NOT YET CALENDARED FOR ORAL ARGUMENT
CASE NO. 05-1350

IN THE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEVADA,

*Petitioner*,

*v.*

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,

*Respondents*.

On Petition for Review of a Decision of the
United States Nuclear Regulatory Commission

## PETITIONER'S REPLY BRIEF


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## GLOSSARY

| | |
|---|---|
| DOE | U.S. Department of Energy |
| NRC | U.S. Nuclear Regulatory Commission |
| JA | Joint Appendix |

## SUMMARY OF ARGUMENT

NRC's Waste Confidence rule predicts that NRC will license DOE's proposed Yucca Mountain geologic repository. This prediction is made even before the license application is filed, let along the subject of the required formal hearing. This is not a prediction and finding about some legislative fact, for example a finding that the concept of geologic disposal is a good one and a prediction that someday, somewhere, a safe disposal facility will be found, but a finding and prediction that a *particular* facility proposed by a *particular* applicant (DOE) at a *specific* location will in fact be licensed. This is a finding and prediction about the resolution of contested adjudicatory facts, and it constitutes an unlawful prejudgment that deprives Nevada of its due process right to a neutral decision maker.

Nevada's Petition to amend the Waste Confidence rule afforded NRC the opportunity to expunge this prejudgment and approach the forthcoming Yucca Mountain licensing hearing with a more clean slate. Remarkably, NRC not only refused to do so, but it compounded the prejudgment by stating that it assumed it would license Yucca Mountain as far back as 1990. It even said that denial of the Yucca Mountain application would be an "unexpected event."

NRC argues in various ways that these findings do not amount to prejudgment. None of these arguments has merit. NRC first argues that the Waste Confidence rule cannot affect the mindset of present or future commissioners, but it instead reflects the views of commissioners who are now long gone. This ignores the fundamental and elementary principle that rules do not lose their effect when those who worked to promulgate them leave the agency.

Next, NRC argues that it is purely conjectural to suppose that it will favor Yucca Mountain just to make its Waste Confidence prediction true, but this does not distinguish the prototypical case of an unlawful prejudgment. Prejudgment depends on the nature of the

statement itself, not on some psychological prognostication about whether the adjudicator would actually endeavor to make the prediction true.

Next, NRC argues that there is no prejudgment here because the Waste Confidence rule does not legally apply to the Yucca Mountain case, but this gets NRC nowhere, because it merely establishes that the source of the prejudgment is extrajudicial, and therefore falls in the same category as the unlawful prejudgment in *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970).

All of the other arguments in NRC's brief collapse if NRC's Waste Confidence rule *does* prejudge the Yucca Mountain licensing adjudication as Nevada argues, for if the rule constitutes unlawful prejudgment, then: (1) the judicial review standard is not unusually deferential, as the NRC argues; (2) the presumption of administrative regularity cited by NRC is overcome; (3) Nevada will be injured and NRC's standing argument fails; (4) amending the Waste Confidence rule only if the Yucca application is denied, as NRC suggests, is not a reasonable alternative; and (5) Nevada provided compelling reasons for NRC to grant its rulemaking Petition.

## ARGUMENT

### I. Standard of Review

NRC argues that the standard for judicial review is "unusually deferential" and that rulemaking is ordered "only in the rarest and most compelling of circumstances" because the agency's decision not to institute a rulemaking is "essentially a legislative one." NRC Brief at 12-13. This is undoubtedly correct for most petitions for rulemaking because they ask the agency to allocate its resources to address and resolve discretionary policy matters. Every case cited by NRC in its brief falls in this category. The case at bar is different because no agency has the discretion to allow a prejudgment of adjudicatory facts to stand. If Nevada is correct that the

Waste Confidence rule prejudges contested adjudicatory facts about the safety of Yucca Mountain, then NRC must amend it. *Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 883 F.2d 93 (D.C. Cir. 1989), cited by NRC, indicates that an agency's decision not to institute rulemaking may be overturned when there is a "plain error of law." *Id.* at 97. *See also American Horse Protection Ass'n, Inc. v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987). NRC's refusal to expunge an unlawful prejudgment of adjudicative facts with respect to Yucca Mountain is such a "plain error of law" that is entitled to no deference.

NRC also argues that Nevada must overcome a "presumption of regularity." NRC Brief at 11, 13. True. However, that presumption is overcome here. This is not a case like *Advanced Communications Corp. v. FCC*, 376 F. 3d 1153 (D.C. Cir. 2004), cited by NRC, where the allegations of impropriety lacked any specificity. Here, we have precise arguments about prejudgment that focus on specific actions and statements of the Commission in its Waste Confidence rule. These allegations require careful consideration, and they cannot simply be brushed aside based on some presumption.

