UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket No. PAPO-001
	)	
U.S. DEPARTMENT OF ENERGY	)	ASLBP No. 08-861-01-PAPO-BD01
	)	
(High Level Waste Repository: Pre-Application Matters)	)	June 16, 2008

U.S. DEPARTMENT OF ENERGY RESPONSE TO THE STATE OF NEVADA'S PETITION TO REJECT THE YUCCA MOUNTAIN LICENSE APPLICATION

I. Introduction

On June 3, 2008, the U.S. Department of Energy (DOE or Department) tendered its License Application (LA) seeking authorization to construct a spent nuclear fuel and high-level radioactive waste repository at Yucca Mountain, Nye County, Nevada. Under its Review Plan, the U.S. Nuclear Regulatory Commission Staff will take approximately three months to review the LA to determine if it contains sufficient information for the NRC to formally docket the application.[1] Ignoring the NRC's established docketing regulations, the State of Nevada has submitted to the Commission a "Petition to Reject DOE's Yucca Mountain License Application as Unauthorized and Substantially Incomplete" (June 4, 2008) (Petition).

In essence, Nevada asks the Commission to reject DOE's LA before the NRC Staff conducts its docketing review. Rather than engage constructively in the licensing proceeding statutorily mandated by the Nuclear Waste Policy Act of 1982, as amended (NWPA), Nevada seeks to derail that process before it begins.[2] That licensing proceeding will provide Nevada and

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1 *See, e.g.*, NUREG-1804 (Rev. 2), Yucca Mountain Review Plan, Executive Summary at p. xv (July 2003).

2 DOE also notes that Nevada's prior Motion to Disqualify Morgan Lewis as counsel to DOE was recently and promptly rejected by the Commission based, in part, on the fact that the Motion was based on speculation by Nevada. *U.S. Dep't of Energy* (High Level Waste Repository: Pre-Application Matters), CLI-08-11, slip op. at

other interested parties ample opportunity to thoroughly examine and challenge DOE's LA in an adjudicatory proceeding and to thereby develop the record on which the Commission will ultimately determine whether to authorize the Department to construct the Yucca Mountain repository. During the licensing proceeding, the scientific, engineering and other information that underlies DOE's LA will be subjected to careful scrutiny by the NRC Staff, Nevada and other interested parties.

As discussed below, while the Commission could reject the Petition on procedural grounds, DOE respectfully requests that the Commission address the merits of the seven legal issues raised by Nevada's Petition before commencement of the hearing process. By addressing these seven legal issues on the merits now, before the start of the hearing process, the Commission will eliminate unnecessary, repetitive, and time-consuming argument of these legal issues both before the Atomic Safety and Licensing Boards (ASLBs), and again before the Commission, when inevitably the ASLBs' decisions on these issues are appealed to the Commission. Addressing Nevada's legal claims now will advance the Commission's ability to meet the 3-year schedule to issue a final decision on construction authorization set forth in the NWPA.[3]

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8 (June 5, 2008). DOE further notes that this Petition is inconsistent with Nevada's position in the context of the Licensing Support Network (LSN). In particular, the State argued in its appeal from the PAPO Board's January 4, 2008 and December 12, 2007 Orders denying Nevada's Motion to strike DOE's LSN certification that it "cannot possibly know for the most part what it will cite or intend to rely upon" in the Yucca Mountain licensing proceeding. The State of Nevada's Notice of Appeal from the PAPO Board's January 4, 2008 and December 12, 2007 Orders 25 (Jan. 15, 2008).

[3] *See* 42 U.S.C. § 10134(d) ("[T]he Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of the submission of such application, except that the Commission may extend such deadline by not more than 12 months . . . .").

II. The Commission Should Reject Nevada's Petition as Meritless[4]

Because the Commission has "ultimate supervisory control" over this proceeding, it may choose to address the merits of Nevada's Petition, despite its procedural deficiencies.[5] DOE respectfully urges the Commission to do so now, for the reasons stated above. In its Petition, Nevada presents two principal arguments urging the Commission to reject the LA. First, Nevada claims that the LA is "completely unauthorized" as a matter of law.[6] Second, Nevada claims that the LA is "incomplete" and "must be returned to DOE."[7] Nevada supports these arguments by raising seven legal claims. This Response addresses each of those claims below.

A. DOE Has Clear Legal Authority to File the LA

Nevada requests that the Commission reject the LA based upon Section 114(b) of the NWPA, which provides that DOE file an application for construction authorization no later than 90 days after the site recommendation became effective on July 23, 2002.[8] In Nevada's view,

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[4] The Commission could deny Nevada's Petition in its entirety because it is procedurally flawed in at least two respects. First, the Petition does not fit any of the specific forms of pleading set forth in the NRC Rules of Practice, and Nevada does not even attempt to explain the procedural basis for the Petition. The NRC Rules of Practice do not provide for the *ad hoc* Petition that Nevada filed, and Nevada does not cite any regulation authorizing the filing of its Petition. And second, the Petition challenges the Commission's carefully crafted regulatory scheme for processing the Yucca Mountain LA. Under the NRC's regulations, the NRC Staff will conduct an acceptance review to determine whether the LA is "complete and acceptable for docketing[.]" 10 CFR § 2.101(e)(3). Nevada argues that there are "special circumstances" here that require the Commission itself to decide whether to docket the Yucca Mountain LA. Petition at 2. A logical extension of Nevada's argument would be that the Commission itself should perform the technical review of the LA. However, the State provides no legal citation or substantive basis for its request. While the Commission does have inherent supervisory authority over the NRC Staff, the Staff's docketing process involves no significant policy or safety issues that warrant the Commission's review or involvement. Moreover, it is inappropriate to suggest that the Commission itself should conduct the acceptance review of the LA (over 8,600 pages in length). The nature of the docketing review is such that it is properly performed by the Staff, which will be performing the technical review if the LA is docketed. Accordingly, the Commission could summarily deny Nevada's Petition based upon its challenge to the NRC Staff's authority to docket applications. However, as stated above, DOE respectfully requests that the Commission address these arguments on the merits now.

