UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMISSION

BEFORE THE COMMISSION

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

Nye County Motion For Leave to File Amicus Brief in Support of DOE Appeal from the PAPO Board's April 23, 2008 Order Denying DOE Motion to Strike Nevada LSN Certification

Pursuant to 10 CFR 2.315(d) Nye County, Nevada ("Nye County" or "County") moves for leave to file the attached amicus curie brief in reference to the decision of the PAPO Board ("Board"), order denying the Motion of the Department of Energy (DOE) to strike the January 17, 2008 Licensing Support Network (LSN) certification by the State of Nevada ("Nevada" or "State"), *U.S. Department of Energy (High Level Waste Repository: Pre-Application Matters), LBP-08-05, 67 NRC ___ (April 23, 2008).*

Although Nye County did not actively participate in the Department of Energy's (DOE) motion to strike the State of Nevada's (State) LSN Certification, Nye County has appeared before the PAPO, certified its own LSN cite on January 17, 2008, has supplemented its LSN monthly, and has been one of the most active participants in the Yucca Mountain process to date. Furthermore, Nye County participated in the original negotiated rulemaking, commencing in 1987, which resulted in the adoption of the Licensing Support System (LSS), the precursor of the LSN, and has been a member of the LSS Advisory Review Panel and LSN Advisory Review Panel since

the adoption of the original 10 CFR Part 2, Subpart J, in April of 1989. Nye County believes that its perspective on this issue is critical for the Commission's consideration in rendering its decision on this appeal.

The Board's decision incorrectly adopts an interpretation that is contrary to plain meaning of the LSN regulations, has the effect of establishing dramatically different document production standards for DOE and another for the remaining parties in the proceeding, including the State, and is inconsistent with the schedule established by the Commission for completion of the licensing proceeding in a timely manner pursuant to the statutory direction in § 114 of the Nuclear Waste Policy Act (NWPA).

The purpose for admitting an amicus curie brief is to allow the Commission to hear the views of third parties who may have a different perspective or position than that being advocated by either party in the appeal. In this case, Nye County offers just such a perspective. The County intends to intervene and participate fully in all aspects of the Yucca Mountain licensing proceedings, and offers this submission to the Commission because it is directly affected by the Board's Order and will be affected by the Commission's resolution of this appeal.

May 20, 2008

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Nye County Amicus Brief in Support of DOE Appeal from the PAPO Board's April 23, 2008 Order Denying DOE Motion to Strike Nevada LSN Certification

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I. Introduction

Nye County, Nevada ("Nye County" or "County") submits this amicus curie brief in reference to the decision of the PAPO Board ("Board") order denying the Motion of the Department of Energy (DOE) to strike the January 17, 2008 Licensing Support Network (LSN) certification by the State of Nevada ("Nevada" or "State"), U.*S. Department of Energy (High Level Waste Repository: Pre-Application Matters), LBP-08-05, 67 NRC ___ (April 23, 2008).* The Board's decision incorrectly adopts an interpretation that is contrary to the plain meaning of the LSN regulations, particularly 10 CFR 2.1003, has the effect of establishing completely different document production standards for DOE and for the remaining parties in the proceeding, including the State, and is inconsistent with the schedule established by the Commission for completion of the licensing proceeding in a timely manner pursuant to the statutory direction in § 114 of the Nuclear Waste Policy Act (NWPA).

II. Preliminary Statement

Nye County is an affected unit of local government under §§116 and 117 of the Nuclear Waste Policy Act, 42 USC 10136 & 10137, and has maintained an active and aggressive oversight program for virtually the entire history of the Yucca Mountain Program. In addition, since 1992 Nye County has conducted an Independent Scientific Investigations Program that has been acclaimed by all parties, and has produced, and continues to generate, data and information that will likely be used by all parties to the Yucca Mountain proceeding, including the Department of Energy and the NRC staff. Furthermore, Nye County participated in the original negotiated rulemaking, commencing in 1987, which resulted in the adoption of the Licensing Support System (LSS), the precursor of the LSN, and has been a member of the LSS Advisory Review Panel and LSN Advisory Review Panel since the adoption of the original 10 CFR Part 2, Subpart J, in April of 1989.

Nye County certified its compliance with 10 CFR 2, Subpart J, on January 17, 2008. That original certification was unchallenged by any party to the PAPO proceedings. Nye has supplemented its LSN in accordance with the requirements of 10 CFR 2.1003(e) and the Case Management Orders of the Board each month since that date.