## II. Nevada Has Standing

NRC argues that Nevada lacks standing because its prejudgment argument is implausible and speculative and Nevada has therefore suffered no injury. NRC Brief at 13-17. However, NRC concedes (as it must) that "Nevada is correct that the standing and merits inquiries overlap in this case." *Id.* at 15, n.3. While NRC invites the Court to dismiss Nevada's case at the threshold on standing grounds, it fails to note that, as the very case cited by NRC explains, "[t]he appropriate treatment of cases in which the standing inquiry overlaps with the merits so precisely is not entirely clear." *Taylor v. FTC*, 132 F.3d 753, 767 (D.C. Cir. 1997). *Taylor* cites here to cases such as *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997), where the Court disposed

of the case on standing grounds after a "merits-laden" determination, and other cases such as *ACLU v. FCC*, 523 F.2d 1344, 1348 (9th Cir. 1975), where the Court decided the case on the merits after determining that standing and merits inquiries overlapped.

Fortunately, there is no need to resolve here what the appropriate treatment should be because it makes no difference. Nevada has been accorded the right to brief and argue both standing and the merits. Nevada has established in its opening brief (and in its Loux affidavit) that it has concrete interests at stake in the forthcoming Yucca Mountain NRC licensing proceeding, and if NRC has unlawfully prejudged this case by its Waste Confidence rule, then Nevada has suffered a cognizable injury and should also prevail on the merits. But if there is no prejudgment, Nevada has suffered no injury, and from Nevada's perspective a loss on standing grounds is equivalent to a loss on the merits.

## III. NRC's Waste Confidence Rule Unlawfully Prejudges the Yucca Mountain Case

NRC does not disagree that Nevada has a fundamental due process right to a neutral decision maker in the forthcoming Yucca Mountain adjudicatory proceeding. NRC also does not dispute Nevada's fundamental contention that the Waste Confidence rule predicts that the NRC will grant the Yucca Mountain license application. Instead, NRC argues in various ways that this prediction does not amount to prejudgment. As explained below, none of these arguments has merit.

### A. Commissioners' Mindset

NRC argues first that Nevada's argument rests on unsupported speculation that the Waste Confidence rule's 2025 prediction will affect the mindset of present or future Commissioners." NRC Brief at 14. This argument ignores the simple and fundamental proposition that rules do not lose their effect when those who worked to promulgate them leave the agency. NRC's

Waste Confidence rule has present effect, and unless and until it is amended, it reflects the position of present and future NRC commissioners that Yucca Mountain will be licensed.

**B. Making the Waste Confidence Prediction Come True**

Next, NRC argues that it is purely conjectural to imply that the Commission will be biased in favor of Yucca Mountain solely to make its Waste Confidence prediction that Yucca Mountain will be licensed come true. *Id.* at 15. But as explained below, prejudgment depends on the nature of the statement itself, not on some psychological prognostication about whether the adjudicator would actually endeavor to make the prediction true or false. Arguments over whether an adjudicatory decision maker will, in fact, try to make his or her prediction (or prejudgment) true cannot be resolved because resolution depends on a probing of the mind of the decision maker that is both prohibited and uncertain in outcome.

Whether a decision maker has prejudged a case depends on "whether 'a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970), quoting from *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2nd Cir. 1959), *cert. denied*, 361 U.S. 896 (1959). This is an objective standard, *see SEC v. Loving Spirit Foundation*, 392 F.3d 486, 493 (D.C. Cir. 2004), that depends on what a disinterested observer may conclude about the contents of the statement alleged to constitute prejudgment, not on whether the decision maker will be psychologically inclined to make his or her prediction come true or false. Moreover, only an objective standard that avoids psychological prognostication could be consistent with the well-established principle that "[a]n adjudicatory hearing must be attended, not only with every element of fairness but with the very

appearance of complete fairness." *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970). *See also Antoniu v. SEC*, 877 F.2d 721, 724 (8th Cir. 1989).

