAPO Board) could possibly answer. If an expert prepares a draft of a contention, with an incomplete basis and no citations to DOE application material, and that draft is not reviewed and approved by anyone else, are there Class 1 or Class 2 materials? If another expert reviews it, and several lawyers also review it and offer preliminary comments, but the draft is never approved, are there now Class 1 or Class 2 materials? If an expert concludes in an e-mail that some work undertaken by DOE appears to be sound, should it nevertheless be assumed a contention to the contrary would be filed, with the result that the e-mail would be Class 2 material? It is much more logical to conclude that no contention will be filed. After all, Nevada has never said that it would

challenge every single statement in the application. There is no reason to require Nevada to presume that it will file a contention that contradicts its own research.

Even if these difficulties could be surmounted, the Commission would either have to assume the contentions would be admitted, or to judge the prospects for those contentions to be admitted before they are finalized, and before an application exists. The Commission would have to guess what these might contain. And in deciding what documents to put on the LSN, the parties would have to guess at what guess the Commission is going to make in its rulings.

In its rulemaking, the Commission recognized that the system does not work DOE's way. The Commission wrote that "while it is not possible to say there are no special circumstances that would necessitate a ruling by the PAPO on the availability of a particular document in the pre-license application phase based on its Class 1 or Class 2 status, disputes over Class 1 and Class 2 documentary material generally would be of a type that would be more appropriately raised before the presiding officer designated during the time following the admission of contentions...." 69 Fed. Reg. at 32843.

The Commission also rejected DOE's current logic when it ruled in DOE's *favor* to find that Nevada was not entitled to obtain DOE's draft license application. *U.S. Dep't of Energy (High-Level Waste Repository: Pre-Application Matters)*, CLI-06-05, 63 N.R.C. 143 (2006). There, the Commission held that a draft application could not possibly contain any Class 1 or Class 2 materials. The Commission reasoned that it was "premature to expect any participant to file a complete set of Class 1 or Class 2 documentary material in the pre-application phase." 63 N.R.C. at 152. The Commission concluded that, with respect to Class 1, DOE will rely on words in the final and not the draft and, with respect to Class 2, "until the final license application is filed, it is pure conjecture to suppose that there will be substantive differences between drafts of a kind that could undermine DOE's position in the final license application." *Id.* at 151.

The Commission's ruling in DOE's favor on this point is all the more telling because Nevada is in a much poorer position than DOE is to know what it is going to rely upon. DOE has been working on an application for *18 years*. That application will need to address a large number of technical issues that are spelled out in great detail in 10 C.F.R. Part 63 and the Commission's License Application Review Plan (NUREG-1804). With the exception of the EPA standard (which is yet to be promulgated, but has not delayed DOE's application plans), DOE has known for years what issues its application must address, and what it must prove about them. DOE has also known for many months, if not years, what information would constitute its Class 1 or Class 2 documentary materials. It has been free to draft and to file its license application without knowing what Class 1 or Class 2 materials the other parties may have. DOE was also free to pick the date on which it wanted to file its LSN certification.

Potential parties, like Nevada, are not afforded 18 years in this proceeding. They do not have rules that dictate what issues they must address. Unlike DOE, potential parties need not address every requirement in Part 63. To determine what they are going to say, potential parties depend on knowing which of the potentially infinite arguments or analyses DOE is relying upon. To this day, the potential parties have yet to see the application, and DOE's piecemeal methods of production and delays in critical pieces prevented potential parties like Nevada from formulating meaningful contentions. *See Thorne Dec.* ¶¶3, 12. The potential parties also do not choose when they do their initial certification. It is mandated to take place 90 days after an arbitrary LSN certification date picked by DOE – regardless of what materials the Potential Parties have at the time.

Even overlooking all of these distinctions, DOE is arguing here for a standard that it claimed did not apply to itself. When DOE responded to Nevada's Motion To Strike DOE's LSN certification, DOE maintained that:

- (p. 5): "The LSN regulations impose no requirement that DOE complete a particular document or amount of work before its initial certification."
- (p. 6): This initial certification "is an attestation that the participant has made available its **existing** documentary material (to the extent it can be reasonably identified in the pre-License Application phase before contentions)."
- (p. 9): "§2.1003(a) does not impose **any** substantive constraint on, or requirements respecting, the completeness of DOE's supporting documentary material at initial certification."
- (p. 14): "There is **nothing** in the text, structure or logic of Subpart J that indicates that the Commission intended Nevada and all other potential participants to have completed their review of DOE's documentary material and have finished their opposing analyses within 90 days of DOE's certification."

DOE November 9, 2007 Response to Nevada's Motion to Strike (emphasis added). If there is no substantive constraint on DOE's certification on a date of its choosing, there cannot possibly be a substantive requirement that Nevada have made final decisions about what response it is going to make to something it has not seen on an arbitrary date chosen by DOE.

In short, DOE cannot fairly pick and chose from the Commission's expectations – transmuting some into law, while ignoring others. The Commission did say that it expected a "good faith" effort from Nevada. Nevada provided that. But the Commission also said that Nevada and other potential parties "would **not be expected** to identify specifically documents that fall within either Class 1 or Class 2 documentary material in the pre-application phase." 69 Fed. Reg. at 32843 (emphasis added). DOE ignores that.

B. Nevada Has, in any Event, Provided What It Has; It Cannot Be Obligated To Provide Something More.

Even if the regulations had imposed a requirement for Nevada to guess in advance what positions it would take and to provide whatever documents it currently imagines will end up supporting (or failing to support) those positions, DOE's appeal would still fail, because Nevada made a good faith effort to do just that. As DOE concedes, Nevada's memos "directed Nevada's

personnel, experts, consultants and contractors to submit without qualification ‘*all* of their relevant documentary material," and there was "no discretion in this requirement." DOE Br. at 9.

As Nevada’s declarations establish, Nevada did not screen or hold back documents it identified. The majority of the PAPO Board found Ms. Lynch’s declaration so compelling that it did not even need to "freight this decision with a detailed rehearsal of" Nevada’s representations; that "suffice it to say, we find them adequate support for Nevada’s rejoinder to the DOE attack upon the Nevada certification that, once again, has a wholly circumstantial foundation." April 23 Order at 8.

On appeal, DOE has no basis for overturning that factual finding. In short, facts (as opposed to fiction) require rejecting DOE’s appeal.

CONCLUSION

For these reason, the Commission should affirm the decision of the PAPO Board denying DOE’s request to strike Nevada’s LSN Certification.

Dated: May 20, 2008

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing State of Nevada's Brief in Opposition to the Department of Energy's Appeal from the PAPO Board's April 23, 2008 Order has been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (*)).

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