

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

<b>In the Matter of</b>	)	<b>Docket No. PAPO-00</b>
	)	
<b>U.S. DEPARTMENT OF ENERGY</b>	)	<b>ASLBP No. 04-829-01-PAPO</b>
	)	
<b>(High Level Waste Repository: Pre-Application Matters)</b>	)	<b>May 30, 2008</b>

**STATE OF NEVADA'S OPPOSITION TO NYE COUNTY'S MOTION FOR LEAVE  
TO FILE *AMICUS* BRIEF IN SUPPORT OF DOE'S APPEAL**

In accordance with 10 C.F.R. §2.323(c), the State of Nevada ("Nevada") files this Answer opposing Nye County's 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. Nevada will show that Nye County's Motion should be denied; should it be granted, Nevada requests a reasonable time after the Commission's order in which to respond to Nye County's *Amicus* Brief on its merits.

**I. INTRODUCTION**

Nevada filed its initial LSN certification on January 17, 2008. Nye County also did so, on the same date. While Nye County brags that no party challenged its LSN certification, it ignores the fact that Nye County itself neither filed any motion regarding Nevada's LSN certification within the ten-day period permitted after January 17, nor did it join, in any way, the challenge to Nevada's certification filed by the U.S. Department of Energy ("DOE") on January 27, 2008. After observing in silence while DOE prosecuted its unsuccessful Motion to Strike Nevada's LSN Certification, and while DOE proceeded to appeal the PAPO's April 23, 2008 decision denying DOE's motion, Nye County now belatedly comes forward, long after all deadlines for either challenging Nevada's LSN or participating in DOE's appeal have gone by,

and seeks leave to advance arguments which misstate and misconstrue the PAPO Board decision, and which ignore the scope and rationale of DOE's appeal which Nye County "supports" and attempts to raise matters not germane to either the DOE appeal or the PAPO Board decision.

## II. **ARGUMENT**

Nye County's Motion for Leave to File *Amicus* Brief in Support of DOE Appeal should be denied for the following reasons:

### A. **Failure to Confer:**

Nye County recites that it intends "to participate fully in all aspects of the Yucca Mountain licensing proceedings" and that it has done so ever since the 1987 rulemaking which led to the current Licensing Support Network. Nye County is, accordingly, aware of, and bound by, NRC regulation 10 C.F.R. 2.323(b), which provides:

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.

(emphasis added).

Nye County wholly failed to so certify, or more importantly, to conduct the prerequisite effort to confer and resolve. Accordingly, Nye County's Motion "must be rejected."

### B. **Nye County is a Potential Party, not an *Amicus*:**

Nye County insists its intention is "to intervene, and participate fully, in all aspects of the Yucca Mountain licensing proceedings." Nye County states that it is an affected unit of local government under Sections 116 and 117 of the Nuclear Waste Policy Act, 42 U.S.C. 10136 and 10137. The Commission's definitions in 10 C.F.R. 2.1001 provide that "a **party** for the purpose of this subpart means the DOE, the NRC Staff, the host state, and any affected unit of local

government as defined in Section 2 of the Nuclear Waste Policy Act of 1982, as amended" (emphasis added). As recently as March 26, 2008, Nye County exercised its party status, filing a Motion in the licensing proceeding to implement and institutionalize webcasting of Yucca proceedings. In addition, Nye County certified its LSN collection on January 17, 2008, and has supplemented it on a monthly basis, up to and including April 30, 2008. Accordingly, it is odd, and inconsistent, for Nye County to elect neither to challenge Nevada's LSN certification nor to participate in DOE's challenge below, but then to belatedly attempt to enter the side door of the appeal by feigning the position of an "*Amicus*."

Tellingly, the regulatory provision under which Nye County seeks to file is 10 C.F.R. 2.315, which specifically applies to a **person not a party**. Section 2.315(d) provides: "a person who is not a party may, in the discretion of the Commission, be permitted to file a brief '*amicus curiae*'." It is doubtful that Nye County truly intends to relinquish its status as a party just to file this *Amicus* brief, yet Section 2.315(a) provides that an *Amicus* "may not otherwise participate in the proceeding." Nye County is not an "*Amicus Curiae*," but an interested party or potential party in this proceeding, and its *Amicus* brief is not authorized by the Commission's rules..