[5] *See, e.g.*, *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 237 (2002).

[6] Petition at 3.

[7] *See id* at 1, 4–20 (discussing alleged "deficiencies" in the LA).

[8] *Id*. at 3 (citing NWPA § 114(b)).

because DOE did not file its application by October 2002 (ninety days after the site recommendation became effective in July 2002), the LA "filed on June 3, 2008 is completely unauthorized."[9] This argument should be rejected for several reasons.

First, Nevada has waived its right to raise this claim and failed to bring it in the correct forum. Section 119 of the NWPA provides *original and exclusive* jurisdiction in the United States Court of Appeals over any challenge to DOE's failure to take an action required under the NWPA.[10] A party must commence these challenges within 180 days of the DOE's failure to act.[11] Accordingly, Nevada was required by April 2003 to challenge in the United States Court of Appeals DOE's alleged failure to apply for a construction authorization by October 2002. Nevada filed no such challenge.[12] Therefore, Nevada is prohibited from raising this claim with the Commission now.

Second, the U.S. Supreme Court has consistently held that statutory provisions providing that the Government "shall" act within a specified time, without specified consequences for failing to do so, do not preclude future agency action. In *Brock v. Pierce County*, the Supreme Court recognized that "agencies do not lose jurisdiction for failure to comply with statutory time limits unless the statute *both* expressly requires an agency or public official to act within a particular time period *and* specifies a consequence of failure to comply with the provision."[13]

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9 *Id*.

10 NWPA § 119(a)(1)(B), 42 U.S.C. § 10139(a)(1)(B).

11 NWPA § 119(c), 42 U.S.C. § 10139(c).

12 In a consolidated action before the U.S. Court of Appeals for the District of Columbia Circuit, Nevada did challenge whether site characterization was complete and whether the site recommendation was appropriate, in addition to asserting other challenges under the NWPA. Nevada never raised the application submittal deadline issue under Section 114(b). *See Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004) (addressing Nevada challenges).

13 *See Brock v. Pierce County*, 476 U.S. 253, 259 (1986) (quoting lower courts' holdings on the issue, including *St. Regis Mohawk Tribe, NY v. Brock*, 769 F.2d 37, 41 (2d Cir. 1985) (internal quotations omitted) (emphasis in original)).

Brock involved a dispute over the Secretary of Labor's attempt to recover disallowed grant funds from a county in Washington State under the Comprehensive Employment and Training Act (CETA). CETA required that any allegation of misuse of funds should be investigated and that the Secretary "shall" issue a final determination "not later than 120 days after receiving the complaint."[14] CETA, however, specified no consequences for failure to meet the 120-day deadline.[15] The county claimed that recovery was time-barred because the grant officer did not issue a final determination disallowing the grant funds until more than two years after an audit report first raised questions about the grants.[16] The Court held that because important public rights were at stake, and that there were less drastic remedies available (such as a lawsuit to compel agency action under the Administrative Procedure Act), the word "shall," standing alone, was not enough to divest the agency of the power to act after the 120-day deadline expired.[17]

Since *Brock*, the Court has reiterated and confirmed the principle that agencies do not lose authority granted by statute simply because a statutory time limit has expired, absent any specified consequences of expiration. In *Barnhart v. Peabody Coal Co.*, the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act) established a deadline of October 1, 1993, for the Commissioner of Social Security to assign eligible retirees to extant coal companies for purposes of funding benefits.[18] Unassigned retiree benefits would be funded from a common fund or proportionally by the coal companies.[19] The Commissioner did not comply with the deadline, in

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14 *Id*. at 256 (citation to statute omitted).

15 *Id*. at 259.

16 *Id*. at 256–57.

17 *Id*. at 260, 266.

18 *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 152–53 (2003).

19 *Id*. at 153–55.

part due to funding delays, leaving approximately 10,000 beneficiaries unassigned.[20] A number of coal companies challenged later assignments after the deadline.[21] The Supreme Court rejected this challenge based on *Brock*, explaining that, not "since *Brock*, have we *ever* construed a provision that the Government 'shall' act within a specified time, without more, as a jurisdictional limit precluding action later."[22] The Court restated the *Brock* rule: "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."[23]

The same principles apply equally to Nevada's argument here: (1) the NWPA does not specify any consequences for the failure to meet the 90-day deadline; (2) important public rights are at stake—protection of the public and the environment through safe disposal of radioactive waste; and (3) less drastic remedies were available, that is, as discussed above, Nevada had the opportunity to challenge, in the United States Court of Appeals, DOE's alleged failure to submit the application earlier. Therefore, the word "shall," standing alone, does not revoke DOE's authority to submit an application to the NRC.

Moreover, both *Brock* and *Barnhart* suggest that the purpose and legislative history of the statute and the specific statutory timing provision should be considered in determining whether expiration of the timing provision revoked agency authority. In both cases, a judicial decision that the agency had lost its authority would have undermined the purposes of the statutes. In *Brock*, "[t]he 120-day provision [in CETA] was clearly intended to spur the Secretary to action,

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20 *Id*. at 155.

21 *Id*. at 156.

22 *Id*. at 158 (emphasis added).

23 *Id*. at 159 (quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993) (holding that courts may not dismiss a timely filed property forfeiture because of non-compliance with applicable statutory timing requirements for the procedural steps in the sequence of property condemnation proceedings)).

not to limit the scope of his authority."[24] Likewise, in *Barnhart*, the Court found that one of the purposes of the Coal Act was to accurately assign pension liabilities, a goal that would be undermined if the agency lost authority to assign such liabilities after the stated deadline.[25]

The scheduling provisions of the NWPA are similarly intended to spur the government to expeditious action:

> The purposes of this part are—(1) 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 high-level radioactive waste and such spent nuclear fuel as may be disposed of in a repository; [and] (2) *to establish the Federal responsibility, and a definite Federal policy, for the disposal* of such waste and spent fuel . . . .[26]

Thus, any claim that DOE is now barred from submitting an application for failure to meet the timing provision undermines the very purpose of the deadline and more generally undermines the policy behind the NWPA. Instead, as the Supreme Court noted in *Barnhart*, the way to reach the congressional objective is to read the statutory date as a spur to prompt DOE action, not as a bar to later completion.[27]

Further, if Congress had intended to revoke DOE's authority to submit the LA for failing to meet the timing provision, it defies logic that Congress has continued to appropriate to DOE hundreds of millions of dollars to the Yucca Mountain repository program.[28] Congress has also

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[24] *Brock*, 476 U.S. at 265.