Here, there is no dispute over what NRC has said and continues to say about its forthcoming Yucca Mountain case. It does not take issue with Nevada's argument that the Waste Confidence rule predicts that Yucca Mountain will be licensed. NRC conceded in its Denial of Nevada's Petition that "a repository could only be available [in 2025, as predicted in the Waste Confidence rule] if the Commission decision [on the Yucca Mountain application] is favorable." Denial, 70 Fed. Reg. at 48,333. NRC even tellingly described a denial of the Yucca Mountain application as a "significant and unexpected event." *Id.* A disinterested observer could only conclude from these statements that NRC has decided it will grant the Yucca Mountain application before it even receives it.

**C. The Waste Confidence Rule Logically Applies to Yucca Mountain**

NRC argues that there cannot be any prejudgment because the Waste Confidence rule does not legally apply to the Yucca Mountain licensing proceeding, but only to proceedings for the licensing of reactors and independent spent fuel storage installations. NRC Brief at 17-18. In fact, NRC has applied the rule more broadly that it admits in its brief. *See* Maryland Safe Energy Coalition: Denial of Petition for Rulemaking, PRM-72-1, July 11, 1995, 1995 WL 500464; List of Approved Spent Fuel Storage Casks: Additions, September 23, 1993, 1993 WL 474779. However, more importantly, NRC's argument is irrelevant. The statement giving rise to an unlawful prejudgment does not need to be applicable in any strict legal sense. FTC Chairman Paul Rand Dixon's statement giving rise to the finding of prejudgment in *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970), was not on the case docket and had no legally binding effect. Indeed, most unlawful prejudgments arise from

extrajudicial sources, that is, from sources other than the proceeding itself that could not possibly be applicable in the legal sense NRC advocates. *See Liteky v. U.S.* 510 U.S. 540, 551 (1994). NRC's argument turns prejudgment doctrine on its head: the prototypically meritorious prejudgment case based on extrajudicial sources would become a prototypically meritless one.

As the objective standard for prejudgment cited above clearly implies, the test has nothing to do with whether the statement evidencing prejudgment is legally applicable and everything to do with whether, based simply on an objective review of the statement, especially its *logical* relevance to the case, a disinterested observer may conclude that the agency has prejudged the case. As indicated above, a disinterested observer would so conclude here.

**D. The Waste Confidence Rule is Not Purely Legislative in Nature**

Next, NRC argues that the Waste Confidence rule cannot constitute an unlawful prejudgment because it is a mere prediction that involves legislative rather than adjudicatory fact finding. NRC Brief at 18-19. We presume NRC is relying here on the well-established body of case law to the effect that opinions about policy and legal issues are usually not disqualifying. *E.g., Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). NRC is right about the legal theory, but wrong in arguing that it applies here. The Waste Confidence rule does not merely find that safe disposal of high-level radioactive waste is feasible, or that someday, somewhere, a safe facility for the disposal of these wastes will become operational, but it finds and predicts that a *particular* facility proposed by a *particular* applicant (DOE) at a *specific* location will in fact be licensed.

Indeed, NRC's 1990 Waste Confidence decision is chock-full of analyses of adjudicatory facts applicable solely to Yucca Mountain. *See e.g.*, 1990 Decision, 55 Fed. Reg. at 38,478 ("NRC does not find a reasonable basis for the argument that even if the Yucca Mountain site

were found to be suitable [by DOE], it might not be available by the year 2025"); 38,505 ("The NRC does not believe that it is likely that NRC's emphasis on completeness and quality of the license application will contribute to substantial delays in submitting the license application and in the licensing proceeding that would delay repository availability much beyond 2010 at the Yucca Mountain site."). While these statements suggest some prejudgment of adjudicatory facts back in 1990, Nevada originally credited other contradictory statements in the 1990 Decision indicating no prejudgment was intended. *See e.g.*, 1990 Decision at 38,493 ("Also, the results of the licensing hearings on construction authorization cannot be predicted"); 38,494 ("Clearly, the Commission cannot be certain at this time that the Yucca Mountain site will be acceptable."); 38,505 ("Another reason the Commission is unwilling to assume the suitability of Yucca mountain is that NRC must be mindful of preserving all its regulatory options—including a recommendation of license application denial—to assure adequate protection of public health and safety from radiological risk. In our view, it is essential to dispel the notion that for scheduler reasons there is no alternative to the currently preferred site."); 38,507 ("need to avoid a premature commitment to the Yucca Mountain site").

