

October 3, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	Docket No. PAPO-00
)	
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 04-829-01-PAPO
)	
(High Level Waste Repository:)	NEV-03
Pre-Application Matters))	

**THE DEPARTMENT OF ENERGY'S NOTICE OF APPEAL
FROM THE PAPO BOARD'S SEPTEMBER 22, 2005 ORDER**

Pursuant to 10 C.F.R. § 2.1015(b), the Department of Energy (DOE) hereby gives notice of its appeal from the September 22, 2005 Order of the Pre-License Application Presiding Officer Board. *U.S. Dep't of Energy* (High Level Waste Repository: Pre-Application Matters), LBP-05-27, Slip Op. (Sept. 22, 2005). For reasons explained in DOE's brief accompanying this notice, that holding is erroneous, raises issues of substantial importance to the licensing proceeding for a high-level nuclear waste repository at Yucca Mountain, and should be reversed and vacated.

In its notice of appeal and brief, the Staff of the Nuclear Regulatory Commission requested a stay of the September 22, 2005 Order pending a ruling on appeal. DOE does not oppose that motion.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

By Michael R. Shibuskip

Donald P. Irwin
Michael R. Shebelskie
Kelly L. Faglioni
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
Telephone: (804) 788-8200
Facsimile: (804) 788-8218
Email: dirwin@hunton.com

Of Counsel:

Martha S. Crosland
U.S. DEPARTMENT OF ENERGY
Office of General Counsel
Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

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Donald P. Irwin
Michael R. Shebelskie
Kelly L. Faglioni
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
Telephone: (804) 788-8200
Facsimile: (804) 788-8218
Email: dirwin@hunton.com

Of Counsel:

Martha S. Crosland
U.S. DEPARTMENT OF ENERGY
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Washington, D.C. 20585

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GLOSSARY OF TERMS

BSC	Bechtel-SAIC Company, LLC
DOE	U.S. Department of Energy
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FOIA	Freedom of Information Act
LAMP	License Application Management Plan
LSN	Licensing Support Network
NEI	Nuclear Energy Institute
NR	Naval Reactors—DOE
NRC	Nuclear Regulatory Commission
NWTRB	Nuclear Waste Technical Review Board
OCRWM	Office of Radioactive Waste Management
ORD	Office of Repository Development
PAP0	Pre-License Application Presiding Officer
SAR	Safety Analysis Report

DOE submits this brief in support of its appeal from the decision of the PAPO Board, *U.S. Dep't of Energy* (High Level Waste Repository: Pre-Application Matters), LBP-05-27, Slip Op. (Sept. 22, 2005) [hereafter, September 22 Order], granting the State of Nevada's motion to compel and requiring DOE to produce two versions of its draft license application on the LSN before DOE can make its initial certification pursuant to 10 C.F.R. § 2.1009(b). The PAPO Board erroneously decided that motion. Its ruling should be reversed.

I. PRELIMINARY STATEMENT

This appeal raises matters profoundly important to the Yucca Mountain proceeding. The PAPO Board has ordered DOE to produce two draft versions of its license application on the LSN as a condition of DOE's initial certification. While the PAPO Board claimed its ruling affects just two drafts, the harm occasioned by the September 22 Order extends far beyond those drafts. If allowed to stand, the September 22 Order would effectively abrogate the regulation excluding preliminary drafts from the LSN and require DOE (and all other participants) to place on the LSN virtually every draft of every document potentially relevant to the Yucca Mountain proceeding. This is a result that this Commission never intended and that its regulations do not mandate.

The PAPO Board brought about this result through a series of four holdings. First, the PAPO Board decreed that drafts of the license application constitute "nonsupporting" documentary material because there may be "differences" between the drafts and the yet unfinished license application (even though the Board did not review either draft at issue, much less specify what particular differences were supposedly "nonsupporting" or how any such determination was possible before the license application was finalized). Second, the PAPO Board held that both drafts underwent a "concurrence" review because both had been commented upon by persons who, broadly speaking, manage or supervise someone, even though

the record was clear that the drafts were in an active state of revision and not ready for concurrence review as typically understood in agency practice. Third, the PAPO Board deemed that the drafts had received a “non-concurrence” because the broad class of managers and supervisors gave “comments” suggesting “changes” to the drafts. And fourth, acting *sua sponte*, the PAPO Board added that “comments” on the drafts are final documents and therefore presumably have to be produced on the LSN in their own right.

Contrary to the PAPO Board’s insistence, these rulings open the floodgate to the production of virtually all preliminary drafts on the LSN, for the PAPO Board provided no meaningful standard or principled basis to bound the participants’ obligation to produce drafts. The PAPO Board’s explanation as to why the two drafts it ordered produced are “nonsupporting” documentary material applies equally to any draft version of the license application. Indeed, it applies to any draft of any document any participant might prepare for, cite during, or that is otherwise relevant to the licensing proceeding. If a concurrence review occurs whenever a manager or supervisor comments on a draft, and any “comment” proposing a change to a draft by a manager or supervisor is a “non-concurrence,” then most drafts of any document worked on by anyone other than the original author will be “circulated drafts” that must be produced on the LSN. And further, if “comments” on drafts must be independently produced—including comments in redline or comparite format or handwritten inserts on the underlying draft—then effectively all drafts will be produced under the compulsion of producing the comments.

This cannot be what the Commission intended. The Commission does not require the indiscriminate production of draft license applications, as well as comments on those drafts, in other licensing proceedings. Discovery of selected portions of them may occur in connection with specific contentions, following an adequate showing supported by experts that a need exists

for the portion related to that specific contention. But since an applicant seeks a license based on the application as filed, the Commission does not wade into the drafting history of the application or permit fishing expeditions into the drafts.

Consistent with that practice, the Commission made clear that the LSN production requirements are presumptively limited to final documents, and its regulations implement that intent by excluding preliminary drafts.¹ The sole exception to this finality requirement is for “circulated drafts,” and it was intended and understood to be a narrow exception measured against NRC’s and DOE’s traditional concurrence policies. That exception was not intended to grab the entire drafting history of the license application or any other document. Yet that is precisely what the PAPO Board has done. It has transmogrified the “circulated draft” exception into a production obligation that swallows up the exclusion of preliminary drafts.

Last year, the PAPO Board ordered DOE to review millions of emails on the back-up tapes of OCRWM’s email system.² The PAPO Board assured that the undertaking should take DOE a “relatively short period of time,” about six weeks.³ In actuality, it took the better part of a year and several millions of dollars to accomplish, ballooning the size of DOE’s production already to nearly 3.5 million documents with more than 28 million pages of information. DOE

¹ 53 Fed. Reg. 44411, 44415 (Nov. 3, 1988) (stating that the requirements to submit documentary material on the LSN “generally apply only to final documents, *e.g.*, a document bearing the signature of an employee of an [LSN] participant or its contractors.”); 10 C.F.R. § 2.1003(a)(1) (providing that preliminary drafts are excluded from the LSN).

² *U.S. Dep’t of Energy* (High Level Waste Repository: Pre-Application Matters), LBP-04-20, 60 NRC 300, 324 (2004).

³ *Id.*, 60 NRC at 340, n.61.

nevertheless completed the task and had recently reached the point where 98% of its documents had been loaded to the LSN.⁴

Now, just as DOE reached a position to make a new certification, the PAPO Board has imposed an unjustified and onerous condition further swelling the scope of the LSN. The PAPO Board maintained that its latest ruling will be limited to the particular drafts at issue and will have no deleterious effects (just like its assurance last year). The rationale of the PAPO Board's decision, however, cannot be so confined. The September 22 Order should be reversed.

II. PROCEDURAL HISTORY

On June 6, 2005, Nevada filed with the PAPO Board a motion to compel, or in the alternative, for a declaratory order. The motion sought to compel DOE to produce the version of the draft license application that BSC delivered to DOE on July 27, 2004.⁵

Nevada's motion to compel was the culmination of various attempts by Nevada to obtain that particular version of the draft license application. Nevada had made a FOIA request for the draft from DOE in August, 2004.⁶ DOE denied the request on the grounds that the draft was privileged and otherwise fell within Exemption 5 of FOIA.⁷ Nevada elected not to pursue any administrative or judicial appeal of that denial.⁸

⁴ DOE Fourth Monthly Status Report to PAPO Board (September 1, 2005).

⁵ State of Nevada Motion to Compel Production of DOE's Draft Yucca Licensing Application, or in the Alternative, for a Declaratory Order (June 6, 2005) [hereafter, Nevada Motion].

⁶ August 24, 2004 Letter from Charles Fitzpatrick to DOE FOIA officer (DOE Brief, Ex. D).

⁷ November 22, 2004 Letter from Kenneth Powers to Charles Fitzpatrick (DOE Brief, Ex. E).

⁸ DOE Brief, p. 16.

Nevada additionally sought to obtain the draft from DOE under § 117(a) of the Nuclear Waste Policy Act, 42 U.S.C. § 10137, by various requests sent to DOE and its counsel in late 2004 and early 2005. The requests were denied.⁹

Nevada then turned to the PAPO Board. In a filing regarding the PAPO Board's proposed privilege log requirements, DOE identified its claim that the draft license application and comments on those drafts are protected by the litigation work product doctrine.¹⁰ This position was the subject of argument at a conference held on May 4, 2005, during which DOE maintained that the draft license application is protected by the litigation work product doctrine because it was prepared in anticipation of litigation.¹¹ Nevada argued to the contrary and added that the July 2004 draft is a "circulated draft."¹²

In supplemental filings following the May 4 conference, Nevada claimed that the draft license application is not covered by the litigation work product doctrine and that the July 2004 draft license application is a "circulated draft."¹³ DOE noted in its filing that Nevada had injected at the conference extra-record factual allegations about the July 2004 draft license application and that the Board should not act on those allegations without allowing DOE to

⁹ Tr., p. 383.

¹⁰ DOE Supplement Regarding the Proposed Case Management Order Regarding Privilege Designations and Challenges (April 25, 2005), p. 8 n.2.

¹¹ Tr., pp. 87-94.

¹² *Id.*, p. 96.

¹³ Nevada Memorandum Regarding Issues Arising from the Board's May 4, 2005 Hearing, p. 7.

respond.¹⁴ DOE repeated too its argument that the draft license application is protected litigation work product.¹⁵

At a subsequent conference held on May 18, 2005, the Board and the participants discussed a means to give the PAPO Board a procedural basis to rule on Nevada's request for the July 2004 draft license application, in light of the fact that DOE had not yet made its new LSN certification. It was mutually decided that a sufficient procedural device would be for Nevada's counsel to send a letter to DOE's counsel requesting the draft, which DOE's counsel would deny, whereupon Nevada would file its motion.¹⁶

Following the exchange of letters (in which DOE once again claimed that the draft is protected from disclosure as litigation work product),¹⁷ Nevada filed its motion. DOE, the NRC Staff and NEI filed briefs, and Nevada filed a reply brief.¹⁸

The PAPO Board heard argument on Nevada's motion on July 12, 2005. Following the hearing, the PAPO Board ordered DOE to answer certain questions and to provide certain

¹⁴ DOE Memorandum in Response to May 11, 2005 Memorandum and Order regarding Second Case Management Conference, p. 29.

¹⁵ *Id.*, pp. 27-28.

¹⁶ Tr., p. 403.

¹⁷ May 19, 2005 Letter from Martin Malsch to Donald Irwin (Nevada Motion, Ex. 1); May 23, 2005 Letter from Donald Irwin to Martin Malsch (Nevada Motion, Ex. 2).

¹⁸ DOE Brief in Opposition to Nevada's Motion (June 20, 2005) [hereafter, DOE Brief]; Brief of NEI Opposing Nevada's Motion (June 20, 2005); NRC Staff Response to Nevada's Motion (as corrected) (June 21, 2005); Nevada's Reply to DOE Brief (July 29, 2005) [hereafter, Nevada Reply Brief].

documents.¹⁹ DOE responded on July 29, 2005.²⁰ The State filed a response to DOE's answers on August 11, 2005.²¹

The September 22 Order followed. The PAPO Board ordered DOE to produce not only the July 2004 draft license application that was the subject of Nevada's motion, but a subsequent version from September 2004.²² The PAPO Board ordered production of the September 2004 version even though Nevada *never* once asked for it, even after learning of its existence. The PAPO Board also ordered its production even though the PAPO Board acknowledged that the September 2004 draft was in fact different from the earlier July version, as a result of modifications that had been made to the July draft.²³

The PAPO Board's rationale for ordering production of both drafts was fourfold: (1) the drafts are "documentary material";²⁴ (2) the drafts underwent a "concurrence review";²⁵ (3) the drafts received a "non-concurrence" as a result of those reviews;²⁶ and (4) the draft license application is not protected by the litigation work product doctrine.²⁷ The PAPO Board

¹⁹ Order Regarding State of Nevada's June 6, 2005 Motion (July 18, 2005) [hereafter, PAPO Board Questions].

²⁰ DOE Response to the PAPO Board's July 18, 2005 Order (July 29, 2005) [hereafter, DOE Response].

²¹ Nevada's Reply to DOE's Response to the Board's July 18, 2005 Order (August 11, 2005).

²² September 22 Order, p. 1 n.1 & p. 52.

²³ September 22 Order, p. 30.

²⁴ *Id.*, p. 19-28.

²⁵ *Id.*, p. 31-38.

²⁶ *Id.*, p. 38-39.

²⁷ *Id.*, p. 50-52.

additionally opined that “comments” on the drafts are themselves “final documents” (and thus presumably required to be produced on the LSN).²⁸

III. STANDARD OF REVIEW

The PAPO Board’s various interpretations of the Commission’s regulations and its application of those regulations to the two draft license applications, as well as the PAPO Board’s application of the attorney work product privilege, are questions of law that are reviewed *de novo*.²⁹

IV. ARGUMENT

Each of the grounds the PAPO Board relied on to compel production of the two draft license applications is erroneous. So is the PAPO Board’s additional determination that all comments on the drafts are “final” documents. Error by the PAPO Board on any one of these grounds is an adequate and independent basis for reversal.