[25] *See Barnhart*, 537 U.S. at 171–72 ("The way to reach the congressional objective . . . is to read the statutory date as a spur to prompt action, not as a bar to tardy completion of the business of ensuring that benefits are funded, as much as possible, by those identified by Congress as principally responsible."); *see also James Daniel Good*, 510 U.S. at 65 ("It would make little sense to interpret the directives designed to ensure the expeditious collection of revenues in a way that renders the government unable, in certain circumstances, to obtain its revenues at all.").

[26] 42 U.S.C. § 10131(b) (emphasis added).

[27] *Barnhart*, 537 U.S. at 172.

[28] *See* Energy and Water Development Appropriations Act, 2002, Pub. L. No. 107-66, 115 Stat. 486, 503–04 (2001); Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11, 148-49 (2003); Energy

continued to appropriate funding to the NRC to support its activities related to the proposed Yucca Mountain repository.[29]

To summarize, "[i]t misses the point simply to argue" that the 90-day provision in the NWPA is "mandatory," "imperative," or a "deadline."[30] Rather, the real question is what the consequences of the delay should be.[31] Like the *Barnhart* claimants' attempt to avoid pension liabilities, Nevada seeks a windfall: rejecting the LA would, in effect, reverse Congress' intent that the NRC should evaluate DOE's application for a geologic repository at Yucca Mountain. Nothing in the NWPA suggests that Congress intended this result. Accordingly, Nevada's argument to reject the LA as unauthorized must fail.[32]

B. Nevada's Claims About Access to Classified Information Are in Error And Do Not Warrant Rejecting the LA

Nevada notes that the LA contains classified information and challenges DOE's position that the NRC must defer to the agency that originated the classified information to determine whether the information is classified and, if so, to make access determinations.[33]

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and Water Development Appropriations Act, 2004, Pub. L. No. 108-137, 117 Stat. 1827, 1855 (2003); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2952 (2004); Energy and Water Development Appropriations Act, 2006, Pub. L. No. 109-103, 119 Stat. 2247, 2272-73 (2005); Revised Continuing Appropriations Resolution, 2007, Pub. L. No. 109-289, div. B, tit. II, ch. 3, § 20313, as amended by Pub. L. No. 110-5, 121 Stat. 8, 19-20 (2007); Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 1960-61 (2007).

29 *See, e.g.*, Energy and Water Development Appropriations Act, 2002, Pub. L. No. 107-66, 115 Stat. 486, 511 (2001); Energy and Water Development Appropriations Act, 2004, Pub. L. No. 108-137, 117 Stat. 1827, 1866 (2003); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2961 (2004); Energy and Water Development Appropriations Act, 2006, Pub. L. No. 109-103, 119 Stat. 2247, 2282 (2006).

30 *See Barnhart*, 537 U.S. at 157 (discussing Coal Act).

31 *See id*. (discussing Coal Act).

32 Nevada briefly argues that the LA also is "unauthorized" because "the facility DOE told Congress in 2002 it would build is substantially different from the one DOE now describes in the LA." Petition at 1, 3. The Commission should readily dismiss this baseless claim: (1) Nevada identifies no legal or factual basis for this allegation; (2) Nevada does not explain in what ways the LA differs from the one DOE purported to tell Congress about in 2002; and (3) Congress has never specified any specific design for the geologic repository.

33 *Id*. at 3–4.

The LA is over 8,600 pages long. Only about 2.5% of the LA, or 214 pages, contain classified information. Those pages are separately bound.[34] And as with every other NRC licensing proceeding that will invoke the special procedures for handling classified information in 10 CFR, Part 2, Subpart I, there is no restriction on a Nevada representative accessing these 214 pages if that representative has an appropriate security clearance, demonstrates a need to access the information (*i.e.*, a "need-to-know"), and agrees to comply with an appropriate Protective Order governing the use of classified information in this proceeding.

Nevada's argument on this issue constitutes an impermissible attack on the Atomic Energy Act of 1954, as amended (AEA), and other relevant statutes as they relate to the authority of DOE to classify and control access to classified information. Nevada complains that DOE, and not the NRC, determines whether information in the LA may be released to the public, and that the NRC should have the authority to second-guess this determination. Classified information is protected from public disclosure because, by definition, its release could endanger national security.[35] DOE is the agency that originated the classified information in the LA, and it has determined that this information is classified.[36]

An agency receiving this information from another agency may not second-guess the classification decision of the originating agency. First, Congress did not intend this when it

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[34] Letter from Edward F. Sproat, III, Director of Office of Civilian Radioactive Waste Management, to Michael F. Weber, Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission at 2 (June 3, 2008). A separate appendix containing figures that are Official Use Only also are not available to the general public, but Nevada has access to those documents through the PAPO Board's Third Case Management Order (Aug. 30, 2007).

[35] The protected information in the LA is classified as Restricted Data. Restricted data is defined in 42 U.S.C. § 2014(y). Control of Restricted Data and Formerly Restricted Data are described in Sections 141–49 of the Atomic Energy Act, as amended, 42 U.S.C. §§ 2161 et seq.