While the 1990 Decision seems internally inconsistent or at best ambiguous on this point of prejudgment of Yucca Mountain, NRC's Denial of Nevada's Petition for rulemaking clears up the matter. The Denial states specifically that NRC "did not see any threat to its ability to be an independent adjudicator in 1990 when it selected the 2025 date *even though then, as now, a repository could only be available if the Commission decision [on Yucca Mountain] is favorable.*" Denial, 70 Fed. Reg. at 48333 [emphasis added]. *See also* NRC Brief at 20. To emphasize the point, NRC did not say here in its denial that the state of the art in science and engineering had advanced to the point that a licensable repository would be found somewhere (a

finding of legislative fact); it stated that a particular repository at a particular site proposed by a particular applicant would be licensed (a finding of adjudicatory fact).

Moreover, it is hardly surprising that NRC would be in a position to make such specific adjudicatory conclusions about Yucca Mountain years before any license application is filed. NRC and DOE have engaged in over ten years of "pre-licensing" discussions of technical safety questions regarding disposal in Yucca Mountain. These discussions resulted in 293 informal agreements between NRC Staff and DOE about how important safety questions may be resolved. These "pre-licensing" discussions advanced to the point that, in 2002, NRC's Chairman was able to advise the Congress that "development of an acceptable license application is achievable." Response of Chairman Meserve to Question from Senator Landrieu, printed in Hearings Before the Committee on Energy and Natural Resources, United States Senate, on S.J. Res. 34, May 16, 22, and 23, 2002, at 170-171.

In a sense, NRC has dug its own grave in this case. In responding to Nevada's Petition, it could have resolved the inconsistencies or ambiguities in its 1990 Decision in favor of maintaining impartiality on Yucca Mountain. NRC could simply have agreed with Nevada that the 1990 Decision estimated that an NRC licensing decision on Yucca Mountain, pro or con, would be made by 2000, leaving enough time for another site to become available by 2025 if the Yucca Mountain licensing decision were unfavorable. But this would have conceded Nevada's point in its Petition that 2000 was long gone with no application, let alone a licensing decision, and that it was therefore necessary to revisit the Waste Confidence rule because the facts had changed.

Rather than concede Nevada's point about new information, NRC insisted in its Denial that the 2000 date in its 1990 Decision referred to the date by which DOE (not NRC) should be

able to find Yucca Mountain suitable or unsuitable. This countered Nevada's argument about new information since DOE did, in fact, find Yucca Mountain suitable close to 2000. However, this interpretation of the 1990 Decision left no time for the development of another repository site if NRC denied the Yucca Mountain application. So, NRC had to say the 1990 Decision (and 1990 Waste Confidence rule) presumed Yucca Mountain would be licensed.

In short, NRC irrationally preferred to say that in 1990 it prejudged the licensing of Yucca Mountain, rather than concede Nevada's point that new information (DOE delays in submitting a license application) required reopening of the 1990 Waste Confidence rule.

### E. There is Prejudgment Even if the Waste Confidence Rule Can Be Changed Later if Yucca Fails

Finally, NRC argues that there is no basis for Nevada's concern that the Waste Confidence rule will have an insidious and prejudicial effect on the Yucca Mountain licensing proceeding because NRC is willing to amend the rule later if it denies DOE's license application. NRC Brief at 17-19. But as Nevada argues above and argued in its opening brief, there is no getting around the fact that the 1990 Waste Confidence rule (and underlying 1990 Decision) predict that Yucca Mountain will be licensed, and this violates Nevada's right to a neutral decision maker. This right applies from the very beginning of the licensing proceeding, and it cannot be satisfied retrospectively by withdrawing the prejudgment if the application is denied, for the obvious reason that NRC's prejudgment makes this unlikely, especially since NRC is now on record as opining that denial of the Yucca Mountain application would be a "significant and unexpected event." Denial at 70 Fed. Reg. 48,333.

Indeed, NRC's argument would irrationally absolve an agency of even the most egregious prejudgment. Under NRC's novel theory, any recusal motion could be denied simply

by promising to withdraw the offending statement later if the movant somehow prevails in the case, in which case the earlier prejudgment would obviously be moot.

## IV. NRC Acted Irrationally in Denying Nevada's Petition

NRC argues that it acted reasonably in denying Nevada's Petition for rulemaking because Nevada had not shown any "significant and pertinent unexpected event that raises substantial doubt about the continuing validity of the 1990 Waste Confidence findings," the rulemaking would "take a large commitment of scarce agency resources," and Nevada's proposal "does not solve the problems it sees." NRC Brief at 19-22. Each of these arguments is addressed in turn.