A. THE DRAFTS ARE NOT “DOCUMENTARY MATERIAL”

The September 22 Order should be reversed in the first instance because the draft license applications do not constitute “documentary material” and therefore are not required to be produced on the LSN as part of DOE’s initial certification.

The license application is one of the “basic licensing documents” referred to in 10 C.F.R. § 2.1003(b). As such, DOE’s obligation to produce the license application is governed by 10 C.F.R. § 2.1003(b), and not by rules governing the production of “documentary material” in

²⁸ *Id.*, p. 29.

²⁹ *In the Matter of Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-124, 60 N.R.C. 160, 206 (2004).

10 C.F.R. § 2.1003(a).³⁰ Indeed, since the production of documentary material under § 2.1003(a) is to precede the license application by six months, § 2.1003(a) cannot logically apply to the license application. It is therefore improper to force production of the license application, much less drafts of the license application, as part of DOE's obligation to produce "documentary material." Such a reading obliterates the distinction between subparts (a) and (b), and leaves subpart (b) with nothing to do, in violation of the "elementary canon of construction that the regulation should be interpreted so as not to render any part inoperative; the whole regulation must be given effect."³¹

The PAPO Board's assertion that subpart (b) merely directs "who" should place basic licensing documents on the LSN does not overcome this problem. Subpart (a) already defines "who" should put documentary material on the LSN. Subpart (a) requires DOE to "make available . . . all documentary material . . . *generated by, or at the direction of*" DOE.³² DOE, therefore, would already have the obligation to produce the license application on the LSN as a

³⁰ Those regulations read in pertinent part:

(a) Subject to the exclusions in § 2.1005 and paragraphs (b), (c), and (e) of this section, DOE shall make available, no later than six months in advance of submitting its license application for a geologic repository . . . (1) An electronic file including bibliographic header for all *documentary material* (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of

(b) *Basic licensing documents* generated by DOE, such as the Site Characterization Plan, the Environmental Impact Statement, and the license application, or by NRC, such as the Site Characterization Analysis, and the Safety Evaluation Report, shall be made available in electronic form by the respective agency that generated the document.

10 C.F.R. §§ 2.1003(a) & (b) (emphasis added).

³¹ *In the Matter of Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-944, 33 N.R.C. 81, 132-33, 1991 NRC LEXIS 18 at *8 (Feb. 28, 1991) (citing *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249-50 (1985)).

³² 10 C.F.R. § 2.1003(a)(1) (emphasis added).

result of subpart (a) if the license application were documentary material, still making subpart (b) superfluous. Subpart (a) makes clear too that no party need re-produce documents produced on the LSN by another party, so subpart (b) cannot be justified either on the ground that its purpose is to prevent duplicate production by other participants.³³

But wholly apart from the interplay between subparts (a) and (b), the PAPO Board had no basis to hold that the two draft license applications independently satisfy the regulatory definition of documentary material. As the PAPO Board noted, there are three classes of documentary material, as applied to DOE: (1) information that DOE intends to rely on or cite in support of its position in the licensing proceeding; (2) information that does not support the information that DOE intends to rely on or cite; and (3) certain reports and studies.³⁴ The PAPO Board acknowledged that the drafts do not fall within Class 1,³⁵ but it erred in holding that the drafts satisfy Classes 2 and 3.

With respect to the drafts' status as Class 2 documentary material, Nevada did not identify any information in either draft that does not support DOE's intended position in the licensing proceeding. Neither did the PAPO Board. Indeed, the only evidence in the record touching on the matter was to the contrary. It was undisputed that all the comments on the July 2004 draft were resolved.³⁶ Similarly, it was undisputed that no differing professional opinions

³³ *Id.* (providing that "an electronic file need not be provided for acquired documentary material that has already been made available by . . . the party that created the documentary material").

³⁴ 10 C.F.R. § 2.1001 (definition of "documentary material").

³⁵ September 22 Order, pp. 21-22.

³⁶ Declaration of Joseph Ziegler, ¶¶ 8-9 (DOE Brief, Ex. B).

had been registered in connection with the drafts.³⁷ In short, Nevada identified nothing to support its motion.³⁸

With no factual basis to support Nevada’s claim, the PAPO Board instead declared conclusorily that it is “obvious” that differences between a draft and the final version of a document “often” reveal “defects or difficulties that raise questions” about the final version.³⁹ The “obviousness” of this asserted notion did not stop the Commission from generally excluding drafts from the LSN, however. If the Commission—or any of the parties that participated in the negotiated rulemaking that gave rise to these regulations—had believed that drafts were nonsupporting material simply because they were different from final documents, it is virtually inconceivable that they would have troubled to promulgate a general rule excluding preliminary drafts.

Moreover, there is no indication in any of the rulemaking history that anyone thought that drafts of the license application were nonsupporting information merely because they might differ from the final version. There is no such reference in the negotiated rulemaking. There is no such reference in the Commission’s Statement of Considerations. There is no such reference in the minutes or transcripts of the LSN Advisory Review Panel in its more than 15-year history. If drafts of the license application are so crucially important for opposing participants, as the

³⁷ DOE Response, p. 19.

³⁸ The PAPO Board’s assertion that a participant moving to compel the production of a document should not be required to provide “concrete factual support” that the subject document contains nonsupporting information, September 22 Order, p. 24, is of no moment. Nevada provided no factual support whatever that either draft is nonsupporting information.

³⁹ September 22 Order, p. 24.

PAPO Board averred, it is utterly remarkable that no one in the history of the LSN regulations even once noted that fact.

In fact, the only reference to draft license applications in that entire history occurred in the midst of the rulemaking in 1998 that amended the LSN regulations to add the current definition of “documentary material,” when DOE’s representative to the LSN Advisory Review Panel expressed doubt that any draft license application would be produced on the LSN.⁴⁰ That statement drew no objection from Nevada, the counties or the other participants. Again, if access to the draft license applications were so fundamental then surely these well-informed participants would not have acquiesced in DOE’s statement during the rulemaking and remained silent until now about the need for the draft license applications and their absence from the LSN regulations.

In any event, the PAPO Board’s blanket assertion that changes between a draft and a final document reveal nonsupporting “defects or difficulties” is insupportable. Changes from one draft to the next are not necessarily nonsupporting. Changes are made to documents for many reasons. Some changes strengthen or augment a position taken in the document. Other changes are necessitated by amendments in the applicable regulatory standards or by the need to incorporate more up-to-date technical basis documents. Other changes reflect alterations in the design of the facility. All such changes are substantive and require revisions to the document, but that does not make the prior draft versions “nonsupporting.” Much more is needed than the prospect of unspecified “changes” to consider a draft nonsupporting.

Neither the PAPO Board nor Nevada, however, could provide anything specific. Nor did they explain how any such determination could even be made before the license application is

⁴⁰ LSN Advisory Review Panel Meeting Transcript, February 24, 1998, p. 25.

finalized. Until then, it is unknown whether there is a “change” between the drafts in question and the final version, much less any basis to assess whether any “change” qualifies as nonsupporting information.

All the PAPO Board offered, therefore, was the speculation that the drafts might reveal “safety and environmental difficulties, issues, and changes”—whatever that means—“that raise questions about the final version” and that may help Nevada formulate contentions.⁴¹ That is nothing more than an assertion that the drafts might prompt questions in the minds of Nevada’s lawyers that might assist in their discovery of potentially relevant evidence. Yet that is the very test for production of documents on the LSN that the Commission rejected when it adopted the current definition of documentary material in 1998.

When the Commission promulgated that definition, a commentator requested the Commission to include a proviso that documentary material also encompasses information “that is likely to lead to the discovery of relevant material.”⁴² The Commission rejected the comment and reaffirmed that its definition struck an appropriate balance between the burdens of production and the reasonable needs of the participants, stating that its new definition “amply defines the body of material that will be important for and **most usable** for the licensing proceeding” and that the production of material merely because it could lead to the discovery of relevant information “could be an apparently **limitless task**.”⁴³ The September 22 Order overrides the Commissioners’ decision and employs the very standard the Commission refused to adopt, and for that reason alone should be reversed.

⁴¹ September 22 Order, pp. 24-25.

⁴² 63 Fed. Reg. 71729, 71730 (Dec. 30, 1998).

⁴³ *Id.* (emphasis added).

The PAPO Board's view that the drafts additionally constitute Class 3 documentary material (*i.e.*, reports and studies) fares no better. That category requires production of "All reports and studies . . . including all related 'circulated drafts,' relevant to both the license application and the issues set forth in the Topical Guidelines in Regulatory Guide 3.69"⁴⁴ The specific mention of "circulated drafts" in the definition makes plain the Commission's intent to exclude all other drafts from this category. Further, substituting the term "draft license applications" for "reports and studies" as the PAPO Board suggested would yield the requirement to produce "*All* draft license applications . . . including all related "circulated drafts . . ." As noted above, the Commission has never indicated an intent to place *all* drafts of anything in the LSN.

The PAPO Board's characterization of the SAR as a report does not support the September 22 Order either. The SAR is part of the license application. Inserting SAR for "reports and studies" into the description of Class 3 would thus require production of "All SARs . . . relevant to . . . the license application" That is a tautology, since all parts of the license application are relevant to the license application. In context, it is quite clear that the "reports and studies" encompassed by Class 3 are something other than the license application itself. (The PAPO Board also never explained why the entire draft license application would have to be produced even if the SAR were considered a report or study within Class 3, further illustrating that Class 3 does not refer to the license application itself.)

⁴⁴ 10 C.F.R. § 2.1001 (definition of "documentary material").

B. NEITHER DRAFT UNDERWENT A “CONCURRENCE REVIEW”

The second reason the September 22 Order should be reversed is that neither the July nor the September version of the draft license application went through the type of concurrence review necessary to create even the potential for a circulated draft. Both drafts instead were still in the active drafting stage that precedes any such concurrence review.

1. DOE’s Concurrence Process

The Commission’s regulations provide that “[c]irculated draft means a nonfinal document circulated for supervisory concurrence or signature in which the original author or others in the **concurrence process** have non-concurred.”⁴⁵ In its Statement of Considerations concerning this definition, the Commission explained that “[t]he intent of this exception to the general rule for final documents is to capture those documents to which there has been an unresolved objection by the author or other person in the internal management review process (the **concurrence process**)”⁴⁶ As reiterated in the Statement of Considerations, this definition makes plain the Commission’s intention that circulated drafts could arise only in the context of a “concurrence process.”

The term “concurrence process” is not unambiguous as the PAPO Board suggested. A statutory or regulatory term is unambiguous only if there is one, and only one, possible reading.⁴⁷ That self-evidently is not the case with “concurrence process.” The term is not

⁴⁵ 10 CFR § 2.1001 (definition of “circulated draft”) (emphasis added).

⁴⁶ 53 Fed. Reg. 44411, 44415 (Nov. 3, 1988); 54 Fed. Reg. 14925, 14934 (April 14, 1989) (emphasis added).

⁴⁷ *AFL-CIO v. Federal Election Comm.*, 333 F.3d 168, 173 (D.C. Cir. 2003) (“A statute is considered ambiguous if it can be read more than one way”); *Securities Indus. Ass’n v. Board of Governors of the Federal Reserve System*, 847 F.2d 890, 894 (D.C. Cir. 1988) (statute phrased in words susceptible to more than one meaning is ambiguous).

defined in the LSN regulations. The term is not defined or even used in the NRC's other regulations. There are no Commission decisions defining the term.

Resort to the Statement of Considerations, therefore, is proper to establish the meaning of that term, and what the Statement of Considerations shows is that the type of concurrence process the Commission had in mind was the kind NRC and DOE followed when the regulation was promulgated in 1989. That is made plain by the Commission's express reference in the Statement of Considerations to NRC's and DOE's concurrence processes and the Commission's exhortation for other participants to assess their draft documents for circulated draft status as if they had undergone similar processes:

Although many of the LSS participants or their contractors do not have the same type of concurrence process as DOE and NRC, the Commission expects all LSS participants to make a good faith effort to apply the intent of this provision to their document approval process.⁴⁸

The clear import of this statement is that the regulatory definition was developed with the DOE and NRC processes in mind; if this was not so, it is difficult to understand why the Commission would find it necessary to state that other participants should apply these procedures when judging their own drafts.

The nature of DOE's concurrence process in 1989 was illustrated by a contemporaneous example in the record.⁴⁹ As that example shows, the concurrence process entailed distribution of a document specifically denominated a concurrence version. The distributed document was presumptively final, as "final concurrence" was expressly requested in the cover memo

⁴⁸ 53 Fed. Reg. 44411, 44415 (Nov. 3, 1988); 54 Fed. Reg. 14925, 14934-35 (April 14, 1989).

⁴⁹ DOE Response, Ex. B.

distributing the document. The document was further accompanied by a sheet on which the requisite officials initialed and dated their concurrence.

DOE's concurrence process was further spelled out in DOE's Correspondence Manual.⁵⁰ As described in that manual, the purpose of the concurrence process was to obtain the final approval of the responsible DOE officials. That did not, and could not, occur while the document was in an active state of revision. The concurrence process had to occur with the presumptively final version of the document, so the official could make the final determination whether the document accurately reflected the views and positions of DOE.