[36] For purposes of any discussion related to classified information, "DOE" includes the Naval Nuclear Propulsion Program. *See* 50 U.S.C. §§ 2406, 2511; Exec. Order No. 12344, 47 Fed. Reg. 4,979, 4,979 (Feb. 1, 1982) ("The Naval Nuclear Propulsion Program is an integrated program carried out by two organizational units, one in the Department of Energy and the other in the Department of the Navy.").

passed the NWPA.[37] Second, Congress did not intend this when it separated DOE from the Atomic Energy Commission. Section 141 of the AEA specifies that it is "the policy of the *Commission* to control dissemination and declassification of Restricted Data"[38] and Section 142 of the AEA states that the "*Commission* shall from time to time determine the data within the definition of Restricted Data, which can be published without undue risk of the common defense and security . . . ."[39] In these provisions, the term "Commission" means either the DOE or the NRC, depending upon the circumstances, because the AEA defines "Commission" as the former Atomic Energy Commission.[40] In the Energy Reorganization Act of 1974, Congress transferred the "licensing and related regulatory functions of the Atomic Energy Commission" to the NRC,[41] but transferred "all" other AEC functions to DOE's predecessor, the Energy Research and Development Administration.[42] DOE assumed those functions with the passage of the Department of Energy Organization Act.[43] Therefore, the NRC and DOE retained authority to classify their own information, but not to second-guess the classified designation given by the

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37 "Some of my colleagues have expressed a concern that our Nation's security could be threatened by giving the Nuclear Regulatory Commission responsibility for disposal of nuclear waste produced by our military. They are afraid that the NRC might divulge information about the waste that could be useful in figuring out exactly what the military is producing. I point out that the Energy Reorganization Act of 1974 requires that the NRC license all repositories. Yet, the NRC is not in a position to give out information about the military waste. Access to classified and restricted information is controlled by the originating agency." 128 CONG. REC. H8,790 (statement of Rep. Foglietta).

38 42 U.S.C. § 2161 (emphasis added).

39 42 U.S.C. § 2162(a) (emphasis added). Furthermore, AEA Section 146 states that "no Government agency shall take any action . . . inconsistent with the provisions of [Section 141–45]." 42 U.S.C. § 2166.

40 AEA, § 11f.

41 Energy Reorganization Act at § 201(f).

42 *Id.* § 104(c).

43 Pub. L. 95-91 (Aug. 4, 1977), 91 Stat. 565, as amended.

other. As a matter of federal statute, therefore, NRC may not second-guess whether the classified information in the LA, originated by DOE, is indeed classified.[44]

And third, Federal courts grant great deference to an Executive Branch agency's determination that information is classified.[45]

Nevada's argument is also contrary to the NRC's implementing regulation. Nevada states that "DOE also claims that this [classified] information may be kept secret from Nevada's representatives even if they have the necessary clearances and the NRC believes those representatives must be allowed to see the complete LA in order to represent Nevada's interests in the NRC licensing hearing."[46] The NRC regulations are clear, however, that DOE, as the originating agency of the classified information in the LA, determines who accesses the classified portion of the LA. 10 CFR section 2.905(h)(2) unambiguously requires that the NRC deny access to classified information if the originating agency objects in writing:

> Access to Restricted Data or National Security Information which has been received by the Commission from another Government agency will not be granted by the Commission if the originating agency determines in writing that access should not be granted. The Commission will consult the originating agency prior to granting access to such data or information received from another Government agency.

Although NRC security staff will process security clearance applications, the Commission itself will act on requests for access to classified information.[47] The Commission must notify DOE

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44 Even assuming, *arguendo*, that the NRC has such authority, DOE does not expect that the NRC Staff would deem itself qualified to declassify information that DOE has determined is classified. The classified information in the LA discusses unique aspects of spent naval nuclear fuel that will be placed in Yucca Mountain. The DOE—and not the NRC—has the expertise to determine what information regarding this spent fuel rises to the level of being classified.

45 *See e.g.*, *Dep't of the Navy v. Egan*, 484 U.S. 518, 527, 529 (1988).

46 Petition at 3–4.

47 10 CFR § 2.905(e)(2); *see also* Final Rule—Special Procedures Applicable to Adjudicatory Proceedings Involving Restricted Data or Other National Security Information, 41 Fed. Reg. 53,328 (Dec. 6, 1976) ("The

that these individuals have requested access to the classified portion of the LA, and consult with DOE before granting access.[48] If DOE objects, the Commission may not grant access.[49]

Nevada never mentions the NRC's governing regulation (Section 2.905(h)(2)) in its Petition. It does acknowledge this regulation in its Answer to the Motion seeking a Protective Order, but argues there that it was never meant to apply in a situation where the originating agency is also an applicant. Had Congress intended to establish special rules for access to DOE-originated classified information in the Yucca Mountain licensing proceeding, it presumably would have done so in the NWPA. It did not.

Furthermore, Nevada implies that DOE will not act in good faith in deciding whether information is properly classified and whether Nevada representatives have demonstrated a need to access the information (*i.e.*, a "need to know"). Such a presumption would, however, be contrary to well-established case law. As the Commission recently noted on June 5, 2008, in CLI-08-11, there is a presumption of regularity that attaches to agency action.[50] In that recent decision, the Commission reiterated that:

> [a] "presumption of regularity attaches to the actions of Government agencies." Absent "clear evidence to the contrary," we presume that public officers will "properly discharge[] their official duties."[51]

DOE has and will act in good faith and will follow its internal procedures in determining whether information is properly classified, and whether access should be granted to such information. Indeed, DOE's Motion seeking entry of a Protective Order Governing Classified

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Commission itself (rather than the presiding officer) would act on requests for access to classified information where the information originated in another Governmental agency[.]").

48 10 C.F.R. § 2.905(h)(2).

49 *Id*.

50 CLI-08-11, slip op at 7–8.

51 *Id.* at 8 (internal citations omitted).