**C. Nye County's Motion is Untimely:**

By any applicable standard, Nye County's Motion for Leave to File *Amicus* Brief in Support of DOE Appeal is past any conceivable deadline, and this is dispositive. According to NRC regulation 10 C.F.R. 2.1015(b), a notice of appeal and supporting brief challenging a PAPO Board order must be filed with the Commission no later than ten days after service of the order. In this appeal, that deadline was May 5, 2008, and was met by DOE. According to the very provision regarding "*Amicus*" status on which Nye County attempts to rely, any *Amicus* brief "must be filed within the time allowed to the party's whose position the brief will support."

10 C.F.R. 2.315(d). Accordingly, even if Nye County were considered an "*Amicus Curiae*," which it is not, its "*Amicus* Brief in support of DOE appeal" was due to have been filed on or before May 5, 2008. It was not filed until May 20, 2008, nor did Nye County seek or receive any extension of time to so file. Even hypothesizing that Nye County sought to file a Brief **in opposition** to DOE's (which it did not), Nye County likewise missed the deadline for that filing, as well. 10 C.F.R. 2.1015(b) provides that: "Any other party, interested governmental participant, or potential party may file a brief in opposition to the appeal no later than ten (10) days after service of the appeal." This date would have been May 15, 2008. Again, Nye County neither met this date nor sought an extension thereof (nor was its brief in opposition to, but was rather in support of, DOE's). Nye County's Motion is accordingly, by any measure, untimely and must be denied.

**D. Nye County's *Amicus* is Irrelevant to DOE's Appeal and the PAPO Board Decision:**

Finally, while a detailed discussion of the merits of Nye County's *Amicus* is deferred unless and until its Motion for Leave is granted, Nevada is constrained to point out that its focus is on extraneous topics not germane to the PAPO decision or DOE's appeal thereof. For example, Nye County spends more than half of its Argument section on the issue of the third category of Documentary Material (DM-3), criticizing the PAPO Board's **lack** of focus on this category of documents. Nye Brief at 4-5. Nye County asks "quizzically, we wonder why a discussion of DM-3 is not more prevalent?" *Id.* at 5. The answer is simple, as reflected by the very DOE Appeal Brief which Nye County says it states it is filed "in support of." DOE's focus on appeal was on the other categories of Documentary Material (DM-1 and DM-2). DOE stated that Nevada "has unilaterally deferred complete production of two of the three categories of its documentary material required to be on the LSN" (DOE Brief at 1-2); and after defining the

three categories went on to state "Nevada has failed to make a substantial, good-faith production of information within the **first and second** of those categories." *Id.* at 2. Nye County can rail at the PAPO Board or at DOE for their failure to discuss **other** arguments on **other** issues, if it wants; but the scope of the appeal is defined by the PAPO Board order appealed from and DOE's appeal of that order.

Similarly, Nye County's purported *Amicus* Brief erroneously suggests that the PAPO Board order authorizes **existing** Documentary Material to be withheld by Nevada or other parties until they file contentions or even until the time contentions are admitted. The PAPO Board nowhere suggested such a result. While the Board's decision focused on the probable timing of parties' **creation** of Documentary Material, it did nothing to disturb its earlier ruling that a party must place all its existing Documentary Material on its LSN at the time of its initial certification. Nye County would do well to heed the observation of the PAPO Board: "It is not this Board's role in passing upon a motion to raise issues on its own that are not presented to it by the moving party." PAPO Board April 23, 2008 Order at 10. Such inapposite arguments are the focus of Nye County's *Amicus* Brief. Nye County's Motion for Leave to File should be denied.

### III. **CONCLUSION:**

For the foregoing reasons, Nye County's 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 should be denied. Should the motion not be denied, Nevada requests a reasonable time after the Commission's order in which to file a response brief, if necessary, addressing the merits of Nye County's proposed *Amicus* Brief, should the Commission permit it to be filed.

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*(signed electronically)*

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing State of Nevada's Opposition to Nye County's Motion for Leave to File *Amicus* Brief in Support of DOE's Appeal has been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (\*)).

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