Other essential characteristics of that process as illuminated by the Correspondence Manual, insofar as it bears on whether a document is in the drafting stage versus the concurrence process, are as follows:

- distribution of the concurrence version to just the senior managers who possess the authority to commit DOE to the positions taken in the concurrence version;⁵¹
- allowance, in view of the presumably final and thoroughly vetted state of the document, of a very short period of time for review, typically two days;⁵²

⁵⁰ DOE Response, Ex. A. The PAPO Board deprecated that manual on the ground that it “merely” concerned correspondence. September 22 Order, p. 34 n.125. Nevertheless, the undisputed fact remains that the concurrence procedure it describes is the procedure DOE had in 1988-89 and is the procedure against which the Commission’s regulation was adopted.

Further, DOE did not concede that the concurrence policy embodied in the manual was inapplicable to the license application when the regulation was promulgated, as the PAPO Board erroneously suggested. The PAPO Board asked for OCRWM’s “general concurrence process”—which was the correspondence manual—and then asked if there was a separate or different written policy for the license application in 1988. PAPO Board Question, No. 1. DOE’s answer that there was no such separate process in no way means that a different type of concurrence process was contemplated for the license application. DOE Response, p. 4.

⁵¹ DOE Correspondence Manual, p. I-18 (DOE Response, Ex. A).

⁵² *Id.* § VI.3(d), p. VI-3.

- explicit recognition that mere requests for revision of the concurrence version did not qualify as non-concurrence;⁵³
- explicit recognition that non-concurrences “are directed to the entire concept of the response,” that is, whether the statement of the significant positions taken in the version had been sufficiently refined to adequately and accurately represent policies or positions to which the responsible senior managers were willing to commit the Department;⁵⁴ and
- specification of a formal manner for making a non-concurrence, generally requiring that a specific statement of non-concurrence be made on the concurrence version and returned to the action office with an explanation of the reasons for non-concurrence, DOE Response.⁵⁵

Had the PAPO Board measured the July and September draft license applications against these characteristics, it would have been forced to conclude that neither draft underwent a concurrence review. The unassailable fact is that both versions were drafts in an active state of revision. Indeed, the PAPO Board itself acknowledged that “**innumerable**”⁵⁶ project personnel were working on the draft between July and September, 2004, reviewing, revising and rewriting the draft, providing “**thousands**” of comments, with countless iterations of the various draft

⁵³ *Id.*, § VI.2(c), p. VI-2.

⁵⁴ *Id.*, § VI.2(a), p. VI-2. The PAPO Board misconstrued DOE’s citation of this requirement as an argument that a non-concurrence could occur only if the DOE official asserted that DOE should not file any license application at all. September 22 Order, p. 34 n.125. This was not DOE’s position at all. DOE cited this requirement from its 1988 concurrence policy in support of the assertion that non-concurrences could occur, in the context of the license application, only when an official asserted, as part of a closed objection, that DOE should not adopt the concurrence version as its final license application. DOE Response, pp. 3-5.

⁵⁵ Correspondence Manual, § VI.4(d), p. VI-4 (DOE Response, Ex. A).

⁵⁶ September 22 Order, p. 37.

sections being generated, “**perhaps daily.**”⁵⁷ Further, and this too is undisputed, during this time many of the technical documents to be cited and relied on in the license application—including analysis model reports, system description documents, facility description documents, and the pre-closure safety analysis—were incomplete or in active revision. Further significant work remained to be done on issues of facility design and analysis too.⁵⁸

All that is fundamentally incompatible with the notion that the license application was undergoing at that time the “concurrence process” contemplated by the Commission’s regulations. The record simply does not support any determination that the license application had reached the presumptive degree of finality by that time that would warrant, or even permit, initiation of a concurrence process within the meaning of DOE’s traditional concurrence process.

2. The Review Of The July 2004 Draft License Application

The conclusion that the July 2004 draft did not undergo a concurrence review as traditionally understood is further borne out by the specifics of the actual review to which that draft was subjected. Those facts show that this draft underwent an additional round of drafting that was a step in the process—and not the last step either—to ready the document for eventual concurrence review and finalization.

To begin with, the draft that BSC delivered to DOE on July 26, 2004 was not distributed for review by anyone. That draft was a compilation of draft chapter groups that BSC had been making available on a rolling basis starting in June. After the last of these draft chapter groups was delivered, BSC assembled them together and re-delivered them on July 26, 2004. That

⁵⁷ September 22 Order, p. 30.

⁵⁸ Declaration of Joseph Ziegler, ¶ 3 (DOE Brief, Ex. B).

delivery did not initiate any type of review of the compiled document. Its purpose was to document the performance of the deliverable noted in BSC's contract with DOE.⁵⁹

The previously delivered draft chapter groups underwent the "joint chapter review."⁶⁰ Prior to that review, the 70-some sections of the draft license application had been drafted separately. For the joint chapter review, these draft sections were grouped into various chapters and worked on for the first time in a quasi-integrated manner.

That review was a working-level review performed by "review teams" comprised of "staff members" of various organizations within BSC, DOE and NR. The staff members of these various teams (which could vary for each chapter group) conferred to prepare a "consolidated set of comments" on behalf of each of BSC, DOE and NR. Thereafter, representatives of these organizations met to resolve the comments.⁶¹

DOE management did **not** participate in that review.⁶² DOE personnel on those teams were technical staff from ORD.⁶³

Additionally, individual concurrences were not sought in connection with the joint chapter reviews. In contrast to the type of memorandum that distributes a concurrence version,

⁵⁹ DOE Response, p. 7 & Exs. F & H.

⁶⁰ DOE Response, p. 7; September 2004 LAMP § 4.4.3 (DOE Response, Ex. D). The September 22 Order refers in several instances to the "technical team review" that is also described in the LAMP. That too was a working-level review that looked at individual draft sections of the license application, as opposed to draft groupings of sections, or chapters. That review preceded the July 2004 draft and was complete before the joint chapter reviews began. *See* Transmittal Letters for Draft Chapters (noting completion of technical team review) (DOE Response, Ex. F).

⁶¹ September 2004 LAMP, §§ 4.4.3 & 4.4.3.3 (DOE Response, Ex. D).

⁶² Declaration of Joseph Ziegler, ¶ 4 (DOE Brief, Ex. B).

⁶³ *Id.*

the memoranda distributing the draft chapter groupings made no request for any such concurrences.⁶⁴ Similarly, the letters from BSC announcing the availability of the chapters for review expressly affirmed that “[t]he LA sections are still considered to be drafts” and that they “may be further revised” even after completion of the joint chapter review.⁶⁵

It is impossible to conceive that this review qualifies as a concurrence review that can give rise to a non-concurrence within the intent of the regulations. In addition to the fact that DOE management did not participate in the review, the document was not ready for a concurrence review. It was still a draft that was actively being revised, and individual concurrence was not in fact sought. The very notion of collective team comments, with DOE’s comments being a roll-up of comments from several organizations within DOE, belies the notion of individual approvals. Such collective comments are not a concurrence review.

3. The Review Of The September 2004 Draft License Application

The review of the September draft likewise was not a concurrence review. Following completion of the joint chapter review, new versions of the various draft chapter groupings were generated. It was these new versions that underwent the joint management review in September, 2004.⁶⁶

⁶⁴ DOE Response, Ex. H.

⁶⁵ DOE Response, Ex. F. The PAPO Board noted in this regard that the LAMP refers to a “concurrence sheet” as part of the joint chapter review. The description of the joint chapter review process makes plain, however, that the sheet is not an approval or acceptance by individuals, but a recordation by a representative of each chapter review team indicating that the team’s comments had been adequately addressed. September 2004 LAMP § 4.4.3.3 (DOE Response, Ex. D).

⁶⁶ DOE Response, p. 8.

The purpose of this review was **not** to obtain the concurrence of the participants. Its purpose was to “assess the overall completeness and accuracy” of the license application; to evaluate whether the comments from the joint chapter review had been adequately resolved; and to ensure that any “LA issues”—areas of work identified from prior reviews—either had been closed or “an acceptable path forward exists” for their resolution.⁶⁷ It also did not generate individual comments, much less non-concurrences. Like the joint chapter review process, this team provided only consolidated comments.⁶⁸

In keeping with the nature of that review, there was no concurrence memorandum. In fact, there were not even memoranda distributing the draft chapter groups to these team members. There merely was a an email announcing the commencement of the review. The email expressly notified the participants that they would **not** be asked to endorse the license application until a later time when the resulting version of the license application was sent to DOE Headquarters for concurrence review.⁶⁹ That never happened.⁷⁰

4. The PAPO Board’s Invalid Considerations

The PAPO Board glossed over these undisputed facts and latched onto matters of no legal significance, and in some instances characterized those matters in ways not supported by the record. One of those matters is that the July draft was, to use the PAPO Board’s terminology, a “major milestone” under BSC’s contract with DOE that made BSC potentially eligible for a bonus. The regulatory definition of circulated draft, however, makes no reference to the

⁶⁷ September 2004 LAMP, § 4.4.4.3 (DOE Response, Ex. D).

⁶⁸ DOE Response, p. 16.

⁶⁹ Email from Janet Christ (DOE Response, Ex. I).

⁷⁰ DOE Response, p. 8.

schedule of deliverables under a contract. Nor does the fee structure of BSC's contract with DOE alter the reality that the July 2004 draft was just that, a draft. The DOE-BSC contract expressly contemplated that the July 2004 deliverable would be a draft that would have to undergo further revision and that would not be ready for DOE's concurrence notwithstanding the prospect of BSC's potential fee incentive.⁷¹

Indeed, as the PAPO Board conceded, the July 2004 deliverable was the first "complete draft" of the license application, in the sense that it was the first time the 70-some separately-drafted sections of the license application were assembled and looked at together.⁷² It defies common sense to think that with a document the magnitude and complexity of the license application, the initial assembly was subject to a concurrence review within the understood meaning of that term.

The PAPO Board also placed great emphasis on the fact that the OCRWM officials publicly stated in 2004 that DOE was on track to file the license application in December, 2004. It is not entirely clear how the existence of a target deadline alters the reality that the license application was in an active state of revision in July and September, 2004, and was not ready for DOE concurrence. Nevertheless, at these same meetings OCRWM's officials made very clear that the license application was still a draft, characterizing the draft license application as only 59% complete at the end of June 2004 (when the joint chapter review was starting) and only 76% complete in September 2004 (in the midst of the joint management review.)⁷³ These empirical

⁷¹ Excerpt of DOE-BSC Contract (DOE Brief, A).

⁷² September 22 Order, p. 9.

⁷³ Summary of NRC Quarterly Management Meeting, Aug. 19, 2004, p. 11 (Nevada Reply Brief, Ex. 14); NWTRB Fall Meeting Transcript, Sept. 20, 2004, p. 41 (Nevada Motion, Ex. 8).

facts, which the PAPO Board neglected to cite, cast a very different light on the state of completeness of the draft license application in the time period in question. The suggestion that a barely half-finished draft would be promoted to concurrence review defies reason, logic, and experience.

Equally infirm is the PAPO Board's repeated assertion that 90 "key" and "senior" managers and supervisors reviewed the July and September versions of the draft license application. That is a significant mischaracterization of the record.

The 90 persons to whom the PAPO Board referred were never identified by anyone other than the PAPO Board as "key" or "senior." Nor was it represented by DOE that each of these persons had participated in either the joint chapter or joint management review, or that they had acted in a managerial or supervisory capacity to the extent they were involved in the review. The PAPO Board broadly required DOE to identify anyone who was a supervisor or manager to whom any part of the draft license application was distributed "*for whatever purpose*" between July and November, 2004.⁷⁴ The question was not limited to either the joint chapter or joint management review. Further, the PAPO Board broadly defined supervisor or manager as anyone who supervises or manages even just one person for any purpose, and not just "key" or "senior" supervisors and managers. Those are adjectives the PAPO Board added after-the-fact in its September 22 Order.

DOE's answer made clear that its response was as broad as the PAPO Board's question. Here is the introductory comment to DOE's answer:

Few people received the entire draft license application. Rather, pertinent sections were made available to reviewers, and not all

⁷⁴ PAPO Board Question, No. 6 (emphasis added).

reviewers reviewed all sections. Further, the broad phrase “for whatever purpose” is not necessarily limited to distribution for formal review and comment. The concept of distribution also is broad. Accordingly, DOE interprets this question as calling for the identification of persons meeting the specified criteria who received all or part of any version of the draft license application between July and November, 2004, regardless of why they received it, regardless of how they got it, and regardless of what they did with it.⁷⁵

DOE then provided the following additional qualifications in the subpart of the answer listing the 90 persons (most of whom, by the way, are not even DOE personnel, another important fact that highlights that the draft was not undergoing a concurrence review):

DOE has been able to identify the following persons who supervised or managed any person and who received part of the draft license application [during] the subject period, regardless of their organizational affiliation; whether they were functioning in a supervisory or managerial capacity when they received and/or reviewed parts of the draft license application; how they got copies; why they got copies; whether they actually reviewed the section or were even expected to review it in any detail. DOE has endeavored to identify all such people with due diligence in the time permitted. There may be a few persons who have been inadvertently missed.

There are many names on this list; however, the phrase “distributed for any purpose” is broad. The Board’s definition of “manager” and “supervisor” also is expansive and does not limit the question to whether they were acting in a managerial or supervising capacity for whatever they did with the draft. The sheer number of persons involved, and the different organizations still working on the drafts is fundamentally inconsistent with these drafts being concurrence copies. They confirm that the license application was still being drafted and not finalized.⁷⁶

⁷⁵ DOE Response, p. 9.

⁷⁶ DOE Response, p. 10.

The PAPO Board bypassed all the limiting language and leapt to the unwarranted assertion that 90 key and senior supervisors and managers reviewed the entire draft license application. That is an indefensible characterization of the record.