Information evidences its intent to make classified information available to Nevada representatives in accordance with applicable law and in a timely manner. In that Motion, DOE specifically confirmed that it "will allow access to classified information to certain authorized individuals . . . if the Commission has issued a suitable Protective Order" and noted that "there is some urgency that a Protective Order be issued."[52]

Finally, Nevada's concerns about this issue are already before the Commission. On May 30, 2008, DOE asked the Commission to enter a Protective Order relating to the handling of and access to classified information in this proceeding for the very purpose of *expediting* Nevada's and others' access to the classified portion of the LA.[53] In that Motion, DOE asked the Commission to directly address issues regarding access to classified information in the Yucca Mountain licensing proceeding. Nevada filed an Answer to that Motion articulating the same concerns it raises in this Petition.[54] Accordingly, these issues are already before the Commission. While DOE does not request the Commission to strike this portion of the Petition, DOE notes that Nevada presents nothing new here.

In short, Nevada's concerns about access to classified information provide no basis for rejecting the LA, and its position on the NRC's authority to override a DOE classification or need to know determination is wrong as a matter of law.

C. The Absence of Final EPA and NRC Standards Does Not Warrant Rejecting the LA

Nevada argues that the "LA cannot be reviewed or docketed" until the U.S. Environmental Protection Agency (EPA) issues its final licensing standards and NRC issues its

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[52] U.S. Department of Energy's Partially Unopposed Motion for Protective Order Governing Classified Information 1 (May 30, 2008).

[53] *Id*.

[54] State of Nevada's Response to DOE's Partially Unopposed Motion for Protective Order (June 3, 2008).

own rule incorporating the new EPA standard.[55] The Petition again suggests, without basis, that DOE (as well as the EPA and NRC) may not be acting in good faith. In particular, Nevada questions whether DOE, NRC and EPA have effectively conspired to deliberately delay issuing the final standards:

> Nevada and others objected vigorously to what EPA proposed, and nothing has been heard from EPA since then, although it is known that EPA, NRC, and DOE *worked behind the scenes* to finalize a new standard, *presumably one that met DOE's needs*, and that a draft final rule was provided to Bush Administration officials for their final approval on or before December 15, 2006. *Perhaps the final rule is being delayed so that there can be a final check for conformity with DOE's LA*, or perhaps the rule has been delayed *deliberately* as a part of some strategy designed to prevent the new EPA rule from being overturned before the LA may be docketed.[56]

As explained below, Nevada's argument, which is devoid of legal authority, citations to analogous cases or any application of law to facts, lacks merit and the Commission should deny it.

As an initial matter, DOE notes that neither the preparation nor the review of the Total System Performance Assessment (TSPA)—the computer model that projects how the repository will perform safely in the post-closure period—is dependent on whether EPA ultimately decides that the standard for the post-10,000 year period should be 350 mrem or some other number.[57] Contrary to the implications in Nevada's Petition, the EPA standard is not necessary to docket the LA and commence the licensing proceeding. The EPA standard will not be necessary until a decision is made as to whether the expected performance of the repository meets the EPA

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[55] Petition at 6–8. EPA issued proposed standards in 2005 but has not issued the final rule. *See* Proposed Rule—Public Health and Environmental Radiation Protection Standards for Yucca Mountain, NV, 70 Fed. Reg. 49,014 (Aug. 22, 2005).

[56] Petition at 7 (emphasis added).

[57] In fact, the TSPA projects that the peak dose between 10,000 and 1,000,000 years will be approximately 2 mrem.

standard. That decision will not be made until after the TSPA has been thoroughly evaluated during the licensing process and any appropriate changes, if necessary, have been made to that assessment.

The TSPA submitted with DOE's LA is complete and there is extensive documentation as to how it projects the expected performance of the repository. The lack of a final EPA standard will not preclude the NRC Staff, Nevada and other interested parties from evaluating, within the context of the licensing proceeding, the extent to which the TSPA achieves its intended purpose of projecting the expected performance of the repository over time. Moreover, as discussed in the remainder of this section, even if the EPA final rule on the post-10,000 year standard were to require a change to some aspect of the TSPA, there are mechanisms to address any such changes in a manner that would permit a thorough evaluation of the TSPA.

Furthermore, as a matter of law, policy and practicality, the NRC should not stop processing license applications or suspend proceedings simply because an ongoing rulemaking will affect or relate to the application. The Commission confronted an analogous situation in *Diablo Canyon*.[58] There, Pacific Gas & Electric filed an application to construct an independent spent fuel storage installation (ISFSI) at the site of its two Diablo Canyon nuclear power plants.[59] Petitioners requested the Commission to suspend the ISFSI application proceeding pending the NRC's comprehensive review of the adequacy of design and operation measures to protect against terrorist attack and other acts of malice or insanity.[60]

The Commission denied the petition in *Diablo Canyon* for several reasons. First, there was no reason to believe that any danger to public health and safety would result "*from mere*

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[58] *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230 (2002).

[59] *Id*. at 234.

[60] *Id*.

continuation of the adjudicatory proceeding"—the proceeding was in its early stages and construction was not scheduled to begin for another two years.[61] Second, suspending the proceeding would have proved "an obstacle to fair and efficient decisionmaking."[62] Therefore, it made no sense to postpone resolving those issues that had no relationship with terrorism.[63] Furthermore, the Commission recognized the need for expedition in that case:

> The Commission supervises its adjudicatory docket with a view toward "sound case management." Efficient and expeditious decisionmaking is particularly important in this case . . . . Congress has recognized the need for and encouraged spent fuel storage at reactor sites and, to this end, has even mandated an *expedited* hearing process.[64]

Finally, the Commission determined that moving forward with the adjudication would not prevent the petitioners from having an opportunity to file late contentions in the proceeding or reopen the record if policy or rule changes took place.[65]

More recently, the NRC has taken the same approach with applications for new reactors. The NRC has received several combined license applications to construct and operate nuclear plants. The NRC has continued to process these applications even though the Commission has ongoing rulemakings that affect these applications (for example, the NRC has proposed a rule that considers the potential impacts of the crash of a large, commercial aircraft).[66] The Commission, at least implicitly, has concluded that these pending rulemakings do not conflict with processing these applications, even though the final rules may affect the applications.

