

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

_____)	Docket No. PAPO-0001
In the Matter of)	
U.S. DEPARTMENT OF ENERGY)	
(High Level Waste Repository:)	ASLBP No. 08-861-01-PAPO-BD01
Pre-Application Matters))	July 31, 2008

**U.S. DEPARTMENT OF ENERGY RESPONSE TO THE
STATE OF NEVADA’S SUPPLEMENTAL PRE-DOCKETING
PETITION TO REJECT THE YUCCA MOUNTAIN LICENSE APPLICATION**

I. **Introduction**

On June 4, 2008, the State of Nevada submitted a Petition¹ to the U.S. Nuclear Regulatory Commission (NRC or Commission), urging that it reject the U.S. Department of Energy (DOE) license application (LA) seeking authorization to construct a spent nuclear fuel and high-level radioactive waste repository at Yucca Mountain, Nye County, Nevada. DOE filed a Response opposing the Petition because the Petition’s substantive legal claims lacked merit and failed as a matter of law.² By letter dated July 21, 2008, Nevada transmitted to the NRC a “Supplement to its June 4, 2008 Petition Asking the NRC to Reject DOE’s Yucca Mountain License Application as Unauthorized and Substantially Incomplete” (Supplement).³

¹ State of Nevada’s Petition to Reject DOE’s Yucca Mountain License Application as Unauthorized and Substantially Incomplete (June 4, 2008) (Petition).

² U.S. Department of Energy Response to the State of Nevada Petition to Reject the Yucca Mountain License Application (June 16, 2008) (DOE Response). The DOE Response also noted that the Commission could reject the Nevada Petition based upon its many procedural flaws. *Id.* at 3 n.4.

³ On July 22, 2008, the Commission announced that it would tentatively hold an affirmation session on Nevada’s initial Petition on July 23, 2008. Sunshine Federal Register Notice (U.S. Nuclear Regulatory Commission), 73 Fed. Reg. 42,630 (July 22, 2008). The Commission, on July 23, 2008, postponed the affirmation session.

In its Supplement, the State repeats its argument that DOE has submitted an incomplete LA, and therefore, the Commission should reject it. First, Nevada claims, as it did in its initial Petition, that the level of design information is insufficient.⁴ Second, Nevada repeats its unsubstantiated claim that DOE has acted in bad faith, alleging that DOE has failed to comply with 10 CFR § 63.11(a)(2).⁵ And, third, Nevada again references DOE's planned use of drip shields and claims, among other things, that the LA should have included a dose calculation based on the unfounded assumption asserted in its initial Petition that DOE will never install the drip shields.⁶

As set forth below, DOE respectfully requests that the Commission reject the Supplement for the following three reasons: (1) the Supplement violates the NRC's Rules of Practice in several respects, including Nevada's failure to make any effort to consult with DOE before filing; (2) the Supplement impermissibly circumvents the regulatory scheme that the NRC promulgated for the Yucca Mountain proceeding; and (3) none of the alleged deficiencies set forth in the Supplement warrant rejecting the LA.

II. **The Commission Should Reject the Supplement Because it Violates the NRC's Rules of Practice**

When Nevada filed its Petition last month, DOE requested that the Commission overlook the State's many procedural deficiencies and address the merits of the seven legal issues raised therein.⁷ DOE reasoned that by addressing these seven legal issues, before the start of the

⁴ Supplement at 2–3.

⁵ *Id.* at 3–7.

⁶ *Id.* at 7.

⁷ Specifically, the Petition raised seven principal arguments: (1) whether the LA was completely unauthorized under Section 114(b) of the Nuclear Policy Act of 1982, as amended (NWPA), which provides that DOE file an application for construction authorization 90 days after the site recommendation became effective on July 23, 2002; (2) whether 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, make access determinations is valid; (3) whether the NRC can review or docket the LA before the U.S. Environmental Protection Agency issues its

hearing process, the Commission would eliminate unnecessary, repetitive and time-consuming argument before the Atomic Safety and Licensing Boards (ASLB), and again before the Commission. Although DOE continues to believe that resolving these seven legal issues will greatly increase efficiency and add clarity to this proceeding, the Supplement presents no additional issues to advance these principles. Therefore, as discussed below, DOE urges the Commission to summarily reject Nevada’s Supplement for failing to comply with its procedural requirements.