To be sure, a handful of OCRWM officials participated in the joint management review of the September version of the draft license application. That is neither surprising nor sufficient to transform the draft they reviewed into a concurrence draft. Since OCRWM management personnel are responsible for the status of the ultimate product, they ought to be involved in the drafting process. That such supervisors had and have something to contribute to the drafting process for portions of a document as huge and as hugely important as the license application is beyond question. It should come as no surprise therefore that these supervisors assisted in “resolving open items to ensure an acceptable path forward,”⁷⁷ provided their own comments on and proposed revisions to the draft license applications,⁷⁸ demanded “serious consideration and response to management’s substantive comments,”⁷⁹ and in other ways assisted in the drafting process towards completion of the license application. However, that does not transform into a concurrence draft each draft (much less portions of drafts) on which a manager or supervisor works.

Then there is the PAPO Board’s *ipse dixit* conclusion that the Commission’s explicit reference to the DOE and NRC concurrence processes in the Statement of Considerations sheds no light on what concurrence processes the Commission intended to reference. The PAPO Board declined to accord any weight to the Commission’s contemporaneous statement indicating

⁷⁷ September 22 Order, p. 37.

⁷⁸ September 22 Order, pp. 36, 38.

⁷⁹ September 22 Order, p. 38.

that the pertinent features of the DOE and NRC concurrence processes should be the general standard by which concurrence processes should be measured. That was error. The Statement of Considerations is entitled to “special weight,” and is not be set aside as inconvenient.⁸⁰

When the Commission’s own explanation on the meaning of its own regulation is given the weight required by consistent Commission precedent, the conclusion that the drafts at issue here did not undergo concurrence review is clear. The PAPO Board’s contrary conclusion eliminates any distinction between drafting processes and concurrence processes (and consequently, any distinction between preliminary drafts and circulated drafts). For that reason, the PAPO Board’s conclusion that the July and September draft license applications were subjected to a concurrence process must be reversed.

C. THERE WAS NO “NON-CONCURRENCE”

The September 22 Order should be reversed for the additional reason that the PAPO Board erroneously held that both the July and September drafts of the license application had received non-concurrences. The non-concurrences, according to the PAPO Board, were any “comment requiring substantive change to the circulated document as a condition to agreement or further approval of it.”⁸¹ There is no basis in the regulations or the record for that determination with respect to either draft.

⁸⁰ *Dominion Nuclear Connecticut, Inc.*, 58 NRC 75, 2003 WL 22006250, at **5 (2003) (Statement of Considerations for final rule amendments “provides elucidation in interpreting and applying” the rule and “is entitled to ‘special weight’”) (citing *Connecticut Yankee Atomic Power Co.*, 54 NRC 177, 2001 WL 34050838, at **6-7 (2001) (internal citations omitted) (where guidance offered in Commission’s Statement of Considerations is “consistent with the regulations and [is] at least implicitly endorsed by the Commission[, it] is entitled to correspondingly special weight”).

⁸¹ September 22 Order, p. 39.

In the first place, the PAPO Board erroneously equated a “comment” with a “non-concurrence.” All comments on a draft, even substantive comments, do not signal a fundamental disagreement with the concept or approach presented by the draft. Comments can include any number of helpful suggestions to improve a draft (*e.g.*, add a sentence on this topic; expand the discussion of this topic; provide additional citations in support of this issue). The mere existence of a “comment” in no way implies an objection or anything else that might be considered a non-concurrence.⁸²

Indeed, in the inescapable absence of an omniscient author, the drafting process for documents of any consequence, especially one of the size and scope of the license application, necessitates the participation of many people from diverse technical and scientific backgrounds. It is inevitable, not to mention highly desirable, that these participants will have “substantive and serious” comments requiring revision of the document. Preliminary drafts of complex technical documents thus are bound to receive significant, substantive, and serious comments and to be modified to reflect and incorporate those comments. By equating “non-concurrence” with “substantive and serious comments,” the PAPO Board has eliminated the distinction between “preliminary drafts” and “circulated drafts.”

The PAPO Board also has contravened the intent and spirit of the “circulated draft” proviso. The parties to the negotiated rulemaking agreed to the “circulated draft” proviso with recognition that the deliberative process privilege was being waived for such drafts.⁸³ As such, the waiver could not have been intended, and should not be interpreted, to sweep as broadly as

⁸² Compare DOE Correspondence Manual, § VI(2)(c) (noting the existence of a concurrence with comments) (DOE Response, Ex. A).

⁸³ See 10 C.F.R. § 2.1006(c).

the PAPO Board's construction. The invasive disgorgement of drafts that the September 22 Order mandates would impose a never-intended chilling pall on internal deliberative processes.

Equally important, the PAPO Board misconstrued the record about the comments made on the July and September drafts. The PAPO Board predicated its holding on DOE's answer to Question 9 of the PAPO Board, but the actual text of the question and of DOE's answer does not justify the PAPO Board's holding. The question reads as follows:

For each person identified in response to item 6, specify those who submitted a mandatory comment or comment requesting or requiring that the Draft License Application be substantively changed in any way.

Two aspects of that question are crucial. First, the question asks about comments "requesting **or** requiring" a change in the draft. Second, the question does not ask about comments tendered "as a condition to agreement or further approval" of the draft license application.

In response, therefore, DOE did not identify anyone who had made comments "requiring" a change, much less requiring a change "as a condition to agreement or further approval" of the draft license application. DOE stated as follows:

That said, it fair to say that virtually everyone identified in response to Question 6 had some kind of comment—whether written or oral—at least **requesting** that the draft license application be changed "in some way." Such vigorous interaction and commentary is natural, expected and indicates a healthy and robust drafting process. It belies any suggestion that the draft license application is a "circulated draft."⁸⁴

DOE's answer says nothing about comments **requiring** a change. Its answer says nothing about conditions of agreement or further approval. Nor would that have made sense,

⁸⁴ DOE Response, p. 16.

since the joint chapter and joint management reviews did not seek approvals from individual reviewers. This point too was made in DOE's response:

[C]omments in the "joint chapter" and "joint management" reviews were not systematically tracked to individuals. As explained in the LA Management Plan, comments from reviewers in the "joint chapter review" were consolidated into a unified set of comments from each organization. See Exhibit D, § 4.4.3.2 at p. 15. The same is true for the "joint management review." Meetings were held with these reviewers to discuss their questions and other comments, and collective action items were identified as a result. These reviewers also submitted a common interlinear mark-up of draft sections without attribution of specific comments to individuals.⁸⁵

In the September 22 Order, the PAPO Board contorted these responses to mean that all 90 persons gave comments **requiring** substantive changes to the draft license application **as a condition to their agreement or further approval**. That is an unjustified recitation of the record.

Further, the PAPO Board failed to credit the Commission's own explanation of what a "non-concurrence" is. When it promulgated the regulation concerning circulated drafts, the Commission provided a Statement of Considerations that explains what it meant by the term "non-concurrence." That Statement left no doubt that an objection to a document could qualify as a non-concurrence only if it was and remained unresolved:

The submission requirements of proposed § 2.1003 generally apply only to final documents, *e.g.*, a document bearing the signature of an employee of an LSS participant or its contractors. However, paragraphs (a) and (b) of § 2.1003 also require the submission of "circulated drafts" for entry into the LSS. . . . The intent of this exception to the general rule on final documents is to capture those documents to which there has been an ***unresolved objection*** by the author or other person in the internal management review process (the concurrence process) of an LSS

⁸⁵ *Id.*

participant or its contractor. In effect, the Commission and the other government agencies who are LSS participants are waiving their deliberative process privilege for these circulated drafts. ***The objection or non-concurrence must be unresolved.*** Any draft documents to which such a formal, unresolved objection exists must be submitted for entry into the LSS. . . . If a decision is made not to finalize a document to which there has been an objection, the draft of that document must be entered into the LSS after the decision-making process on the document has been completed, *i.e., the requirements of proposed § 2.1003 do not require a LSS participant to submit a circulated draft to the LSS while the internal decision-making process is ongoing.*⁸⁶

A substantive comment, even an objection, that is accepted and incorporated by the authors is not, of course, unresolved, and as the Commission's guidance makes clear, a resolved objection is not a non-concurrence. Similarly, an open objection—one that remains under consideration for acceptance and incorporation—does not become unresolved while the decision-making process for accepting or rejecting the objection continues.

Here, the undisputed record was that *all* the comments from the joint chapter review had been resolved, either by incorporation of the comment, the development of alternative language, or the establishment of an action item with an agreed path forward.⁸⁷ Further, the reviews did not generate objections but action items with an agreed path for resolution (some of which were still being worked or had been superseded by later technical direction letters).⁸⁸ So, in fact, there were no unresolved objections from those reviews—even if those reviews could be considered a concurrence review, which they were not—and under the direction provided in this

⁸⁶ 53 Fed. Reg. 44411, 44415 (Nov. 3, 1988); 54 Fed. Reg. 14925, 14934-35 (April 14, 1989) (emphasis added).

⁸⁷ Declaration of Joseph Ziegler, ¶ 8 (DOE Brief, Ex B).

⁸⁸ DOE Response, p. 17.

Commission's Statement of Considerations, this record alone compels the conclusion that the July and September draft license applications were not circulated drafts.

The PAPO Board, however, did not follow this Commission's direction, describing it as "entirely extraneous,"⁸⁹ "inconsistent with the regulation," and "impractical."⁹⁰ The Commission's precedents do not support the PAPO Board's disregard of the Commission's Statement of Considerations as "extraneous." The Commission has ruled that if a Statement of Considerations "provides elucidation in interpreting and applying" a regulation, the Statement is "entitled to 'special weight'" in the interpretation of that regulation.⁹¹

The Statement of Considerations was issued simultaneously with the promulgation of the regulation, and the Commission adopted for its Statement an explication of the regulation agreed to by the very parties to the negotiated rulemaking who had written the regulation at issue. In view of these facts, the suggestion that the Statement is inconsistent with the regulations requires the untenable conclusion that neither the Commission nor the parties that drafted the regulation and the explanation of it understood their own regulation.

That is the conclusion the PAPO Board reached, but it cannot withstand scrutiny. To try to justify its disregard of the Statement of Considerations, the PAPO Board argued that the regulatory requirement that a supervisor must "*have* non-concurred," which is in the past tense, conflicts with the explanation in the Statement of Considerations that a non-concurrence "must *be* unresolved," which is in the present tense. There is no contradiction. While an objection remains open, acceptance and incorporation into the draft of the objection remains possible and

⁸⁹ September 22 Order, p. 40,

⁹⁰ September 22 Order, p. 41.

⁹¹ See n.80 above.

whether the objector will in fact withhold his concurrence cannot be known. If the objection is accepted or withdrawn, then the basis for the objection is eliminated and the objector will not withhold his concurrence. Only when the objection is rejected does the possibility of a non-concurrence even arise. Thus only for closed objections can it be determined whether the objector in fact *has* non-concurred. The PAPO Board's contrary conclusion has the perverse effect of requiring the finding that a non-concurrence has occurred even when the drafters of the document have accepted all the objector's proposed revisions and the objector is fully satisfied.

The PAPO Board made the further argument that the requirement that the objection be unresolved and the requirement that the decision-making process on the objection be finished are supposedly mutually contradictory.⁹² According to the PAPO Board, if the decision-making process is completed, the objection is resolved one way or another, with the result that there can never be an unresolved objection and thus never a circulated draft.⁹³ This is, to say the least, a strained reading of the Statement of Considerations. A permissible, and far more sensible, reading is that the Statement indicates a requirement that a final decision be made on an objection before the determination is made whether that objection qualifies as a non-concurrence.

Finally, the PAPO Board further sought to escape the effect of the Statement of Considerations by concluding that DOE had abandoned its intention to finish the draft license

⁹² September 22 Order, pp. 41-42.

⁹³ September 22 Order, p. 42. In the same vein, the PAPO Board claimed that the concurrence process established in the LAMP included steps intended to identify and resolve all disputes before submission of a draft for concurrence review. September 22 Order, p. 42. The Board took this to mean that an unresolved non-concurrence was not possible in the DOE process. This is not the case; while the LAMP concurrence process sensibly sought to resolve all disputes in advance of concurrence review, it did not prohibit supervisors with concurrence authority from non-concurring if they thought that was appropriate.

application. According to the PAPO Board, this was so because the ruling of the D.C. Circuit partially invalidating the EPA's post-closure radiation exposure standard led DOE to conclude that it could not file a draft license application in December 2004 and might require DOE to make changes in the draft (depending, of course, on what the new regulation might provide). These facts, the PAPO Board concluded, met the requirement in the regulation providing that a participant could not prevent a draft from becoming a circulated draft "due to . . . a decision not to finalize the document."⁹⁴

The PAPO Board's logic does not hold up. DOE's decision not to file its license application *at a particular time* is in no way a decision "not to finalize the document." Indeed, work continues on the license application and will continue until it can be filed. By the same token, the fact that DOE may need to revise part of its license application to meet changing regulatory requirements hardly qualifies as a decision not to finalize the document. To the contrary, the fact that DOE is revising the document establishes that finalization of the document is precisely its intention. The PAPO Board's conclusion that DOE has abandoned its license application must thus be rejected.

D. THE DRAFTS ARE PROTECTED LITIGATION WORK PRODUCT

The fourth reason the September 22 Order should be reversed is that the license application is being created in anticipation of the Yucca Mountain license proceeding and thus its drafts are protected litigation work product. This follows from the unique nature of the Yucca Mountain proceeding.

⁹⁴ 10 C.F.R. § 2.1001 (definition of "circulated draft").