Nye County intends to intervene, and to participate fully, in all aspects of the Yucca Mountain licensing proceedings, and makes this submission because it will be directly affected by the Commission's resolution of this appeal. However the order and dissent both ignore the fact that the State and DOE are not the only potential parties.

III. Argument

If, by chance, Nye County, NEI, another affected unit of local government, or any other potential intervenor wanted to review and use some of the State's documentation to support one of our contentions we are unable to do so until they make that information available. At that time, under the schedule currently in place, Nye County could not possibly review, analyze, digest, and craft from scratch, a new contention regarding DOE's LA. Assume, for purposes of this appeal, that there likely may be relevant information that the State elects not to use to support one or more of their contentions, but that Nye County or another intervenor may wish to use to support one of our contentions. Based on the majority opinion, that information will never be divulged by the State so no participant will ever have the opportunity to review the information or craft a contention based upon that information. The LSN rules were crafted to avoid just this potential result.

A lot of the discussion for the majority and for the dissent focuses on subparagraphs (1) and (2) of the definition of "documentary material" in 10 CFR 2.1001, (DM-1 and DM-2), but seems to

ignore subparagraph (3) of the definition (DM-3). Quizzically, we wonder why a discussion of DM-3 is not more prevalent? DM-3 includes:

> (3) All reports and studies, prepared by or on behalf of the potential party, interested governmental participant, or party, including all related "circulated drafts," relevant to both the license application and the issues set forth in the Topical Guidelines in Regulatory Guide 3.69, regardless of whether they will be relied upon and/or cited by a party. The scope of documentary material shall be guided by the topical guidelines in the applicable NRC Regulatory Guide. (Emphasis supplied)

Regulatory Guide 3.69, App A, at 1-6, describes this material as:

> 1. Technical reports and analyses by all participants (including those developed by contractors).
>
> Note that this applies only to final technical reports and does not include preliminary drafts (including predecisional and other internal review drafts) other than "circulated drafts," as defined in 10 CFR Part 2, Subpart J (Item 6 below). See 10 CFR 2.1019(i)(2), which states that preliminary drafts, although subject to derivative discovery, are excluded from entry in the LSN.
> 2. Quality assurance records
> 3. External correspondence
> 4. Internal memoranda
> 5. Meeting minutes/transcripts
> 6. Draft documents circulated for supervisor concurrence or signature on which a nonconcurrence has been registered

Nye County does not believe that there is any requirement in Subpart J to designate documentary material as belonging to any of the 3 classes defined in Section 10 CFR § 2.1001. The essential requirement is that all parties and potential parties must make available ALL of their "extant" documentary material on the LSN pursuant to Section 2.1003(a), which makes NO distinctions among the 3 classes. In fact, 2.1003 (a) (1) specifies:

> An electronic file including bibliographic header for all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, a potential party, interested governmental participant or party;. . .

We believe that the whole classification debate misses the intent of the LSN rule.

Were Nye County and every other non-DOE participant to take the Board's Order to heart, we would all simply stop certifying anything to our LSN – after all nothing is due under the order

until such time as we have filed our contentions. Then again, a good faith argument can also be made that a submitted contention need not be supported by actual LSN materials until it is accepted, so Nye County and the others could wait until their contentions are admitted before they submit their supporting documents to the LSN. Although an argument can be made that the Order supports such an interpretation, no one can honestly assert that the parties agreed that this was how the LSN was to be employed. Simply stated, the LSN was to provide a pre-application opportunity for the parties to review the materials of the other parties and conduct some level of electronic document discovery concerning those materials – all with the idea of speeding up the LA application process. This was clearly the purpose of the NRC in initiating the negotiated rulemaking in 1987, was the intent of the parties to that negotiation, including the State of Nevada, in adopting the fruits of that negotiating, and of the Commission in adopting the precursor of the current LSN, 10 CFR 2, Subpart J in April of 1989. See FR 14944, April 14, 1989. This intent has remained essentially unchanged throughout the transformation of the LSS to the LSN and the various amendments to that rule up to the current version. The Board's Order does not move this goal forward. Instead it contravenes this clear intent and allows the parties to manipulate when they file their LSN materials.

The Commission should grant the DOE appeal, and direct the PAPO to order Nevada, within a reasonable time, but no later than 60 days after the filing by DOE of its LA, to fully populate its LSN with all relevant documentary material under 10 CFR 2.1001 and 2.1003.

May 20, 2008

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Leave to File Amicus Brief and Nye County Amicus Brief, dated May 20, 2008, have been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (*)).

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