The Supplement violates the NRC Rules of Practice.⁸ Nevada failed to make any effort to consult with DOE before filing its Petition and Supplement, as required by 10 CFR § 2.323(b). Section 2.323(b) establishes that a party’s motion *must* be rejected if the party does not make a “sincere effort” to consult with the other parties and attempt to resolve the issue(s):

A motion *must be rejected* if it does not include a certification by the attorney or representative of the moving party that the movant has made a *sincere effort* to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant’s efforts to resolve the issue(s) have been unsuccessful.⁹

The NRC refers to this regulation as the “consultation” requirement,¹⁰ and this requirement “seeks to avoid unnecessary litigation by requiring the movant to make a reasonable effort to

final radiation standards; (4) whether it is permissible for Nevada to speculate that DOE will never install drip shields when DOE has committed to doing so in the LA; (5) whether the LA must include all final repository design information at the time of submittal; (6) whether the NWPA precludes DOE from developing the planned Aging Facility; and (7) whether the NRC can review or docket the LA before the NRC promulgates its final standards regarding physical protection and material control and accounting.

⁸ Notably, the Supplement, submitted several weeks after the Petition, does not explain its procedural basis. The NRC Rules of Practice do not provide for the *ad hoc* submission that Nevada makes, and Nevada does not cite any regulation that authorizes its Supplement. Even if the Commission treats the Supplement as a “general motion,” the Commission should nevertheless reject it because Nevada did not serve the Supplement on DOE consistent with 10 CFR § 2.323(a). Nor has Nevada limited its disregard for the NRC procedures to this Supplement. As DOE noted in its initial response, Nevada also failed to establish a procedural basis for the Petition and failed to properly serve the Petition on DOE. DOE Response at 3 n.4.

⁹ 10 CFR § 2.323(b) (emphasis added).

¹⁰ *Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-05-33, 62 NRC 828, 837 (2005).

discuss and perhaps resolve the problem or misunderstanding before involving the [ASLBs or Commission].”¹¹

Here, Nevada did not make *any* effort to contact DOE *or* resolve the issues raised in the Petition or the Supplement before filing with the Commission. As such, Nevada provided no certification with the Petition or Supplement because no consultation occurred. Furthermore, Nevada cannot escape this requirement merely by filing a “Petition” rather than “Motion”, for both seek relief, and to do so would impermissibly circumvent the consultation requirement.

Given Nevada counsel’s experience appearing before the NRC, the State has no credible excuse for ignoring this rule. Therefore, the Commission should reject Nevada’s Supplement because it violates the NRC’s Rules of Practice.

III. **The Commission Should Reject the Supplement Because It Circumvents the NRC’s Regulatory Scheme for this Proceeding**

The Commission also should reject the Supplement because it impermissibly seeks to circumvent the Commission’s carefully articulated and well-understood docketing and hearing process for DOE’s LA for constructing a geologic repository at Yucca Mountain. This process begins with a period for the NRC Staff to conduct a docketing or sufficiency review of a tendered application.¹² If the NRC Staff’s docketing review determines that the application is sufficiently complete to support a more detailed technical review, the NRC will issue a Notice of Docketing and Notice of Hearing.¹³ If such a Notice is issued, Nevada and other interested parties will have the opportunity to raise contentions challenging DOE’s LA. Those contentions that the ASLBs admit will be adjudicated in the hearing process. The adjudicatory hearing

¹¹ *Id.*

¹² 10 CFR § 2.101(e)(2).

¹³ *Id.* § 2.101(e)(8).

process will develop the record on which the Commission will, in addition to the NRC Staff's review, ultimately determine whether to authorize DOE to construct the geologic repository.

By its Supplement, Nevada seeks to impermissibly circumvent this well-understood process by bringing issues regarding the LA prematurely to the Commission. Such issues should be raised as contentions during the licensing proceeding—not with the Commission during the NRC Staff's docketing review.

The Commission recently considered a similar attempt to circumvent the NRC's docketing and hearing processes in the *Shearon Harris* proceeding to construct and operate a nuclear power plant. There, the petitioners filed with the Commission a motion to immediately suspend the hearing notice.¹⁴ The petitioners argued, in part, that the Commission should immediately suspend the hearing notice because the applicant's submittal was "not complete."¹⁵ As support for their request, the petitioners cited a letter from the NRC Staff to the applicant that listed "specific issues that may 'introduce uncertainty in the review schedule.'"¹⁶ The petitioners claimed that this letter showed that the application was incomplete and that the notice of hearing should be suspended until the application was complete enough for the NRC Staff to establish a review schedule.¹⁷

The Commission rejected the petitioners' motion in *Shearon Harris* to suspend the proceeding.¹⁸ The Commission observed that the NRC Staff did not state the application was incomplete, and in fact, the Staff docketed the application, "thus finding that the application was

¹⁴ *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, slip op. at 1 (July 23, 2008).