By statute, DOE is compelled to apply to the NRC for a license to construct and operate the Yucca Mountain geologic waste repository.⁹⁵ That license application commences a mandatory adjudicatory licensing proceeding.⁹⁶ NRC licensing proceedings constitute litigation—no one has argued otherwise—and NRC regulations specify that such litigation shall be initiated by the filing of a license application.⁹⁷ In the circumstances, it seems obvious that the drafts leading to the final application by which DOE will initiate the mandated litigation are prepared in anticipation of litigation and are litigation work product (just like draft complaints in civil litigation).

The PAPO Board’s contrary conclusion cannot stand. The PAPO Board arrived at its conclusion first by decreeing that DOE had waived its litigation work product protection and second by concluding that DOE had not prepared its license application “because of” the hearing process to which that application would lead. Neither conclusion holds water.

The PAPO Board decided that DOE had waived its litigation work product protection because, in its final brief on the issues before the PAPO Board, DOE did not reiterate the arguments it had consistently asserted in the briefs and during the hearings that both preceded and followed the final brief—that the draft license applications are protected litigation work product prepared in anticipation of litigation.⁹⁸ As the PAPO Board itself admitted, “[t]he issue as to the proper scope of the litigation work product privilege in this proceeding has been briefed

⁹⁵ Nuclear Waste Policy Act of 1982 § 114(b), 42 U.S.C. § 10101.

⁹⁶ 10 C.F.R. §§ 2.101(f), 2.104(a).

⁹⁷ *Id.*

⁹⁸ See DOE’s Supplement Regarding the Proposed Case Management Order Regarding Privilege Designations and Challenges (April 25, 2005), pp. 2-8; DOE’s Brief in Opposition to Nevada’s Motion to Compel Production of the Draft LA, pp. 15-16; Tr., pp. 86-100 (May 4, 2005); Tr., pp. 447-48 (July 12, 2005); see also pages 4-6 above.

and we have heard oral argument on it twice.”⁹⁹ Given that the merits of the issue had been fully briefed and argued, it is difficult to understand why the PAPO Board would insist on pointless reiteration.

Further, DOE in no way suggested in its final brief that it was abandoning its position and instead explained why a decision on other issues obviated the need to reach the issue of whether DOE’s draft license application deserved work product protection. There is no Commission rule or regulation requiring unnecessary repetition, and judges generally prefer that it be avoided. Every participant was on repeated notice that DOE was asserting the privilege as well as DOE’s basis for the privilege. In short, no party has asserted that DOE’s failure to reiterate arguments repeatedly made elsewhere means that DOE did not make its claim of privilege and that it did not understand DOE’s claim. Nevada certainly sufficiently understood DOE’s position to be able to fully brief whether the draft license applications were being prepared in anticipation of litigation.¹⁰⁰

Turning to the merits of this issue, it is evident that the draft license application is being prepared because of, and solely because of, the Yucca Mountain licensing proceeding (*i.e.*, created for litigation). DOE has no reason to prepare the license application except to initiate the licensing proceeding, and the filing of that application is what automatically triggers the hearing process. The PAPO Board itself admitted that there is a “mandatory hearing that will take place on DOE’s application and the application will be of central importance during that adjudicatory

⁹⁹ September 22 Order, p. 49.

¹⁰⁰ Nevada Motion, pp. 16-21.

phase.”¹⁰¹ That the very document necessary to initiate this litigation amounts to litigation work product is obvious.

That is certainly the conclusion indicated by the Commission’s litigation work product regulations. Specifically, the Commission’s Subpart J regulations expressly provide that the litigation work product privilege extends to “documentary material ... *prepared in anticipation of, or for the hearing* by, or for another party’s ... representative (including its attorney, surety, indemnitor, insurer, or similar agent).”¹⁰² The Commission’s general rules of practice for adjudicatory proceedings made applicable to the Yucca Mountain proceeding similarly provide that the litigation work product privilege applies to “documents and tangible things ... *prepared in anticipation of or for the hearing* by or for another party’s representative”¹⁰³ That is precisely why the license application is being prepared.¹⁰⁴

Federal decisions too confirm that drafts of the document initiating litigation enjoy the protection of the litigation work product privilege. Just as NRC regulations prescribe that licensing litigation is commenced by the filing of a licensing application, Federal Rule of Civil Procedure 3 provides that a “civil action is commenced by filing a complaint with the court.”

¹⁰¹ September 22 Order, p. 52.

¹⁰² 10 C.F.R. § 2.1018(b)(2) (emphasis added).

¹⁰³ 10 C.F.R. § 2.705(b)(3) (emphasis added).

¹⁰⁴ See *In re Kerr-McGee Chemical Corp.* (West Chicago Rare Earth Facility) and *In re Kerr-McGee Chemical Corp.* (Kress Creek Decontamination), 22 N.R.C. 604, ASLBP 83-495-01-ML, ASLBP 84-502-01-SC, LBP-85-38, 1985 NRC Lexis 29 *22 (1985) (a Licensing Board applied the “because of” test holding that three documents prepared by non-lawyer employee in preparation for meeting with NRC Staff after a show cause proceeding were protected litigation work product).

And it is settled law that drafts of complaints are protected from disclosure under the work product doctrine.¹⁰⁵

The PAPO Board wrongly concluded that the draft license application is not prepared in anticipation of or for the hearing. Its decision ignores the law and should be reversed.¹⁰⁶

E. COMMENTS ON DRAFTS ARE NOT FINAL DOCUMENTS

There is another way in which the September 22 Order threatens to erase the Commission's intended distinction between excludable preliminary drafts and includable final documents. The parties agreed that the July and September draft license applications were nonfinal documents.¹⁰⁷ In the course of relating that agreement, however, the PAPO Board

¹⁰⁵ *E.g., Grupo Sistemas Integrales de Telecomunicacion v. AT&T Commun., Inc.*, 1995 U.S. Dist. LEXIS 2775 *1-2, 92 Civ. 7862 (S.D.N.Y. March 9, 1995) (court ordered that a draft complaint against AT&T was privileged for work product reasons because it was "material prepared in anticipation of litigation within the meaning of Rule 26(b)(3)"); *Harris Corp. v. Amperex Elec. Corp.*, 1987 U.S. Dist. LEXIS 14077 *3-4, No. 86 C 6338 (E.D. Ill. May 15, 1987) (court held that there "can be no doubt" that the draft complaint was protected work product); *Candle Corp. v. Boole & Babbage, Inc.*, 1985 U.S. Dist. LEXIS 17545, No. CV 82-4758-PAR (C.D. Cal. Aug. 2, 1985) (accord).

¹⁰⁶ Of course, DOE would not be required to produce the two drafts at issue on the LSN even if they were not litigation work product, because neither is a circulated draft. Their failure to qualify as circulated drafts is independent of whether they also are protected litigation work product.

Further, the litigation work product privilege is a qualified privilege in part, and during the licensing proceeding, Nevada could attempt to establish a need for some parts of the drafts related to certain contentions. Nevada, however, did not attempt any such showing in connection with its motion.

Nor does treating the draft license application as litigation work product open the floodgate to over-claiming of the privilege. As DOE last reported to the PAPO Board, DOE's estimate of documents in its LSN collection subject to any primary privilege (*i.e.*, the attorney-client, litigation work product privilege, and/or deliberative process privilege) is less than 20,000 documents (which is less than 1% of DOE's document collection, the same as Nevada's estimate of the percentage of privileged documents in its collection). *Tr.*, p. 601. Nevada's scare tactic about the implications of DOE's position is unfounded.

¹⁰⁷ September 22 Order, p. 29.

delivered the *ex cathedra* pronouncement that, “for example, the written comments by the ninety plus reviewers of the Draft LA are presumably final documents, even if the Draft LA is not.”¹⁰⁸

The September 22 Order does not specifically compel DOE to produce such comments on the LSN, and the PAPO Board’s pronouncement accordingly is *dicta*. However, because of the uncertainty it raises as to what documents must be placed on the LSN, the Commission should make clear that comments on drafts are part of the drafts themselves and need not be placed on the LSN.

The need for this clarification is particularly acute in light of the PAPO Board’s view as to what makes something Class 2, “nonsupporting” documentary material. The PAPO Board ruled that the draft license applications necessarily were nonsupporting because they will, in all likelihood, differ from the final license application DOE ultimately will file, albeit in unspecified and unknown ways. DOE has explained above why that ruling should not stand. If it does stand, however, it is likely that the comments on the draft license application leading to those differences would also be adjudged nonsupporting by the PAPO Board. And if those comments are final documents, they would have to be produced on the LSN.¹⁰⁹ Such an outcome is contrary to the Commission’s intention to exclude preliminary drafts from the LSN and should be foreclosed.

Comments are an integral part of the drafting process. Indeed, once the author has produced an initial draft, comments *are* the drafting process—without them, draft documents cannot make their way to final status. That something so fundamentally and inextricably part of

¹⁰⁸ *Id.*

¹⁰⁹ Whether they would have to be produced in full-text or in header-only format is a separate question that neither the parties nor the PAPO Board has yet addressed.

a nonfinal drafting process should itself be considered final does not make sense. Certainly the PAPO Board cited no authority and offered no reasons to the contrary. The Commission's intent generally to exclude the drafting history of documents from the LSN is plain. The reasons for that exclusion were well-understood. The Commission rightly insists that litigation focus on the positions actually taken by the parties, not on the positions they did not take. Preserving this focus would be virtually impossible if comments on draft documents were required to be produced.

Moreover, if comments must be produced, the Commission's exclusion of preliminary drafts will be repealed as a practical matter. This is because it is impossible to produce comments without also producing drafts. Many comments are handwritten on the draft being reviewed. Other comments are offered in a redline format in which proposed additions are highlighted as double-underlined text and proposed deletions are identified as strike-through text. There is no practical way to produce such comments without also producing the draft on which they have been recorded. Any ruling compelling production of such comments necessarily violates both the spirit and the letter of the regulation expressly excluding preliminary drafts.

Comments at times are recorded separately from the draft under review. Sometimes the commenter will have excerpted the sentence or paragraph of the draft being addressed, and to that extent, such comments disclose the text of the preliminary draft. In view of the number of reviewers a preliminary draft may have, this can result in very substantial portions of the draft being excerpted, eliminating the distinction between this form of comments and the handwritten or redlined comments. Other times the commenter will not have excerpted the preliminary draft, rendering those comments cryptic or meaningless and depriving them of any utility.

Whatever their form, comments on preliminary drafts are comments, a record of the ongoing, unfinished drafting history of a nonfinal document. Nothing in the history of the LSN regulations suggests that the Commission intended that the form of comments should take precedence over the substantive fact that comments constitute drafting history that the Commission generally intended should be excluded from the LSN's production requirements. The PAPO Board's unnecessary and unsolicited pronouncement that the components of this drafting history qualify as final documents is wrong in fact and achieves *sub rosa* repeal of the Commission's regulation excluding preliminary drafts from the LSN. The Commission should make clear that comments on preliminary drafts are not final documents.

V. CONCLUSION

The September 22 Order is not a faithful application of the LSN regulations. The PAPO Board made clear both at the hearing and in its ruling that it is dissatisfied with the schedule the Commission promulgated for adjudication of DOE's license application, especially the deadline for contentions.¹¹⁰ The PAPO Board also is dissatisfied that the Commission did not require production of drafts of the license application at the time of DOE's certification under 10 C.F.R. § 2.1009(b). DOE is producing on the LSN the documents cited and relied on in the license application as well as extensive documentation concerning the development of that scientific and engineering information—by now some 28 million pages of information, both supporting and nonsupporting, far more than anyone ever imagined there would be when the LSN was established. The PAPO Board apparently believes, nonetheless, that it would be better if the other participants also had the drafts of the license application as well as the actual underlying

¹¹⁰ September 22 Order, p. 47; Tr., pp. 484-87.

evidence, and the September 22 Order leaves the distinct impression that the PAPO Board simply read the regulations and the record in whatever manner was necessary to achieve that result.

It is difficult to see why the PAPO Board believes its objective would be achieved with two drafts that are now more than a year old, and that the PAPO Board believes could be “significantly different” than the actual license application in light of a new EPA post-closure standard.¹¹¹ In any event, there is no warrant for ignoring the Commission’s regulations and unilaterally imposing new and different rules of the road on the LSN. The September 22 Order should be reversed.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

By Michael R. Shebelskie

Donald P. Irwin
Michael R. Shebelskie
Kelly L. Faglioni
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
Telephone: (804) 788-8200
Facsimile: (804) 788-8218
Email: dirwin@hunton.com

Of Counsel:

Martha S. Crosland
U.S. DEPARTMENT OF ENERGY
Office of General Counsel
Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

¹¹¹ September 22 Order, p. 47.

1995 U.S. Dist. LEXIS 2775, *

LEXSEE 1995 U.S. DIST. LEXIS 2775

**GRUPO SISTEMAS INTEGRALES DE TELECOMUNICACION S.A. DE C.V., et al.,
Plaintiffs, - against - AT&T COMMUNICATIONS, INC. and HARRIS
CORPORATION, Defendants.**

92 Civ 7862 (KMW) (BAL)

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK**

1995 U.S. Dist. LEXIS 2775

**March 8, 1995, Decided
March 9, 1995, FILED**

COUNSEL: [*1] For GRUPO SISTEMAS INTEGRALES DE TELECOMUNICACION S.A. DE C.V. TELEFONIA Y CONMUTACION DIGITAL S.A. DE C.V., DIGITAL SISTEMAS TELEFONICAS S.A. DE C.V., SISTEMAS TELEFONICAS MULTILINEAS S.A. DE C.V., plaintiffs: Richard W. Cohen, Robinson, Brog, Leinwald et al, NY, NY. Franz S. Leichter, Walter, Conston, Alexander & Green, P.C., New York, NY. For INMOBILIARIA CALZADA XOCHIMILCO, 5,765-A S.A., plaintiff: Richard W. Cohen, Robinson, Brog, Leinwald et al, NY, NY. For DIGITAL SISTEMAS TELEFONICOS, DIVISION TECNICA S.A. DE C.V., plaintiff: Daniel J. O'Neill, Sepulveda & Sepulveda, New York, NY. Richard W. Cohen, Robinson, Brog, Leinwald et al, NY, NY. Franz S. Leichter, Walter, Conston, Alexander & Green, P.C., New York, NY.