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61 *Id*. at 239 (emphasis in original).

62 *Id*.

63 *Id*.

64 *Id*. at 239–40 (emphasis in original).

65 *Id*. at 240.

66 Proposed Rule—Consideration of Aircraft Impacts for New Nuclear Power Reactor Designs, 72 Fed. Reg. 56,287 (Oct. 3, 2007).

These same considerations support the Commission moving forward with the LA review while EPA finalizes its radiation dose standards. The instant matter is in its initial stages. Further, no danger to the public health and safety would result from the "mere continuation" of the NRC Staff docketing review. Conversely, rejecting the LA would "prove an obstacle to fair and efficient decisionmaking." As with *Diablo Canyon*, "[e]fficient and expeditious decisionmaking is particularly important in this case . . . ." Congress has recognized the importance of this proceeding, mandating that NRC issue a final decision on construction authorization on a three-year schedule. The Commission has carefully crafted its regulations to achieve the NWPA milestones. Rejecting the LA based on the absence of final standards would unnecessarily delay the proceeding and create a dangerous precedent that applications cannot be processed if all applicable regulations are not final.

Finally, allowing the NRC Staff to continue its review while EPA continues to work on the final standards will not prejudice Nevada in any way. As noted previously, if the EPA final rule were to necessitate a change in the TSPA, there are mechanisms available to ensure that Nevada has an opportunity to challenge the validity of the TSPA within the context of the licensing proceeding. In addition, Nevada may challenge the EPA and the NRC final rules judicially when they are issued. Such challenges, however, would not be an appropriate basis for either delaying docketing of DOE's LA or, if made after the LA has been docketed, suspending the licensing proceeding.

Accordingly, Nevada's concerns about "missing" EPA and NRC licensing standards provide no basis for rejecting the LA.

D. Nevada's Allegations Regarding Drip Shields Do Not Warrant Rejecting the LA

Nevada raises several speculative arguments about DOE's planned use of drip shields. As discussed in this section, Nevada's speculation is not grounds for rejecting the LA.

The repository design contains drip shields that will be installed over the waste packages before closure.[67] Section 1.3.4.7 of the LA's Safety Analysis Report includes a detailed discussion regarding the drip shield system, including the system's operational processes, safety category classification, design criteria, design bases, design methodologies, consistency of materials with design methodologies, and design codes and standards.[68] The LA also discusses the operational processes associated with installing the drip shields as part of closure of the repository.[69]

Contrary to this information, Nevada speculates—again, without citing any authority or support by expert opinion—that DOE will not install drip shields for three reasons: (1) DOE will not obtain sufficient financing to install the drip shields;[70] (2) world annual production of titanium and palladium will be insufficient for manufacturing the drip shields;[71] and (3) "conditions of high temperatures, high humidity, high radiation fields, and limited visibility in

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[67] As the LA explains, the drip shields will divert moisture away from the waste packages to increase the longevity of the waste packages:

> After closure and after the heat produced by the waste package has dissipated, moisture may enter the emplacement drifts in liquid form or as water vapor. The primary function of the drip shield is to divert the liquid moisture that drips from the drift walls around the waste packages and to the drift invert, increasing the longevity and prolonging the structural integrity of the waste packages. The drip shields are designed to link together, forming a single, continuous barrier to advective water flow for the entire length of the emplacement drift.

Yucca Mountain Repository Safety Analysis Report, *Drip Shield System*, § 1.3.4.7 at p. 1.3.4–26.

[68] *Id*. at §§ 1.3.4.7.5–1.3.4.7.8.

[69] *Id*. at § 1.3.4.7.2.

[70] Petition at 8.

[71] *Id*.

rock-strewn tunnels" will prevent drip shield installation.[72] This speculation, with nothing more, would not support the admission of contentions on these issues much less warrant rejecting the LA.

The Commission has consistently rejected arguments speculating that an applicant may fail to meet a license condition or commitment. For example, in *Private Fuel Storage*, the State of Utah argued that after operation commenced, the applicant *might* fail to generate sufficient revenue and therefore *might* attempt to cut operating costs by reducing the number of trained firefighting personnel, contrary to the licensee's commitments.[73] The Commission rejected this argument on appeal, stating that "we will neither assume that PFS will operate without sufficient financing, nor will we assume that an unexpected funding shortfall will induce PFS to ignore its responsibility to train and employ a sufficient number of firefighters."[74]

Similarly, in *Curators of the University of Missouri*, the Commission had previously imposed as a condition on the license amendments the requirement that the University could not use more than 1 gram of any actinide at any one time in its experiments.[75] The Commission based its analysis on the assumption that only 1 gram of actinide would be involved in a fire.[76] The intervenors requested that the Commission reconsider its ruling, arguing that the license permitted the University to possess and use more than 1 gram of actinide and therefore, the University's use *might* exceed the condition limit of 1 gram.[77] The Commission rejected the

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[72] *Id*. at 9. Nevada also claims that that "DOE's own calculations suggest that without the drip shields in place the repository would exceed the EPA standard by about a factor of 10." *Id*. at 8. Nevada provides no citation for this statement, and DOE is unaware of the basis for this statement.

[73] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 234 (2001).

[74] *Id*. at 235.

[75] *Curators of the Univ. of Mo.*, CLI-95-8, 41 NRC 386, 399 (1995).

[76] *Id*. at 400.

[77] *Id*.

intervenors' request "to base our findings on the assumption that the University will violate an explicit and unambiguous condition of its license."[78] The Commission declined to "rest" its "analysis on that hypothetical possibility."[79]

Likewise, in *Public Service Co. of New Hampshire*, a petitioner sought to reopen the record of an operating license proceeding by arguing that future budget cuts *might* force the State of New Hampshire to fail to maintain sufficient emergency response staff.[80] The Commission found that petitioner's "[s]peculation about future effects of budget curtailments" failed to provide a sufficient factual basis for his concerns.[81]

Here, Nevada's speculation that DOE *might* not install drip shields is not grounds for rejecting the LA. DOE has committed in the LA to install drip shields over the waste package before permanent closure. The State has not presented any factual basis—let alone a sufficient basis—to support any of its concerns. As explained above, the Commission will not rest its analysis on hypothetical possibilities. In refusing to rely on baseless possibilities, the Commission has recognized the inequitable consequences that would result if a party could contest an application on nothing more than allegations that an applicant will not meet a commitment.