¹⁵ *Id.* at 2.

¹⁶ *Id.* (citation to letter omitted).

¹⁷ *Id.*

¹⁸ *Id.* at 3.

sufficient enough to commence review.”¹⁹ The Commission then made a point applicable to the Yucca Mountain proceeding and to Nevada’s Petition and Supplement.²⁰ Noting that docketing decisions are not challengeable in an adjudicatory proceeding,²¹ the Commission stated:

If the Petitioners believe the Application is incomplete in some way, they may file a contention to that effect. Indeed, the very purpose of NRC adjudicatory hearings is to consider claims of deficiencies in a license application; such contentions are commonplace at the outset of NRC adjudications. Accordingly, this claim does not provide a basis for suspending the hearing notice.²²

Based upon this holding, the Commission should reject Nevada’s attempt to prematurely raise issues regarding the LA to the Commission during the Staff’s docketing review, and instead rely on the above, well-established processes to review and process the LA.

IV. **None of the Alleged Deficiencies Set Forth in the Supplement Warrant Rejecting the LA**

In the Supplement, Nevada asserts three bases for rejecting the LA: (1) “missing” final design information in the LA or otherwise incomplete information; (2) deliberate misconduct; and (3) issues regarding DOE’s planned drip shields. DOE addresses each of Nevada’s allegations below.

A. **Nevada’s Additional Allegations Regarding the Level of Repository Design Information Do Not Warrant Rejecting the LA**

Nevada’s initial Petition raised two distinct claims regarding the level of design information contained in the LA: (1) Nevada argued that, as a purely legal matter, 10 CFR Part 63 requires the LA to include *all* definitive details of design information for structures, systems

¹⁹ *Id.* at 2.

²⁰ *Id.*

²¹ *Id.* at n.2. The Commission has long recognized that “in adjudicatory proceedings, it is the license application, not the NRC staff review that is at issue.” *Id.* (quoting *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 350 (1998) (internal quotation omitted)).

²² *Id.* at 2–3.

and components, important to safety or waste isolation,²³ and (2) Nevada argued that, based upon its fundamental misunderstanding of Part 63, the LA is incomplete and, therefore, the Commission should reject it.²⁴ Nevada’s Supplement simply restates these two claims, and also identifies two specific areas where it contends that the NRC cannot make the required safety findings under 10 CFR § 63.31(a)(3)(i) and (ii)—information regarding the waste package transport and emplacement vehicle (TEV) and the multi-canister overpack (MCO).²⁵

With respect to Nevada’s first claim, the NRC Staff’s and DOE’s initial responses to Nevada’s initial Petition establish as a matter of law that Part 63 does *not* require the LA to fully identify the geologic repository’s entire design before issuing the construction authorization. Rather, under Part 63, to issue the construction authorization, the NRC must determine that there is reasonable assurance and expectation that DOE can receive, possess and dispose of radioactive materials without an unreasonable risk to public health and safety.²⁶ Furthermore, Part 63 requires only that the application “be as complete as possible in the light of information that is reasonably available at the time of docketing.”²⁷ Beyond the plain language of the regulations, the DOE and the NRC Staff responses to the initial Petition also identified relevant regulatory history to support each of their positions:

- ◆ The regulatory history of the regulations indicates that the NRC has built inherent flexibility into the licensing process and acknowledged that some detailed information may be unavailable at the time of initial application.²⁸

²³ Petition at 9–17.

²⁴ *Id.*

²⁵ Supplement at 2–3. Nevada also refers to an attachment that lists “those portions of the LA where DOE concedes that important design information is missing and will need to be supplied later.” *Id.* at 2, Ex. A.

²⁶ 10 CFR § 63.31(a)(1) and (2).

²⁷ 10 CFR § 63.21(a).

²⁸ DOE Response at 21–23.