For AMERICAN TELEPHONE AND TELEGRAPH COMPANY, defendant: Robert W. Hirth, Sidley & Austin, New York, NY. Adam D. Mitzner, RICHARDS SPEARS KIBBE & ORBE, New York, NY. Steven M. Bierman, Sidley & Austin, New York, NY. For HARRIS CORPORATION, defendant: Adam D. Mitzner, RICHARDS SPEARS KIBBE & ORBE, New York, NY.

JUDGES: Barbara A. Lee, United States Magistrate Judge

OPINIONBY: Barbara A. Lee

OPINION:

MEMORANDUM ORDER

BARBARA A. LEE, United States Magistrate Judge.

This case was referred to me for pretrial supervision

by the Hon. Kimba M. Wood, U.S.D.J., by Order of Reference entered January 3, 1995. By joint letter dated February 21, 1995, in accordance with my "Procedures for Informal Resolution of Discovery Disputes," counsel submitted two discovery disputes for judicial resolution. By memorandum (endorsed) entered February 23, 1995, decision was reserved pending the submission of certain additional information. Having considered the additional submissions, as well as the facts and arguments in the joint letter, it is hereby

ORDERED:

1. Harris's objections to the production of the draft complaint against AT&T on grounds of attorney client privilege and attorney work product are sustained. The facts stated in the Declaration of Guy w. Numann executed March 2, 1995, make clear that there was no waiver of either privilege. The discussion of the "draft" was a confidential attorney-client communication; even if a complaint had eventually been filed (which did not occur), that act would not have waived the attorney-client [*2] privilege as to drafts. The drafts are also material prepared in anticipation of litigation within the meaning of *Rule 26(b)(3), Fed. R. Civ. P.* The question whether the exception for "substantial need" pursuant to that Rule is applicable need not be reached, since the document is also protected by attorney-client privilege, to which Rule 26(b)(3) does not apply.

2. Plaintiffs' objections to AT&T's request for discovery of expert information are sustained without prejudice to AT&T's serving an appropriately specific request in accordance with *Rule 26(a)(2)(B), Fed. R. Civ. P.*, as amended effective December 1, 1993. The Order of Chief Judge Griesa entered December 1, 1993, and local Civil Rule 49, effective April 3, 1995, "opt out" of certain provisions of the discovery rules as provided

therein, but Rule 26(a)(2)(B) is applicable in this district. This and all other rules amended effective December 1, 1993 are applicable to litigation pending on that date "insofar as just and practicable." Order adapting amendments to the *Federal Rules of Civil Procedure*, 113 S. Ct. 475, 477 (1993). Plaintiffs' conclusory assertions regarding the expense of compliance do [*3] not warrant a contrary construction. The provisions of the amended rule will not, however, be read into interrogatories served before its effective date which omitted to request information now specifically permitted to be requested. The letter from AT&T's counsel dated January 25, 1995, attempting so to construe the earlier interrogatories, is not a substitute for a properly framed discovery request.

3. AT&T may serve a new request, in accordance with Rule 26(a)(2)(B), as presently in effect, no later than April 14, 1995. Counsel are directed, in accordance with the requirements and the purpose of the amended rules, to avoid duplication in discovery and limit the length and scope of expert depositions to what is reasonably necessary in light of the responses to Rule 26(a)(2)(B) requests.

Barbara A. Lee

United States Magistrate Judge

Dated: New York, New York
March 8, 1995

LEXSEE 1987 U.S. DIST. LEXIS 14077

HARRIS CORPORATION, Plaintiff, v. AMPEREX ELECTRONIC CORPORATION, Defendant**No. 86 C 6338****UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION***1987 U.S. Dist. LEXIS 14077***May 15, 1987, Decided****LexisNexis(R) Headnotes****OPINIONBY: [*1]**

ROSEMOND, Magistrate

OPINION:**OPINION AND ORDER**

W. THOMAS ROSEMOND, JR., UNITED STATES MAGISTRATE

On March 26, 1987 plaintiff, Harris Corporation, filed a motion seeking entry of a protective order directing defendant, Amperex Electronic Corporation, (1) to return six privileged documents which were inadvertently produced in the course of discovery, along with all copies thereof, (2) to refrain from referring in any way to the privileged documents for evidentiary purposes and (3) to file an affidavit of compliance with the protective order. Copies of the documents were Submitted by Harris for in camera inspection by the magistrate The motion is granted,

In support of its motion, Harris states that it has produced approximately 7,864 pages of documents in response to Amperex's first request for production. On March 16, Harris discovered that a number of documents protected from disclosure by the attorney-client privilege and work product doctrine were inadvertently delivered to a copying service, duplicated and produced, prior to being reviewed by counsel.

On April 15, 1987 Amperex filed its response to the motion arguing that (1) the documents are not privileged and (2) even if the [*2] documents are protected by the attorney-client privilege or work product doctrine, Harris is not entitled to the return of the documents. Amperex

urges that a review of the author, recipients and/or subject matter of the various documents precludes any protection for the documents. In addition, Amperex maintains that Harris' sloppiness in connection with its document production does not amount to an inadvertent production of documents which eluded adequate safeguards. Finally, Amperex argues that Harris waited too long before attempting to reclaim the documents.

Document Nos. 4178 and 4179. As we understand the documents, 4178 is a follow-up or a response to 4179. Our review of the subject matter of the documents show that both are work product. n1

n1 Document 4177 is a copy of 4179, and as such enjoys the same protection from disclosure as does 4179.

The impetus for 4179 was a meeting between Harris representatives and its lawyers. Following the meeting the author of the memo wrote to the addressee listing certain things that had to be done to give Harris' lawyers a better understanding of what the lawsuit would be about, n2 and what Harris' problems with the Amperex tubes [*3] were.

n2 The lawsuit was filed by Harris on August 25, 1986.

Document 4184 is a draft of the complaint that Harris anticipated filing. The draft complaint has several exhibits as attachments, 4196 to 4232. It is all work product.

Document 4182 is styled "Harris Corporation v. Amperex Electronic Corporation," and authored by Harris' in-house counsel. Harris' counsel writes to a

Harris vice-president enclosing for his review and comment a draft of the proposed complaint prepared by outside counsel. The draft complaint contained blank spaces which denoted areas requiring additional information from Harris in order to complete the complaint. That needed information, as well as the counts of the proposed complaint and the damages claims, are discussed. There can be no doubt that the document is protected from disclosure by the attorney-client privilege and the work product doctrine.

Document 3860 (with attachments 3861-3863). Document 3860 is styled "Harris Corporation v. Amperex Electronic Corporation," authored by Harris' in-house counsel, and directed to the client requesting the client's assistance in providing counsel with the necessary information and documents [*4] to enable outside counsel to respond to defendant's discovery. The attachments are lists of questions that outside counsel requests the client to respond to, either in writing or through document production. The documents are clearly protected from disclosure by the attorney-client privilege and the work product doctrine.

The subject matter of all of the documents reviewed reveals unquestionably that they are protected from disclosure by the attorney-client privilege and the work product doctrine. In some instances they were authored by counsel and directed to Harris' representatives who were instrumental in Harris' decision to file the lawsuit. And in other instances, the documents are from Harris employees to other employees whose apparent advisory role to top management is such that a decision would not normally be made without the employee's advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority. The documents were either generated in anticipation of the filing of the August 25th complaint, or defendant's discovery requests.

Review of the documents does not reveal evidence of legal advice given to perpetuate a fraud. Attorneys [*5] are free to explore legal theories which they

reasonably believe fit the facts of their case.

We find that the production was inadvertent, and that Harris promptly moved for the return of the documents once it became aware of the inadvertent production.

Inadvertent production of privileged materials does not constitute a waiver of the privilege. This is because waiver imports the intentional relinquishment or abandonment of a known right, and "inadvertent production is the antithesis of that concept". *Mendenhall v. Barber-Green Co.*, 531 F. Supp. 951, 955 (N.D. Ill. 1982). See also, *Magnavox v. Bally Midway Manufacturing Company*, Case No. 83 C 2357, Memorandum Opinion, (N.D. Ill. Nov. 5, 1984) and *Abbott Laboratories v. Airco Inc.*, Case No. 82 C 3292, Memorandum Decision and Order, (N.D. Ill., Nov. 5, 1985).

Accordingly, it is hereby adjudged, decreed and ordered that,

1. Plaintiff's motion for a protective order is granted.
2. Defendant is hereby directed to return the privileged documents listed below and all copies thereof to the plaintiff:
 - a. 3860 - 3863;
 - b. 4177 - 4179;
 - c. 4182 - 4183;
 - d. 4184 - 4232.
3. Defendant is precluded from referring in any way to the [*6] privileged documents for evidentiary purposes, and
4. Defendant is directed to file an affidavit of compliance with this protective order within ten days of the date of the order.

So Ordered.

Dated: May 15, 1987

1985 U.S. Dist. LEXIS 17545, *

LEXSEE 1985 U.S. DIST. LEXIS 17545

**CANDLE CORPORATION, Plaintiff, v. BOOLE & BABBAGE, INC.,
Defendant AND RELATED COUNTERCLAIM**

No. CV 82-4758-PAR

**UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF
CALIFORNIA**

1985 U.S. Dist. LEXIS 17545

**July 24, 1985, Decided
August 2, 1985, Filed**

LexisNexis(R) Headnotes

Claim 1 of the patent; and

JUDGES: [*1]

Pamela Ann Rymer, United States District Judge.

OPINIONBY:

RYMER

OPINION:

MEMORANDUM OF DECISION AND ORDER

Defendant Boole & Babbage ("Boole") has filed the following motions in limine which seek to:

- A. Exclude "industry estoppel" evidence;
- B. Bar reference to the effect of injunctive relief on Candle's employees;
- C. Bar use of the term "monopoly;"
- D. Order the return of or exclude certain privileged documents;
- E. Redact portions of articles; and
- F. Order proof at trial.

Plaintiff Candle Corp. has filed the following motions in limine which seek to:

- G. Exclude evidence regarding Aubrey Chernick's personal wealth and compensation;
- H. Confine evidence regarding reduction to practice to

I. Exclude evidence regarding Boole's "experimental use" or "experimental intent" after January 8, 1969.

A. "Industry estoppel" evidence.

Boole seeks to exclude, on grounds of irrelevance and unfair prejudice, evidence which Candle contends relates to secondary considerations of obviousness, inequitable conduct before the PTO and the "exceptional case" provision for attorneys fees. Candle argues that the evidence is relevant to [*2] two secondary tests for obviousness -- commercial non-acquiescence and simultaneous invention.

1. Commercial non-acquiescence. No reported case has squarely held that evidence of commercial non-acquiescence may or may not be introduced to show non-validity of the patent. Although it has been recognized that the licensing of an invention is a valid indicator of patent validity, see *CBS, Inc. v. Sylvania Electric Products, Inc.*, 415 F.2d 719, 728 (1st Cir. 1969), *Eibel Process Co. v. Minnesota & Ontario Paper Co.*, 261 U.S. 45, 55 (1923), acceptance of a license is not significant when it is attributable to factors other than a belief in the validity of the patent. *Chisum, Patents*, § 5.05[3] at 5-253 (1985) A number of courts have expressed skepticism at the probative value of licensing agreements. See *John E. Thropp's Sons Co. v. Seiberling*, 264 U.S. 320, 329-30 (1924) (discounting the significance of a license where the smaller licensee may have agreed to the license to avoid litigation); *Phillips Electrical v. Thermal & Electric Industries*, 450 F.2d 1164, 1179 (3d Cir. 1971); see also Comment, Subtests of Non-obviousness, 112 U.Pa.L.Rev. 1169, 1179 (1964) [*3] ("it is crucial that the licensees be primarily motivated by respect for

the patentee's legal rights. If other factors underlie a decision to license, the arrangement may lose evidentiary significance"); *CBS, Inc. v. Sylvania Electric Products, Inc.*, 415 F.2d 719, 728 (1st Cir. 1969) (fact that the leader in the field chose to license the patent was entitled to some weight so long as there was no showing that the licensing arrangement was motivated by considerations other than those relating to evaluations of validity and desires to avoid infringement).

While it may be that evidence of commercial non-acquiescence has some probative value in some cases, in this case, however, there is no contention by Boole that commercial acquiescence indicates non-obviousness. In addition, although the acceptance of a license by a competitor may reasonably support an inference of recognition of validity, the rejection of a license may equally imply lack of an infringing product, lack of clout, or an adversary position. The difference, it would appear, is because the acceptance of a license entails an action to the licensee's detriment -- the payment of royalties -- whereas non-acquiescence [*4] may require nothing more than taking the position that the patent is invalid.

Further, even if clearly relevant, evidence of commercial non-acquiescence must be predicated on a foundational showing of failure to license motivated by considerations other than those relating to evaluations of validity and desire to avoid infringement. Cf. *CBS, Inc. v. Sylvania Electric Products, Inc.*, 415 F.2d 719 (1st Cir. 1969). Of the proffered evidence, only Exhibit 81 (the Bitner/IBM letter) arguably reflects a considered judgment that a commercial licensing arrangement proposed by Boole be rejected because of patent invalidity. As to it, there is considerable potential for prejudicial impact on account of the apparent facts that Boole did not demand, but rather inquired about, licensing. Additionally, IBM and Boole occupied such disparate positions in the market at the time that IBM's response is misleading and its probative value is substantially lessened. Exhibits 82 [NASA letter of February 2, 1973], 102 [Boole Board of Directors minutes] and 211 [NASA letter of August 26, 1974], although they indicate an evaluation that the patent is invalid, appear to have been made in the context [*5] of an administrative proceeding rather than a proposed licensing arrangement. Thus, their relevance to commercial non-acquiescence is not demonstrated. Each of the other documents either does not reflect a belief in the patent's invalidity or does not indicate a commercial relationship and the necessary foundation is lacking. Consequently, the documents are not admissible with respect to the issue of commercial non-acquiescence.