Put simply, Nevada's speculation that DOE may not install drip shields provides no basis for rejecting the LA.

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78 *Id*.

79 *Id*.

80 *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-90-10, 32 NRC 218, 221–23 (1990).

81 *Id*. at 223.

E. Nevada's Allegations Regarding the Level of Repository Design Information Do Not Warrant Rejecting the LA

Nevada requests that the Commission reject the LA because it allegedly "has no final repository design, and relies instead on preliminary or conceptual design information."[82] Significantly, except for a brief mention of the transportation, aging and disposal canister, Nevada's Petition does not identify any actual inadequate design information. As explained below, Nevada's argument on repository design reveals Nevada's fundamental mischaracterization of the review process for license applications and NRC requirements regarding the level of information required in the LA.

1. *The NRC Staff Will Identify Any Deficiencies Regarding Level of Design Detail During its Acceptance and Technical Reviews*

As explained above, the NRC Staff will determine during its acceptance review whether the LA provides sufficient information to support a detailed technical review. Due to the very nature of reviewing a voluminous application, only the NRC Staff can reasonably determine whether the LA contains an adequate amount of design information. Therefore, any argument at this stage that the LA lacks design information represents nothing more than a premature and impermissible challenge to the NRC Staff's docketing review process. On this basis alone, the Commission should reject this argument.

2. *The Information Contained in the LA is Consistent with NRC Regulations*

According to Nevada, Part 63 requires DOE's initial application to include "much more design information[.]"[83] This argument reveals a fundamental misunderstanding of Part 63. As explained in this section, the NRC does not require DOE to identify all design features at the time of initial application. The level of information that the LA contains is entirely consistent

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82 Petition at 9–18.

83 *Id*. at 10.

with NRC regulations and is sufficient for the NRC to determine that the LA satisfies 10 CFR Part 63.

Under Part 63, the NRC must make the following fundamental safety findings before it issues a construction authorization for the repository: (1) there is reasonable assurance that the types of and amounts of radioactive materials described in the LA can be received and possessed without unreasonable risk to public health and safety and (2) there is reasonable expectation that the materials can be disposed of without unreasonable risk to public health and safety.[84] The NRC requires a sufficient level of design detail to allow it to make those findings. "The application must be *as complete as possible in the light of information that is reasonably available at the time of docketing*."[85] The LA meets these requirements.

The Statements of Consideration for Part 63 reveal that the NRC intended to provide DOE with flexibility in the amount of detail required in the LA. When the NRC proposed Part 63, the language regarding the completeness of the application appeared only in Section 63.24(a), "Updating of application and environmental impact statement."[86] In its comments on the proposed rule, DOE urged the NRC to clarify its intent regarding the level of information required in the LA.[87] DOE suggested that the NRC move the proposed section 63.24(a) requirement (that the application be as complete as possible at the time of docketing based on reasonably available information) to section 63.21(a) because this section provides requirements for the content of the license application.[88]

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84 *See* 10 CFR 63.31(a)(1)–(2) (stating that the "Commission may authorize construction of a geologic repository operations area at the Yucca Mountain site" if it makes these two determinations).

85 10 CFR 63.21(a) (emphasis added).

86 Final Rule—Disposal of High-Level Radioactive Wastes in a Proposed Geological Repository at Yucca Mountain, Nevada, 66 Fed. Reg. 55,732, 55,739 (Nov. 2, 2001).

87 *Id.* at 55,738.

88 *Id*.

In 2001, the NRC clarified its expectations regarding the level of information for the license application by including the language on "reasonably available" information in section 63.21(a). The NRC explained its rationale on the licensing process and the level of information it expects in the application:

> [P]art 63 provides for a multi-staged licensing process that affords the Commission the flexibility to make decisions in a logical time sequence *that accounts for DOE collecting and analyzing additional information over the construction and operational phases of the repository. . . . Clearly, the knowledge available at the time of construction authorization will be less than at the subsequent stages*. . . . [W]e agree with DOE that the proposed requirement at § 63.24(a) speaks to the content of the initial application, as well as all subsequent updates, and, therefore, it has been included at the end of § 63.21(a).[89]

Thus, NRC's final rule regarding the content of the application confirms that the NRC has: (1) built inherent flexibility into the licensing process and (2) acknowledged that detailed information may be unavailable at the time of initial application. According to the plain language of the regulation, DOE's application need only be *as complete as possible* based on *reasonably available* information at the time of docketing. To the extent that Nevada asserts that *all definitive* details of design information must be provided at the time of docketing, Nevada impermissibly challenges the regulations, contrary to 10 C.F.R. section 2.335.[90] Accordingly, there is no basis for Nevada's request to reject the LA on the ground of the level of design information.

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89 *Id*. at 55,738–39 (emphasis added).

90 *See, e.g.*, *Pub. Serv. Co. of N.H.* (Seabrook Stations, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982) (contention which "advocate[s] stricter requirements than those imposed by the regulations" is "an impermissible collateral attack on the Commission's rules" and must be rejected).