- ◆ NRC Chairman Klein previously addressed a similar concern that DOE may submit an incomplete application.²⁹ Chairman Klein explained in a letter to the U.S. Senate that “[p]ercent completion of total design is not a valid indicator of the sufficiency of the safety information contained in an application.”³⁰

The information provided in Nevada’s Supplement does not alter these well-recognized positions and, as a result, the Commission should reject Nevada’s claim and rule as a matter of law that Part 63 does not require the LA to contain all final design information.

The Commission should also reject Nevada’s second claim (that the LA is incomplete), but for different reasons. As set forth in *Shearon Harris*, allegations that an application is incomplete can only be set forth in contentions during the adjudicatory proceeding. As such, based upon this fundamental principle alone, the Commission should summarily reject any allegations that the LA is incomplete.

Furthermore, there is no validity to Nevada’s factual assertions that the LA is deficient because it allegedly lacks information regarding the TEV, MCO or any other structure, system or component. The LA contains sufficient information for the NRC Staff to make its findings under Part 63. Using the TEV and MCO as examples, the following briefly demonstrates that the level of information contained in the LA is entirely consistent with NRC regulations.³¹

1. *The LA Contains Sufficient Information Concerning the Transportation and Emplacement Vehicle*

Contrary to Nevada’s assertion, that the “codes and standards and design requirements for the critically important TEV . . . necessary to ensure safety do not exist,”³² the LA details the

²⁹ NRC Staff Response Opposing Nevada’s June 4, 2008 Petition at 8.

³⁰ *Id.* (citation to letter omitted) (emphasis added).

³¹ While this Response addresses issues raised by Nevada regarding the TEV and MCO, DOE notes that these issues are examples of the types of issues customarily raised as contentions to be adjudicated in the hearing process.

³² Supplement at 2.

applicable codes and standards and design requirements in Section 1.3.3.5, which total approximately 20 pages of text, plus figures.³³ In Sections 1.6,³⁴ 1.7,³⁵ and 1.9³⁶ of the LA, DOE has analyzed and identified potential hazards, and developed relevant master logic diagrams and fault trees to assess what aspects of the TEV are important to safety. Based upon the foregoing analyses, DOE has been able to assess the design bases and design criteria important to safety related to the equipment. Final design of the equipment will occur in the future and it will need to be verified that it is in conformance with the design bases and design criteria specified in the LA. Accordingly, Nevada's claim regarding the TEV provides no basis for rejecting the LA or terminating the NRC Staff's docketing review.

2. *The LA Contains Sufficient Information Concerning the Multi-Canister Overpack*

For the MCO, Nevada mischaracterizes DOE's position with respect to these containers in the LA. Nevada asserts that "the design detail, event sequence, and reliability analysis needed to determine the nuclear safety design basis" for the MCO have not been completed and therefore, NRC cannot make the required safety determination in accordance with 10 CFR § 63.31(a)(3)(i) and (ii). DOE's LA, however, makes it clear that DOE does not seek any safety determination from the NRC on the use of the MCO based on the analyses described in the LA. As discussed in Section 1.5.1, page 1.5.1-1, "[t]he MCO is included in this section to provide a description of the analyses that have been completed and to demonstrate the intent of DOE to complete the above analyses and include DOE SNF [spent nuclear fuel] in MCOs in future

³³ See Yucca Mountain Repository Safety Analysis Report, *Waste Package Transportation System* § 1.3.3.5 (discussing TEV); see also §§ 1.3.2.3.1, 1.3.2.7, and 1.3.4.8 (discussing TEV design requirements, codes and standards).

³⁴ See *id.* at *Identification of Hazards and Initiating Events* § 1.6.

³⁵ See *id.* at *Event Sequence Analysis* § 1.7.

³⁶ See *id.* at *Structures, Systems and Components; Natural and Engineered Barriers Important to Waste Isolation; Safety Controls; and Measures to Ensure Availability of the Safety Systems* § 1.9.

licensed operations of the repository.”³⁷ DOE further acknowledges the need to “obtain authorization to receive DOE SNF in MCOs once the safety analyses are completed.”³⁸ Therefore, DOE does not currently request that the NRC make a preclosure operations safety determination on the use of the MCO based on the LA. Accordingly, Nevada’s claim regarding the MCO provides no basis for rejecting the LA or terminating the NRC Staff’s docketing review.