2. Simultaneous and independent invention.

Although evidence that a number of other persons, working under the same state of the prior art, arrived at the same or similar solutions to that embodied in a patent claim may tend to show that the claimed solution was obvious, *E. I. Du Pont de Nemours & Co. v. Berkley & Co.*, 620 F.2d 1247 (8th Cir. 1980); 2 *Chisum, Patents*, § 5.05[7] at 5-258 (1985), Candle must establish as a foundation that the other inventors were working under the same state of the prior art, and arrived at the same or similar solutions independently and contemporaneously and without infringing Boole's patent. None of the documents which Boole seeks to preclude is sufficient, standing alone, to provide a foundation of simultaneous [*6] invention. Instead, the documents generally evidence nothing more than a dispute over possible infringement and the validity of Boole's patent. Evidence that other companies were possibly infringing Boole's invention is not, in itself, relevant to whether those companies had arrived at a simultaneous invention independently. Accordingly, the documents which are the subject of the motion do not appear to be relevant to the simultaneous invention subtest.

3. Inequitable conduct. Candle argues that the documents are relevant to Boole's knowledge of the state of the technology and thus to whether Boole failed to disclose important information to the Patent Office. However, all of the documents were written well past the time Boole applied for its patent and thus would not be relevant to the state of Boole's knowledge at the time of applying to the PTO.

4. Exceptional case. Under 35 U.S.C. § 285 provides: "The court in exceptional cases may award reasonable attorneys fees to the prevailing party." Such cases include those where the patent was procured through fraud combined with misconduct at trial and bad faith assertion of infringement. *Rohm & Haas Co. v. Crystal Chemical* [*7] *Co.*, 736 F.2d 688, 693 (Fed. Cir. 1984). Even if the documents which are the subject of this motion are relevant to whether this is an exceptional case warranting departure from the American rule against an award of attorney fees, their introduction is appropriate only at such time as it has been determined that Candle is the prevailing party and is thus limited to post-trial consideration by the Court.

B. References to injunctive relief and its effect on Candle employees.

Candle argues that references to injunctive relief and the resultant economic cost of terminating employment is relevant to the second prong of its laches defense: that Candle detrimentally relied on Boole's inaction. Boole seeks to exclude this information on grounds that under

Fed.R.Evid. 403 the evidence is unfairly prejudicial.

While references to hiring employees, like all other evidence that Candle expanded its operations, is relevant to the issue of reliance, any reference to possible harm resulting to the employees from enjoining Candle's infringement is not relevant. See *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Inc.*, 505 F.Supp. 1125, 1172 (E.D. Pa. 1980).

Given the many [*8] ways in which Candle can meaningfully demonstrate its reliance on Boole's inaction, the relevance of evidence pertaining to the hiring of employees is marginal at best and the evidence is potentially cumulative. Furthermore, the sympathy with which some jurors may view the potential unemployment of Candle employees makes real the risk of unfair prejudice against Boole. Accordingly, under *Fed.R.Evid. 403*, evidence regarding harm to Candle or its employees as a result of an injunction in Boole's favor shall be excluded.

C. Use of the term "monopoly."

Although the term "patent monopoly" has found its way into legal parlance, it has been recognized that such a description "is irrelevant when considering patent questions." *Schenck v. Nortron Corp.*, 713 F.2d 782, 786 n.3 (Fed. Cir. 1983). The Federal Circuit has also recognized that use of "monopoly" in the context of patent disputes has the potential to exert a prejudicial effect because of the pejorative connotations associated with the term. *Schenck v. Nortron Corp.*, 713 F.2d 782, 784 (Fed. Cir. 1983); *Jamesbury Corp. v. Litton Industrial Products, Inc.*, 756 F.2d 1556, 1558-59 (Fed. Cir. 1983).

Candle has neither [*9] demonstrated nor argued how use of the word "monopoly" fairly relates to any issues in this case or is necessary in the context of this action. In view of the potential prejudicial effect and the absence of any real necessity to use the term, Candle may not refer to patent rights as a "monopoly" or "patent monopoly."

D. Return of or exclusion of certain privileged documents.

Boole argues that a draft complaint and accompanying correspondence between Boole and its lawyer should be ordered returned and/or excluded because their introduction at trial would violate the attorney-client privilege and the work product doctrine. Additionally, Boole contends that the documents are inadmissible hearsay and present a risk of unfair prejudice.

1. Attorney-client privilege. The party asserting the privilege bears the burden of establishing: (1) the holder of the privilege is a client; (2) the person to whom the communication was made is a member of the bar or his subordinate; (3) the communication relates to a fact of which the attorney was informed by his client for the purpose of securing legal services and not for the purpose of committing a crime or tort; and (4) the privilege [*10] has not been waived by the client. *S.E.C. v. Kingsley*, 510 F.Supp. 561, 563 (D. D.C. 1981).

A waiver of the privilege may be either express or implied. A waiver by implication, as is argued here, contains two elements. The first requires analysis of the subjective intent of the holder, that is, whether the holder intended to waive the privilege. The second element is objective: whether it is fair and consistent with the assertion of the claim or defense being made to allow the privilege to be invoked. *United States v. Woodall*, 438 F.2d 1317, 1325 (5th Cir. 1970); *United States v. Catalanotto*, 468 F.Supp. 503, 506 (D.C. Ariz. 1978). From the parties' papers, it is impossible to determine when the inadvertent disclosure took place and how soon after the disclosure Boole sought to invoke the attorney-client privilege. Boole's counsel made clear in his letter of May 8, 1985 that the inadvertent disclosure of certain documents was not meant to constitute a waiver of the attorney-client privilege. This motion to exclude the documents was filed on June 3, 1985. These objections leads the Court to conclude that Boole did not subjectively intend to waive the privilege.

Nor does [*11] the second factor compel a finding of waiver. Considerations of fairness typically require disclosure where the holder of the privilege voluntarily discloses favorable information without objection but invokes the privilege to protect unfavorable communications. See *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982); *Handgards, Inc. v. Johnson & Johnson*, 413 F.Supp. 926, 929 (N.D. Cal. 1976); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1161 (D. S.C. 1974). For example, in *Weil v. Investment/Indicators, Inc.*, 647 F.2d 18, 23 (9th Cir. 1981), the Ninth Circuit held that a party may not disclose a privileged communication about a material issue and then invoke the privilege to prevent discovery of other communications about the same matter. Here, to apply the privilege would not be unfair because Boole does not seek to withhold other communications on the same subject. Thus, neither element supports a finding of waiver of the attorney-client privilege.

b. Work product doctrine. With respect to documents and tangible things, *Fed.R.Civ.P. 26(b) (3)* codifies the work product doctrine announced in

Hickman v. Taylor, 329 U.S. 495 (1947). See 8 [*12] Wright & Miller, Federal Practice: Civil, § 2023 at 193 (1970). Although Rule 26(b)(3) concerns discovery of documents, the same principles apply with equal force to issues involving the admissibility of documents. Rule 26(b)(3) allows discovery of documents prepared in anticipation of litigation or trial "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

Here the draft complaint and accompanying letters were clearly prepared in anticipation of litigation. Candle seeks to introduce the complaint to show that the invention was on-sale before the critical date. This type of factual information "merely shifts the standard presumption in favor of discovery and requires the party seeking discovery to show 'adequate reasons' why the work product should be subject to discovery." *In re Sealed Case*, 676 F.2d 793, 810 (D.C. Cir. 1982). At the same time, the documents contain the opinions, legal theories and thought processes of counsel. Thus the documents "receive some higher level of protection and a [*13] party seeking discovery must show extraordinary justification." *Id.*

Regardless of which standard should be applied to the documents, Candle has not made the minimal showing that it has a substantial need for the documents and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Consequently, the work product doctrine also bars the introduction of the documents into evidence.

c. The Fraud/Crime Exception. The work product doctrine and the attorney-client privilege do not apply when "a privileged relationship is used to further a crime, fraud or other fundamental misconduct." *In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir. 1982). Thus, "the crime-fraud exception comes into play if 'the client consults an attorney for advice that will assist the client in carrying out a contemplated illegal or fraudulent scheme.'" *In re International Systems*, 693 F.2d 1235, 1242 (5th Cir. 1982).

The party invoking the exception must make out a prima facie showing of fraud which is analyzed in two parts. First, there must be a prima facie showing of a violation sufficiently serious to defeat the work product privilege. Second, there must [*14] be some reasonable relationship between the work product sought and the prima facie violation. *In re Sealed Case*, 676 F.2d 793, 814-15 (D.C. Cir. 1982). In other words, the party seeking to vitiate the privilege must establish: "(1) the client was engaged in or planning a criminal or

fraudulent scheme when he sought the advice of counsel to further the scheme and (2) the documents containing the attorney's opinion work product must bear a close relationship to the client's existing or future scheme to commit a crime or fraud." *In re Murphy*, 560 F.2d 326, 338 (8th Cir. 1977).

Even assuming that Candle can make out a prima facie showing of fraud on the patent office, it has failed to show that the letters and draft complaint are related in any way to the alleged fraud. The documents were prepared by different counsel from those who prepared the patent application and in anticipation of antitrust litigation against a competitor. Because the complaint drafted by Cooley, Godward is unrelated to any alleged fraud on the PTO, the crime/fraud exception does not apply. *In re Murphy*, 560 F.2d 326, 339 (8th Cir. 1977); but see *Kockums Industries v. Salem Equipment*, 561 F.Supp. [*15] 168 (D. Or. 1983).

d. Hearsay. The documents in question are a draft complaint which indicates that the PPE and CUE were on sale in May 1968 (see para. 15), a letter from the drafter of the complaint asking for comments, and the Boole's response which was to decline comment in view of the likelihood that litigation would not be necessary. Despite its tentative character, the complaint is a "statement" because it is a "written assertion." *Fed.R.Evid.* 801(a).

Of the recognized exceptions to the hearsay rule for admissions by a party opponent, *Fed.R.Evid.* 801(d)(2), only exceptions (C) and (D) apply. Generally, whether the statement falls within Rule 801(d)(2)(C) is determined by applying agency doctrine rather than analyzing the statement's trustworthiness. 4 Weinstein's Evidence, para. 801(d)(2)(C)[01] at 801-210 (1984). However, in this instance the trustworthiness of an unsigned draft of a complaint which was not approved is especially troublesome. Similarly, although application of Rule 801(d)(2)(D) turns on whether the statement was made by an agent within the scope of his employment -- and a statement by an attorney would appear generally to qualify, the statement made [*16] in the draft complaint, viewed in conjunction with counsel's unanswered request for the client's review for accuracy, raises a substantial question about whether it was within the scope of the agent's authority for purposes of exemption from the hearsay rule. See *Hoptowit v. Ray*, 682 F.2d 1237, 1262 (9th Cir. 1982). In view of the inapplicability of the exception for admissions by a party opponent, the documents are also inadmissible hearsay.

E. Redaction of references to the monitoring method.

Based on Candle's proposed witness list, it appears

that the article's authors, Cantrell and Ellison, will be called at trial and will therefore have the opportunity to lay a foundation for admissibility of those portions of the article which Boole wants red acted. Accordingly, it is appropriate to continue to defer ruling pending presentation of foundation testimony.

F. Order of proof at trial.

Because of the factual and legal complexity of this case and for reasons of fairness and efficiency, the order of proof at trial shall be as follows:

1. Seminar for the jury and Court. Candle will begin with a discussion of hardware. Boole will follow with a discussion of hardware [*17] and software. Candle will then discuss software and the patent claim. Boole will then discuss the patent claim.

2. Opening statements. Candle, acting as plaintiff, will present its opening statement with respect to the validity issues first. Boole will follow with its opening statement on the same subject.

3. Background information. Boole will present the testimony of Gary Holtwick and Kenneth Kolence on the background of the problem solved by the invention and the invention's development with respect to on sale, experimental use and reduction to practice issues.

4. Validity. Candle will present its case with respect to the issues concerning the validity of the patent. Boole will then present its case on the same issues.

5. Opening statements. Boole, acting as plaintiff, will make its opening argument on the issue of infringement. Candle will then follow with its opening statement on the same subject.

6. Infringement. Boole, followed by Candle, will present evidence on the issue of patent infringement.

7. Closing arguments. Candle will present its closing argument on the validity issues. Boole will follow with its closing argument on the same subject to be followed by Candle's [*18] rebuttal. Boole will then begin its closing argument on infringement, followed by Candle's closing, and then Boole's rebuttal. At the end of the closing arguments, the jury will deliberate on the issues of validity and infringement with the use of a special verdict form.

8. Damages. In the event that the jury finds the patent valid and infringed, Boole will present its evidence on the issue of damages to be followed by Candle. The jury, or, if the parties agree, the Court, will then determine the amount of damages.

Excluding time for jury selection, pre-instruction and

the seminar, a period of twenty days will be allotted for trial. Each side will have a total of ten days in which to present their evidence, including that presented on cross-examination, on all issues.

G. Evidence regarding Chernick's wealth or compensation.

Candle seeks to exclude as irrelevant and unfairly prejudicial any evidence concerning the wealth or compensation of its founder, chief executive and sole shareholder, Aubrey Chernick.