F. Section 141(g) of the NWPA Does Not Prohibit Developing the Planned Aging Facility and Including that Facility in the LA Does Not Warrant Rejecting the LA

Nevada cites Section 114(g) of the NWPA for the proposition that a "retrievable spent fuel storage facility [may not be located] at Yucca Mountain" and argues that DOE attempted to "circumvent" this statutory prohibition.[91] While there is no Section 114(g) in the NWPA, Section *141(g)* of the NWPA states that "[n]o monitored retrievable storage facility development pursuant to this section may be constructed in any state in which there is located any site approved for site characterization under Section 112."[92] Nevada alleges that because the planned Aging Facility established as part of the repository design has a capacity that is "far in excess of what conceivably could be needed for efficient disposal operations," DOE must therefore be "planning an illegal end run around the law in order to make nuclear licensees happy by accepting lots of spent fuel at Yucca Mountain as soon as possible, regardless of when it will actually be disposed."[93] Nevada cites no legislative history or other support for its allegations and does not explain the bases for its belief that the Aging Facility is sized way beyond operational needs. Nevada's allegations are wrong as a matter of law.

First, the NWPA defines the "repository" to include "both *surface* and subsurface areas at which high-level radioactive waste and spent nuclear fuel handling activities are conducted."[94] The planned Aging Facility at Yucca Mountain is one of the necessary surface facilities included as part of the Repository. Under NRC regulations, the Aging Facility would not constitute a monitored retrievable storage facility prohibited from being located at Yucca Mountain. 10 CFR section 72.96 reiterates the prohibition in Section 141(g) of the NWPA with respect to the siting

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91 Petition at 19–20.

92 NWPA § 141(g), 42 U.S.C. § 10161(g)

93 Petition at 19.

94 42 U.S.C. § 10101(18) (emphasis added).

of a monitored retrievable storage facility. 10 CFR section 72.3 defines a monitored retrievable storage facility as a "complex . . . for receipt, transfer, handling, packaging, possession, safeguarding, and storage . . . *pending shipment to a HLW repository* . . . ."[95] Clearly the spent nuclear fuel and high level waste to be received at the Aging Facility will already have been shipped to the repository.[96] Thus, the Aging Facility does not meet the definition of a monitored retrievable storage facility under NRC regulations.

Furthermore, the NRC Staff has already addressed this issue, acknowledging that the planned Aging Facility is incidental to Repository operations and will serve important functions other than waste storage. In an April 19, 2004, letter from C. William Reamer, Director Division of High-Level Waste Repository Safety, to Ms. Judy Treichel, the NRC Staff stated:

> A surface aging facility, incident to waste handling activities is different than a facility licensed and regulated under Part 72. . . . A surface aging facility will likely not be designed merely for temporary storage, but will serve other functions, which are integral to the logistics of waste handling for the purposes of permanent storage in the repository. . . .
>
> If the LA includes a surface aging facility, NRC will review that facility to determine whether it complies with 10 CFR Part 63.[97]

The functions integral to repository operation to be served by the Aging Facility are readily apparent from a cursory review of the LA. The Facility is designed to "uncouple waste receipts from waste emplacement operations to accommodate repository temperature and thermal limits,

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95 10 CFR § 72.3 (emphasis added).

96 Indeed the Aging Facility is located inside the Geologic Repository Operations Area or "GROA." *See* 10 CFR § 63.2; Yucca Mountain Repository Safety Analysis Report, *Aging Facility* § 1.2.7 at p. 1.2.7-3 (citing Figure 1.2.1-1).

97 Letter from C. William Reamer, Director, Division of High-Level Waste Repository Safety, to Judy Treichel, 1–2 (Apr. 19, 2004).

operations workflow (differences in acceptance and emplacement rates), and maintenance outages."[98] The specific functions include:

- Providing up to 21,000 MTHM of aging capability for the Repository in 2,500 aging spaces;
- Protecting Transportation, Aging and Disposal canisters and Dual Purpose Canisters from external hazards;
- Providing the capability to place commercial spent fuel in a location where it can be aged to appropriate thermal power levels, providing passive heat removal to preclude exceeding waste form temperature limits;
- Providing the capability to uncouple receipt of commercial spent fuel from emplacement of commercial spent fuel by creating a location to temporarily place commercial spent fuel until the waste emplacement process can accommodate it;
- Providing the capability to move commercial spent fuel between the Aging Facility and the handling facilities; and
- Protecting the workers and the public from radiation.[99]

Nevada once again alleges that DOE is not acting in good faith, this time by asserting, without basis, that DOE is attempting to circumvent statutory prohibitions in order to appease nuclear utilities. There is no basis for Nevada's claim. Inclusion of the planned Aging Facility in the LA is not a basis for rejecting the LA.

G. The Absence of New Regulations on Protection Against Terrorist Acts and Material Control and Accounting Do Not Warrant Rejecting the LA

Finally, Nevada argues that the Commission must reject the LA because the NRC has not promulgated its final standards regarding physical protection and material control and accounting (MC&A).[100] This argument mirrors Nevada's claim regarding the allegedly "missing" EPA and

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98 Yucca Mountain Repository Safety Analysis Report, *Aging Facility* § 1.2.7 at p. 1.2.7-1.

99 *Id*. at pp. 1.2.7-3–1.2.7-4.

100 Petition at 20–21.

NRC licensing standards.[101] Similar to its claim regarding the EPA standards, Nevada cites no legal basis for the proposition that the NRC must reject the LA based upon an absence of final, revised security and MC&A regulations. Based upon the legal authorities and reasoning set forth above in Section II.C., the Commission should reject Nevada's claim regarding "missing" final, revised security and MC&A rules.

III. **Conclusion**

As explained above, Nevada's Petition is procedurally flawed and its substantive legal claims lack merit and fail as a matter of law. Accordingly, the Commission should deny Nevada's Petition.

Respectfully submitted,

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[101] *Id*. at 6.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Thomas S. Moore, Chairman
G. Paul Bollwerk, III
Paul S. Ryerson

In the Matter of	)	Docket No. PAPO-001
	)	
U.S. DEPARTMENT OF ENERGY	)	ASLBP No. 08-861-01-PAPO-BD01
	)	
(High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board)	)	June 16, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing U.S. DEPARTMENT OF ENERGY RESPONSE TO THE STATE OF NEVADA'S PETITION TO REJECT THE YUCCA MOUNTAIN LICENSE APPLICATION have been served upon the following persons on June 16, 2008 through the Electronic Information Exchange.

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