B. Nevada’s Allegations of Deliberate Misconduct Are Unfounded

Nevada next argues that DOE has engaged in “deliberate misconduct” under 10 CFR § 63.11(a)(2) for omitting “important safety information that DOE must have known was material.”³⁹ Specifically, in Nevada’s view, the LA omitted (1) the “independent review of DOE’s infiltration model performed at DOE’s request by ORISE (Oak Ridge Institute for Science and Education)”⁴⁰ and (2) the “update to the Probabilistic Volcanic Hazards Analysis expert elicitation.”⁴¹ As discussed below, there is no basis for a finding that DOE has failed to comply with 10 CFR § 63.11(a)(2).

1. *DOE Has Not Engaged in Deliberate Misconduct*

It is well-established that a “presumption of regularity attaches to the actions of Government agencies”⁴² As the Commission has recognized in these proceedings, “[a]bsent

³⁷ *Id.* at *Waste Form and Waste Package* § 1.5.1 at p. 1.5.1-1.

³⁸ *Id.*

³⁹ Supplement at 3.

⁴⁰ *Id.* at 4.

⁴¹ *Id.* at 5.

⁴² *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) (citation omitted); *see also U.S. Dep’t of Energy* (High Level Waste Repository: Pre-Application Matters), CLI-08-11, slip op at 8.

clear evidence to the contrary, we presume that public officers will properly discharge their official duties.”⁴³

The NRC requires that all information provided to it be complete and accurate in all material respects. Section 186 of the Atomic Energy Act of 1954, as amended, underscores this need by stating that “[a]ny license may be revoked for any material false statement in the application or any statement of fact required [by statute or regulation]”⁴⁴ The NRC has promulgated rules concerning completeness and accuracy of information that specifically apply to information that a licensee or applicant for a license provide to the Commission, including 10 CFR § 63.10(a).⁴⁵ Under the Deliberate Misconduct Rule, in 10 CFR § 63.11(a)(2), the NRC may take action against anyone that *deliberately and knowingly* provides information to the NRC that is incomplete or inaccurate in some material respect.⁴⁶

The NRC applies a “rule of reason” when assessing completeness and accuracy of information and applying its policies and regulations in this area.⁴⁷ For example, the Commission has reserved the charge of a “material false statement” to “egregious situations,” given that such a charge may be equated with “lying” and an “intention to mislead.”⁴⁸ Furthermore, in the context of reviewing an initial application, the Commission has observed:

The Commission intends to apply a rule of reason in assessing completeness of a communication. For example, in the context of

⁴³ *U.S. Dep’t of Energy*, CLI-08-11, slip op. at 8 (internal quotations, brackets and citation omitted).

⁴⁴ *See* Atomic Energy Act § 186(a), 42 U.S.C. § 2236(a) (discussing “false applications”).

⁴⁵ *See* 10 CFR § 63.10(a) (stating in relevant part that information provided to the Commission by an applicant for a license “must be complete and accurate in all material respects”).

⁴⁶ *See id.* at § 63.11(a)(2) (stating in relevant part that a license applicant may not “[d]eliberately submit to the NRC . . . information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC”).

⁴⁷ *See, e.g.*, Final Rule and Statement of Policy—Completeness and Accuracy of Information, 52 Fed. Reg. 49,362, 49,366 (Dec. 31, 1987).

⁴⁸ *See id.* at 49,365 (addressing public comment that a charge of material false statement “is equated by most people with lying and an intention to mislead”).

reviewing an initial application . . . , it is not uncommon for an NRC reviewer to seek additional information to clarify his or her understanding of the information already provided. This type of inquiry by the NRC does *not* necessarily mean that incomplete information which would violate [the completeness and accuracy] rule has been submitted.⁴⁹

Similarly, the Commission understands that the rule cannot apply to situations where the submitter has acted in good faith and *acknowledged* that the information is incomplete:

[T]he submission of information acknowledged to be incomplete would not be considered deliberate misconduct *if it is made in good faith and based on the best information available, but is corrected later based on additional information or analysis*. The NRC's General Statement of Policy and Procedures for Enforcement Actions (NUREG-1600) . . . points out that a citation is not made if an initial submittal was accurate when made but later turns out to be erroneous because of newly discovered information or advances in technology.⁵⁰

Likewise, the Commission has appropriately determined that application of the analogous rule applicable to nuclear power reactors must be closely controlled and judicially applied:

As [we] stated in the original Deliberate Misconduct Rule: It would be an *erroneous reading* of the final rule on deliberate misconduct *to conclude that conscientious people may be subject to personal liability for mistakes*. The Commission realizes that people may make mistakes while acting in good faith. Enforcement actions directly against individuals are not to be used for activities caused by merely negligent conduct. These persons should have no fear of individual liability under this regulation, as the rule requires that there be deliberate misconduct before the rule's sanctions may be imposed. The Commission recognizes . . . that enforcement actions involving individuals are *significant actions* that need to be *closely controlled and judicially applied*.⁵¹

⁴⁹ *Id.* at 49,366 (emphasis added).

