

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman  
Gregory B. Jaczko  
Peter B. Lyons  
Kristine L. Svinicki

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

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CLI-08-22

**MEMORANDUM AND ORDER**

The United States Department of Energy (DOE) appeals<sup>1</sup> from the Pre-License Application Presiding Officer (PAPO) Board's denial<sup>2</sup> of DOE's Motion to Strike the State of Nevada's (Nevada's) certification of the availability of its documentary material on the Licensing Support Network (LSN). Nevada opposes DOE's appeal.<sup>3</sup>

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<sup>1</sup> *The Department of Energy's Notice of Appeal from the PAPO Board's April 23, 2008 Order* (May 5, 2008) (DOE's Notice); *The Department of Energy's Brief on Appeal from the PAPO Board's April 23, 2008 Order* (May 5, 2008) (DOE Appeal).

<sup>2</sup> LBP-08-5, 67 NRC \_\_\_\_, slip op. (Apr. 23, 2008).

<sup>3</sup> *The State of Nevada's Brief in Opposition to the Department of Energy's Appeal from the PAPO Board's April 23, 2008 Order* (May 20, 2008) (Nevada Opposition). The deadline for responses to DOE's Appeal was extended from May 15, 2008, to May 20, 2008, by Order (May 9, 2008) (unpublished).

Nye County filed a motion for leave<sup>4</sup> to file an amicus curiae brief, together with its amicus brief,<sup>5</sup> in support of DOE's appeal. Nevada opposed Nye County's amicus motion.<sup>6</sup>

We affirm the PAPO Board's decision to deny DOE's motion to strike. We also deny Nye County's motion for leave to file an amicus curiae brief.

#### **I. DOE'S MOTION TO STRIKE NEVADA'S CERTIFICATION**

Subject to certain exclusions, our regulation, at 10 C.F.R. § 2.1003, requires other (that is, non-NRC Staff<sup>7</sup>) potential parties, interested governmental participants and parties to "make available no later than ninety days after the DOE certification of compliance . . . all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, a potential party, interested governmental participant or party."<sup>8</sup> Our regulations, at 10 C.F.R. § 2.1009, further require potential parties, interested governmental participants, and parties to certify that they have established procedures for implementing the requirements of § 2.1003, that they have trained their personnel to comply with these procedures, and

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<sup>4</sup> *Nye County Motion for Leave to File Amicus Brief in Support of DOE Appeal from the PAPO Board's April 23, 2008 Order Denying DOE Motion to Strike Nevada LSN Certification* (May 20, 2008) (Nye County Amicus Motion).

<sup>5</sup> *Nye County Amicus Brief in Support of DOE Appeal from the PAPO Board's April 23, 2008 Order Denying DOE Motion to Strike Nevada LSN Certification* (May 20, 2008) (Nye County Amicus Brief).

<sup>6</sup> *State of Nevada's Opposition to Nye County's Motion for Leave to File Amicus Brief in Support of DOE's Appeal* (May 30, 2008).

<sup>7</sup> The NRC Staff has thirty days, rather than ninety, to provide its documentary material. 10 C.F.R. § 2.1003(a).

<sup>8</sup> 10 C.F.R. § 2.1003(a).

that the documentary material specified in § 2.1003 has been made available.<sup>9</sup>

Nevada's certification pursuant to these regulations is the subject of DOE's motion to strike.

The PAPO Board<sup>10</sup> denied DOE's motion to strike Nevada's LSN certification. The Board gave two reasons. First, the Board found that DOE failed to satisfy its burden to show that Nevada had in fact withheld documents it should have provided. The Board found that instead of factual support, DOE provided "rank speculation and conjecture," that the three documents DOE specifically identified as missing from the LSN were in fact not missing, and that in any event, Nevada "satisfactorily rebutted" DOE's circumstantial presentation (through a declaration by the Administrator of Technical Programs in Nevada's Agency for Nuclear Projects).<sup>11</sup> Second, the Board found, based upon its interpretation of our regulations (specifically, the three-category definition of documentary material), that "Nevada is not legally obligated to produce reliance material, including supporting and non-supporting [documentary material], until it has a 'position in the proceeding' by filing contentions."<sup>12</sup> This has been referred to as the "no-position" premise.