Evidence of Chernick's position with and compensation from Candle are relevant to whether he has an interest in the litigation and the issue of his credibility. Evidence [*19] of Chernick's position and interest in the financial well-being of Candle is not unfairly prejudicial. However, evidence of Chernick's personal wealth is not relevant.

H. Evidence regarding reduction to practice of Claim 1 of the patent.

While only the invention embodied in Claim 1 is at issue in this litigation, to the extent that reducing Claim 1 to practice involved techniques or problems also applicable to other claims, evidence regarding those techniques or problems is relevant to Claim 1 as well. Thus if the measurement technique mentioned in Claim 8 is also relevant to or solved the double-counting problem encountered with respect to Claim 1, evidence regarding the solution of the double counting problem is relevant to reduction to practice of Claim 1. No unfair prejudice, confusion or delay is indicated by the introduction of evidence concerning the double counting problem and its solution with respect to Claim 1.

At oral argument and in its post-hearing brief, Candle makes a number of arguments which are best resolved on a motion for summary judgment.

I. Evidence regarding "experimental use" or "experimental intent" by Boole after January 8, 1969.

Based [*20] on its reading of the Court's Order of September 21, 1985, Candle urges the Court to declare that there is no longer an issue regarding experimental use after January 8, 1969 -- the date of Boole's written contract proposal to Bell Laboratories. Accordingly, Candle seeks an order barring evidence of experimental use or experimental intent after that date.

Even if the Court's September 21 Order precludes evidence concerning experimental use or intent at Bell Labs, Boole may still put on evidence concerning experimental use or intent at the other test sites. Such

evidence is appropriate if Candle does not establish that the invention was reduced to practice by January 8, 1969, when the Bell Labs contract was offered.

At the same time, Boole is also not precluded from introducing evidence regarding experimental use or testing as it bears on the state of mind of the inventors at the time of applying to the PTO for the patent.

Accordingly, IT IS ORDERED THAT

A. Boole's motion to exclude "industry estoppel" evidence is GRANTED;

B. Boole's motion to bar reference to the effect of injunctive relief on Candle's employees is GRANTED;

C. Boole's motion to bar the use of the term monopoly" [*21] is GRANTED;

D. Boole's motion to order the return of and exclude certain privileged documents is GRANTED;

E. Boole's motion to redact portions of certain articles is DENIED;

F. Proof at trial shall be accordance with that outlined above;

G. Candle's motion to exclude evidence regarding Aubrey Chernick's personal wealth and compensation is GRANTED IN PART;

H. Candle's motion to confine evidence regarding reduction to practice to Claim 1 of the patent is DENIED; and

I. Candle's motion to exclude evidence regarding Boole's "experimental use" or "experimental intent" after January 8, 1969 is DENIED.

J. The trial date is continued to February 4, 1986 at 9:00 a.m. The parties shall exchange witness and exhibit lists no later than 30 days before the start of the trial.

October 3, 2005

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION**

In the Matter of)	Docket No. PAPO-00
)	
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 04-829-01-PAPO
)	
(High-Level Waste Repository: Pre-Application Matter))	NEV-03
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of (1) THE DEPARTMENT OF ENERGY'S NOTICE OF APPEAL FROM THE PAPO BOARD'S SEPTEMBER 22, 2005 ORDER and (2) THE DEPARTMENT OF ENERGY'S BRIEF ON APPEAL FROM THE PAPO BOARD'S SEPTEMBER 22, 2005 ORDER in the above captioned proceeding have been served on the following persons this 3rd day of October, 2005 by Electronic Information Exchange.

Thomas S. Moore, Chair
Administrative Judge
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board
Panel
Mail Stop: T-3 F23
Washington, D.C. 20555
E-Mail: papo@nrc.gov

Alan S. Rosenthal
Administrative Judge
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board
Panel
Mail Stop: T-3 F23
Washington, D.C. 20555
E-Mail: papo@nrc.gov
rsnthl@comcast.net

Office of the Secretary
ATTN: Rulemakings and Adjudication
Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
Washington, D.C. 20555

E-mail: HEARINGDOCKET@nrc.gov

Alex S. Karlin
Administrative Judge
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board
Panel
Mail Stop: T-3 F23
Washington, D.C. 20555
E-Mail: papo@nrc.gov

G. Paul Bollwerk, III
Administrative Judge
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board
Panel
Mail Stop: T-3 F23
Washington, D.C. 20555
E-Mail: papo@nrc.gov
Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
E-mail: hlb@nrc.gov

Donald P. Irwin, Esq.
Kelly L. Faglioni, Esq.
Edward P. Noonan, Esq.
W. Jeff Edwards, Esq.
Melissa Grier, Esq.
Stephanie Meharg, Esq.
Michael R. Shebelskie, Esq.
Audrey B. Rusteau
Belinda A Wright
Christopher A. Updike
Hunton & Williams LLP
951 East Byrd Street
Richmond, VA 23219
E-mail: dirwin@hunton.com
kfaglioni@hunton.com
enoonan@hunton.com
arusteau@hunton.com
jedwards@hunton.com
mgrier@hunton.com
smeharg@hunton.com
bwright@hunton.com
cupdike@hunton.com
mshebelskie@hunton.com

Karen D. Cyr, Esq.
General Counsel
David A. Cummings, Esq.
Gwendolyn D. Hawkins
Janice E. Moore, Esq.
Trip Rothschild, Esq.
Tyson R. Smith, Esq.
Mitzi A. Young, Esq.
Marian L. Zobler, Esq.
OGCMailCenter
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop - O-15 D21
Washington, DC 20555-0001
E-mail: kdc@nrc.gov
dac3@nrc.gov
gxh2@nrc.gov
jem@nrc.gov
tbr@nrc.gov
trsl@nrc.gov
may@nrc.gov

mlz@nrc.gov
OGCMailCenter@nrc.gov

Michael A Bauser, Esq.
Associate General Counsel
Robert W. Bishop, Esq.
Ellen C. Ginsberg, Esq.
Rod McCullum
Stephen P. Kraft
Nuclear Energy Institute
1776 I Street, NW, Suite 400
Washington, DC 20006-3708
E-mail: mab@nei.org
ecg@nei.org
rwb@nei.org
rxm@nei.org
spk@nei.org

Thomas R. Combs
Office of Congressional Affairs
U.S. Nuclear Regulatory Commission
Mail Stop O-17 A3
Washington, DC 20555
E-mail: trc@nrc.gov

W. John Arthur, III, Deputy Director
Susan L. Rives, Esq.
Kerry M. Grooms
U.S. Department of Energy
Office of Civilian Radioactive Waste
Management
Office of Repository Development
1551 Hillshire Drive
Las Vegas, NV 89134-6321
E-mail: john_arthur@notes.ymp.gov
susan_rives@ymp.gov
kerry_grooms@ymp.gov

White Pine County
City of Caliente
Lincoln County
Jason Pitts
E-mail: idt@idtservices.com

Atomic Safety and Licensing Board
Panel

ASLBP HLW Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail:
ASLBP_HLW_Adjudication@nrc.gov

Michele Boyd
Legislative Representative
Critical Mass Energy and Environment
Public Citizen
215 Pennsylvania Ave., SE
Washington, DC 20003
E-mail: mboyd@citizen.org

Lea Rasura-Alfano, Coordinator
Lincoln County (NV) Nuclear Oversight
Prgm
100 Depot Ave., Suite 15
P.O. Box 1068
Caliente, NV 89008-1068
E-mail: jcciac@co.lincoln.nv.us

Joseph R. Egan, Esq.
Martin G. Malsch, Esq.
Charles J. Fitzpatrick, Esq.
Robert J. Cynkar, Esq.
Elayne Copping
Jack Kewley
Susan Montesi
Nakita Toliver
Egan, Fitzpatrick, Malsch & Cynkar,
PLLC
7918 Jones Branch Dr., Suite 600
McLean, VA 22102
E-mail: eganpc@aol.com
mmalsch@nuclearlawyer.com
rcynkar@nuclearlawyer.com
cfitzpatrick@nuclearlawyer.com
ecopping@nuclearlawyer.com
jkewley@nuclearlawyer.com
smontesi@nuclearlawyer.com
ntoliver@nuclearlawyer.com

State of Nevada
Marta Adams

100 N. Carson Street
Carson City, NV 89710
E-mail: maadams@govmail.state.nv.us

Malachy Murphy
Nye County Regulatory & Licensing
Advisor
18150 Cottonwood Rd. # 265
Sunriver, OR 97707
E-mail: mrmurphy@cmc.net

Les Bradshaw
Nye County Dept of Natural Resources
and Federal Facilities
1210 E. Basin Road, Suite 6
Pahrump, NV 89048
E-mail: clittle@co.nye.nv.us

Clark County Nuclear Waste Division
500 S. Grand Central Parkway
Las Vegas, NV 89155
Irene Navis
E-mail: iln@co.clark.nv.us
Engelbrecht von Tiesenhausen
E-mail: evt@co.clark.nv.us

Christopher M. Wachter
Bethany L. Engel
James M. Cutchin
Jonathon Rund
Susan Stevenson-Popp
Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: papo@nrc.gov

Andrew L. Bates
Adria T. Byrdsong
Rebecca L. Giitter
Emile L. Julian
Evangeline S. Ngbea
Office of the Secretary of the
Commission
U.S. Nuclear Regulatory Commission

Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: alb@nrc.gov
atb1@nrc.gov
rll@nrc.gov
ldl@nrc.gov
elj@nrc.gov
esn@nrc.gov

Abby Johnson
617 Terrace St.
Carson City, NV 89703
E-mail: abbyj@gbis.com

Martha S. Crosland
U.S. Department of Energy
Office of the General Counsel
1000 Independence Avenue, S.W.
Washington, DC 20585
E-mail: martha.crosland@hq.doe.gov

William Greene
U.S. Department of Energy
Public Information Officer
1000 Independence Avenue, S.W.
Washington, DC 20585
E-mail: william.greene@rw.doe.gov

William H. Briggs
Ross, Dixon & Bell
2001 K Street, NW
Washington, DC 20006-1040
E-mail: wbriggs@rdblaw.com

Linda Mathias
Administrator
Office of Nuclear Projects
Mineral County Board of County
Commissioners
P.O. Box 1600
Hawthorne, NV 89415
E-mail: mineral@oem.hawthorne.nv.us

Anthony C. Eitrem, Esq.
Chief Counsel

Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: papo@nrc.gov

Daniel J. Graser
Licensing and Support Network
Administrator
Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: djg2@nrc.gov

Steve Frishman
Technical Policy Coordinator
Nuclear Waste Project Office
1761 East College parkway, Suite 118
Carson City, NV 89706
E-mail: ssteve@nuc.state.nv.us

Jeffrey Kriner
Yucca Mountain Project, Licensing
Group,
DOE/BSC
E-mail: jeffrey_kriner@ymp.gov

Alan Kall
155 North Taylor Street, Suite 182
Fallon, NV 89406
E-mail:
comptroller@churchillcounty.org

Judy Treichel, Executive Director
Nevada Nuclear Waste Task Force
Alamo Plaza
4550 W. Oakley Blvd., Suite 111
Las Vegas, NV 89102
E-mail: judynwtf@aol.com

Robert I. Holden, Director
Nuclear Waste Program

National Congress of American Indians
1301 Connecticut Ave., NW - 2nd Floor
Washington, DC 20003
E-mail: robert_holden@ncai.org

George Hellstrom, Esq.
U.S. Department of Energy
Office of the General Counsel
1551 Hillshire Drive
Las Vegas, NV 89134-6321
E-mail: george.hellstrom@ymp.gov

Mike Sinom, Director
(Heidi Williams, Adm. Asst.)
White Pine County Nuclear Waste
Project Office
959 Campon Street
Ely, NV 89301
E-mail: wpnucwstl@mwpower.net

Dr. Mike Baughman
Intertech Services Corporation
(For Lincoln County)
P.O. Box 2008
Carson City, NV 89702-2008
E-mail: bigoff@aol.com

Andrew Remus, Project Coordinator
Inyo County (CA) Yucca Mtn Nuclear
Waste
Repository Assessment Office
P.O. Drawer L
Independence, CA 93526
E-mail: aremus@gnet.com

Ray Clark
Environment Protection Agency
E-mail: clark.ray@epa.gov

Laurel Marshall
Eureka County (NV) Yucca Mtn Info
Ofc

P.O. Box 990
Eureka, NV 89316
E-mail: ecmarshall@ymp.gov

Loreen Pitchford Consulting
LNS Administrator for Lander,
Churchill and
Mineral County's
3888 Snow Valley Drive
Reno, NV 89506
E-mail: lpitchford@comcast.net

Robert Loux
Nuclear Waste Project Office
1761 East College Parkway, Suite 118
Carson City, NV 89706
E-mail: bloux@nuc.state.nv.us
Victoria Reich
Nuclear Waste Technical Review Board
E-mail: reich@nwtrb.gov

Debora Teske
Lander County Nuclear Waste Oversight
315 S. Humboldt
Battle Mountain, NV 89820
E-mail: dteske@landercounty.com

Patricia Larimore
Talisman International, LLC
1000 Potomac St., NW
Suite 300
Washington, DC 20007
E-mail: plarimore@talisman-intl.com

Loreen Pitchford Consulting
LSN Administrator for Lander, Mineral
and Churchill Counties
3888 Snow Valley Drive
Reno, NV 89506
E-mail: qb4@charter.net

U.S. DEPARTMENT OF ENERGY

By Michael R. Shebelskie

Donald P. Irwin
Michael R. Shebelskie
Kelly L. Faglioni
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
Telephone: (804) 788-8200
Facsimile: (804) 788-8218
Email: dirwin@hunton.com

Of Counsel:

Martha S. Crosland
U.S. DEPARTMENT OF ENERGY
Office of General Counsel
Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585