⁵⁰ Final Rule—Deliberate Misconduct by Unlicensed Persons, 63 Fed. Reg. 1,890, 1,892 (Jan. 13, 1998) (emphasis added).

⁵¹ *Id.* (quoting Final Rule—Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, 40,681 (Aug. 15, 1991)) (emphasis added).

In short, there is no basis for the allegations in Nevada’s Supplement. As discussed above, this regulation is aimed at the deliberate concealment of information (or lack of information) or an act of deception, such as in the case of deliberate misrepresentation. DOE has *not*, in any manner, engaged in any conduct that would fall within the confines of the Deliberate Misconduct Rule—and Nevada has not suggested any factual basis for its assertions.

To the contrary, DOE has tendered the LA with the reasonable belief that the application is as “complete as possible in the light of information that is reasonably available at the time of docketing,”⁵² as required under Part 63. Furthermore, DOE has specified that the LA does not include all final details and has acknowledged that it will produce additional information as this matter proceeds. In fact, as Nevada itself points out in Exhibit A to its Supplement, DOE has made these acknowledgements in the LA itself. By making these disclosures, DOE has clearly put the NRC Staff, as well as prospective parties, on notice as to the nature of additional information that DOE anticipates will be provided in the future.

To summarize, it is well-settled that government officials are presumed to act conscientiously and in good faith in the discharge of their duties.⁵³ In order to overcome this presumption, a party must allege *and prove*, by clear and strong evidence, specific acts of bad faith on the part of the government.⁵⁴ The level of proof to overcome this presumption is high.⁵⁵

2. *Nevada’s Claim of Deliberate Misconduct with Respect to the ORISE Report is Unsupported and Should be Rejected*

Nevada first asserts that DOE has engaged in deliberate misconduct because the “LA omits any mention whatsoever of the independent review of DOE’s infiltration model performed

⁵² See 10 CFR § 63.21(a) (discussing level of information required in LA at time of submittal).

⁵³ See, e.g., *Libertatia Assocs., Inc. v. United States*, 46 Fed. Cl. 702, 706 (2000).

⁵⁴ *Id.*

⁵⁵ *Id.*

at DOE's request by ORISE (Oak Ridge Institute for Science and Education)."⁵⁶ Nevada's claim of deliberate misconduct has no merit and the Commission should reject it.

Contrary to Nevada's claims of concealment and omission, DOE made the ORISE Report publicly available on the LSN. That report has been publicly available on the LSN since June 25, 2008 and has been accessible to all parties and potential parties, including the NRC Staff and the State. Any matters relating to the substance of the ORISE Report should be raised in the adjudicatory hearing process.⁵⁷

Accordingly, the Commission should reject Nevada's claim of deliberate misconduct in this area.

3. *Nevada's Claim of Deliberate Misconduct with Respect to the PVHA Update is Unsupported and Should be Rejected*

Nevada asserts that DOE has engaged in deliberate misconduct because it omitted from the LA the update to the 1996 Probabilistic Volcanic Hazard Assessment (PVHA), which is an expert elicitation concerning the risk of volcanic activity in the Yucca Mountain region.⁵⁸

Nevada also implies (impermissibly) that the PVHA update has been completed for some time, but DOE has deliberately delayed issuing it.⁵⁹ Nevada is wrong in both respects.

The Commission should reject Nevada's claim that DOE has deliberately concealed or withheld the PVHA update. To the contrary, the LA expressly acknowledges that updates to expert elicitations, of which the PVHA is one, have not been completed.⁶⁰

⁵⁶ Supplement at 4.

⁵⁷ It is DOE's position that the existing infiltration model and infiltration estimates underlying the LA are sufficiently conservative to address the matters raised in the ORISE Report.

⁵⁸ *Id.* at 5–6.