On appeal, DOE argues that the Board misinterpreted our regulations, and that its decision should be reversed. According to DOE, Nevada improperly withheld reliance material when it certified its LSN document collection because it assertedly relied on a "legally incorrect" conclusion that it could not provide "reliance" material until it knows

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<sup>9</sup> 10 C.F.R. §§ 2.1009(a)(2) and (b).

<sup>10</sup> LBP-08-5, 67 NRC at \_\_\_; Judge Karlin filed a dissenting opinion, slip op. at 17.

<sup>11</sup> LBP-08-5, 67 NRC at \_\_\_, slip op. at 6-8.

<sup>12</sup> *Id.* at 13.

what its position on the issues will be — that is, until after it has filed proposed contentions. Nevada counters that it has provided its documentary material, certifying its document collection as required, and denies that it excluded documentary material based on a “no-position” premise. Nevada argues that DOE has the burden, on appeal, of showing that the Board made “clearly erroneous” factual findings, that its failure to do so is “dispositive,” and that the Commission “need not reach *any* legal issue.”<sup>13</sup>

For the reasons the Board gave, we agree with the Board that DOE has not met its burden of showing that, in making its LSN certification, Nevada withheld documents it should have provided. We affirm on that basis. We need not consider the Board’s second reason (the “no-position” premise), and today’s ruling neither endorses nor rejects the Board’s interpretation on that point.

The LSN functions as a mechanism for early collection of all extant documents that normally would be collected later through traditional discovery, and we remind potential parties that we expect full compliance with our LSN requirements as set out in Part 2, Subpart J, of our regulations. The LSN is intended to “provide potential participants with the opportunity to frame focused and meaningful contentions and to avoid the delay potentially associated with document discovery, by requiring parties and potential parties to the proceeding to make all of their Subpart J-defined documentary material available through the LSN prior to the submission of the DOE application.”<sup>14</sup> “[We expect] all participants to make a *good faith effort* to have made available all . . .

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<sup>13</sup> Nevada Opposition at 17.

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

documentary material by the date specified for initial compliance in section 2.1003(a) of the Commission's regulations."<sup>15</sup> If the NRC Staff docket DOE's license application and a hearing ensues, we expect the presiding officer to impose appropriate sanctions for any failure to fully comply with our LSN requirements.<sup>16</sup>

## II. NYE COUNTY'S AMICUS FILINGS

We decline to grant Nye County's motion to file an amicus curiae brief. Subpart J does not provide for the filing of amicus curiae briefs. Our general rule on amicus briefs, 10 C.F.R. § 2.315(d), as a formal matter applies only to petitions for review filed under 10 C.F.R. § 2.341 or to matters taken up by the Commission *sua sponte*, not to appeals filed, as here, under 10 C.F.R. § 2.1015. Where 10 C.F.R. § 2.315(d) does apply, an amicus brief must be filed by the same deadline as the brief of the party whose side the amicus brief supports, unless the Commission provides otherwise. Permission to file an amicus brief under 10 C.F.R. § 2.315(d) is at the discretion of the Commission. All motions, including a motion for leave to file an amicus brief, are required to include a certification that the sponsor of the motion has made a sincere effort to contact the other parties and to resolve the issues raised in the motion (10 C.F.R. § 2.323).

Nye County's amicus brief supports DOE's position, not Nevada's, so even if it did fit within 10 C.F.R. § 2.315(d) it would have been due by the deadline for DOE's filing rather than, as filed, by the deadline for responses to DOE's filing. Nye County's motion also does not include any certification that it contacted the other parties prior to filing the motion. And there are no extraordinary circumstances making acceptance of Nye

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<sup>15</sup> *Id.* (emphasis added).

<sup>16</sup> See, e.g., 10 C.F.R. § 2.336(e).

County's amicus brief imperative as a matter of fairness or sound decision-making. In view of these considerations, Nye County's motion is denied.

**III. CONCLUSION**

For all of these reasons, we *affirm* the PAPO Board's decision (in LBP-08-5) denying DOE's motion to strike Nevada's initial LSN certification. We *deny* Nye County's motion for leave to file an amicus curiae brief.

IT IS SO ORDERED.

For the Commission

**(NRC SEAL)**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 8<sup>th</sup> day of September, 2008