⁵⁹ *Id.*

⁶⁰ "DOE has not completed updates to the results of any expert elicitations and does not expect to rely upon any such updates to comply with 10 CFR Part 63. Insofar as the DOE completes any updates to the expert elicitations that are relied upon to comply with 10 CFR Part 63, the DOE will docket, as part of the license

The Commission should also reject Nevada’s claim that DOE has somehow deliberately delayed issuing the PVHA update until after filing the LA. The only basis Nevada provides for its allegation of deliberate delay is a Bechtel SAIC document from December 2006, which identifies “post-docketing risk candidates and other issues.” Nevada cites one entry in this document for the proposition that “we now know that the decision not to include the PVHA [update] in the LA was made over one and on-half [sic] years ago (see DN2002500340, item 32).”⁶¹ Nevada misrepresents this document, wrongly implying that the update was completed months ago and DOE simply decided not to include it with the LA. That document, however, merely recognizes that the PVHA update would not be completed until June 2008. As a factual matter, the PVHA update has not yet been completed.

Accordingly, the Commission should reject Nevada’s claim of deliberate misconduct in this area.

C. Nevada’s Additional Allegations Regarding Drip Shields Do Not Warrant Rejecting the LA

The Supplement raises two additional issues beyond those set forth in the Petition to support its speculative claim that DOE will not install drip shields. First, Nevada argues that “[n]o LA would be reasonably complete without” calculations of the peak dose to the Reasonably Maximally Exposed Individual (RMEI) *without* drip shields.⁶² Second, Nevada identifies Congressional testimony of Dr. John Garrick, Chairman of the Nuclear Waste Technical Review Board, which purportedly stated that “DOE assumptions about draft

application, the results of the updates.” Yucca Mountain Repository Safety Analysis Report, *Expert Elicitation* § 5.4 at p. 5.4-1.

⁶¹ Supplement at 6.

⁶² *Id.* at 7.

degradation and repository tunnel tolerances may make installation of the drip shields, as currently designed, problematic.”⁶³

Again, the Commission may summarily reject these claims based upon the legal authorities and reasoning set forth in the *Shearon Harris* decision. Nevada and other potential parties will have the opportunity to file these and other contentions regarding drip shields at the outset of the adjudicatory hearing process.

Furthermore, as discussed in DOE’s initial response, Nevada’s speculation that DOE might not install drip shields is not grounds for rejecting the LA.⁶⁴ DOE has committed in the LA to install drip shields over the waste package before permanent closure.⁶⁵ The LA includes a detailed discussion regarding the drip shield system, including its design criteria, design bases, design codes and standards, and associated processes.⁶⁶ Furthermore, the LA includes references to the analyses supporting DOE’s position that installation of drip shields before closure can be achieved. In contrast, Nevada has not presented any credible factual basis to support its concern that DOE will not install the drip shields. The Commission has consistently rejected arguments speculating that an applicant may fail to meet a license condition or commitment.⁶⁷ In short, these issues provide no basis for rejecting the LA.

V. Conclusion

As set forth above, DOE submits that the Commission should reject Nevada’s Supplement.

⁶³ *Id.*

⁶⁴ DOE Response at 18–20.

⁶⁵ See Yucca Mountain Repository Safety Analysis Report, *Drip Shield System* § 1.3.4.7 (discussing drip shield system).

⁶⁶ *Id.* § 1.3.4.7.5–1.3.4.7.8.

⁶⁷ See DOE Response at 19 (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-09, 53 NRC 232, 234 (2001); *Curators of the Univ. of Mo.*, CLI-95-8, 41 NRC 386, 399 (1995); *Pub. Serv. Co. of N.H.* (Seabrook Station Units 1 & 2), CLI-90-10, 32 NRC 218, 221–23 (1990)).

Respectfully submitted,

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Dated in Washington, D.C.
this 31st day of July 2008.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	Docket No. PAPO-0001
)	
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 08-861-01-PAPO-BD01
)	
(High-Level Waste Repository: Pre-Application Matters))	July 31, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **U.S. DEPARTMENT OF ENERGY RESPONSE TO THE STATE OF NEVADA'S SUPPLEMENTAL PRE-DOCKETING PETITION TO REJECT THE YUCCA MOUNTAIN LICENSE APPLICATION** have been served upon the following persons on July 31, 2008 through the Electronic Information Exchange.

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