### A. The Argument That There is No Significant and Pertinent New Information

NRC's argument here relies on its inexplicable interpretation of its 1990 Decision to the effect that NRC assumed back in 1990 that the Yucca Mountain license application would be granted. Accordingly, it was no news to NRC that the Waste Confidence rule assumed Yucca Mountain would be licensed—it had assumed this since 1990—and NRC had little difficulty in concluding that Nevada presented nothing new in its Petition that would warrant revisiting the 1990 Decision and rule. This hardly excuses the prejudgment. NRC has made statements prejudging the Yucca Mountain case and it has a duty to expunge them whenever they occurred. Besides, what NRC said in its response to Nevada's Petition surely qualifies as a "significant and unexpected pertinent event." When it filed its Petition, Nevada never imagined that NRC would admit in response that it had prejudged Yucca Mountain as far back as 1990.

### B. The Argument That Rulemaking Would Require Scarce Agency Resources

Nevada can find no law, and the NRC cites to none, that allows a party's due process right to a neutral decision maker to be abridged merely because assuring neutrality would be

inconvenient or too costly. Besides, NRC offers no facts to support its argument about scarce resources. NRC is spending "tens of millions of dollars" *every year* preparing for the upcoming Yucca Mountain licensing proceeding, NRC Brief at 23 (emphasis added), and it is unfathomable why some portion of these many millions cannot be dedicated to assuring a basic right to due process. Moreover, while granting Nevada's Petition would require NRC to do an independent safety review of extended storage of spent reactor fuel, such a review would build on previous NRC evaluations concluding that "dry spent fuel storage is safe and environmentally acceptable for a period of 100 years." NRC Brief at 6, quoting from NRC's 1990 Decision.

### C. The Argument That Nevada's Proposed Rule Would Not Solve Nevada's Problem

NRC argument here seems to be, in part, that *any* Waste Confidence rule will necessarily predict the success of a disposal facility, and amending the rule as Nevada suggests will just prejudge some other case. This is not true. As long as NRC's prediction of when a repository will become available allows sufficient time for any specific pending proposal to be denied, and another as yet unspecified site to be found, there will be no prejudgment because NRC's deliberations will be confined to legislative facts. Indeed, as explained above, this is precisely how Nevada construed NRC's 1990 Decision when it filed its Petition.

Nevada argued in its opening brief that granting its petition would avoid the dilemma NRC would face if it found that no repository would be available until 2040 but that spent fuel could *not* be stored safely in the meantime. Nevada Opening Brief at 18. NRC argues it could just as easily face the same dilemma if it granted Nevada's Petition. But granting Nevada's Petition would give NRC and other governmental authorities a substantial lead time to address the problem that would arise in this unexpected event. NRC speculates that "other ways of dealing with the waste would have to be found," and it suggests several alternatives such as

centralized storage and advanced recycling. NRC Brief at 22. However, these will take time: the most recent centralized storage licensing case (the Private Fuel Storage case cited by the NRC) took over eight years for NRC to resolve, and advanced recycling will require extensive research and development and agency reviews of novel safety questions. There is simply no excuse for waiting, especially if, as Nevada believes will be the case, a rulemaking will confirm the legislative fact that spent fuel *can* be stored safely for hundreds of years, allowing other technologies to be pursued in the interim on a deliberate and considered basis.

## V. Granting Nevada's Petition is Required For a Fair and Transparent Yucca Mountain Licensing Hearing

In the closing section of its brief, NRC complains that Nevada's Petition for rulemaking was an effort to pry out of NRC some statement about the safety of long-term storage of spent fuel, and thereby decouple the licensing of Yucca Mountain from the future of nuclear power. NRC Brief at 22-23. While Nevada's motives in filing its Petition are not legally relevant, NRC's discussion here illustrates why granting Nevada's Petition to amend the Waste Confidence rule is so important to a fair licensing proceeding.

When the President of the United States formally recommended the Yucca Mountain site to Congress several years ago, he stated that "[p]roceeding with the repository program is necessary to protect public safety, health and the Nation's security...." Letter from President George W. Bush to The Honorable Richard B. Cheney, President of the Senate, dated February 15, 2002. This was in keeping with what the Secretary of Energy had advised him the day before. In recommending the Yucca Mountain site to the President, the Secretary of Energy advised that Yucca Mountain was "important to our homeland security" because "the facilities housing these materials [spent nuclear fuel and other nuclear materials] were intended to do so on a temporary basis. They should be able to withstand current terrorist threats, but that may not

remain the case in the future. These materials would be far better secured in a deep underground repository at Yucca Mountain, on federal land, far from population centers, that can withstand an attack well beyond any that is reasonably conceivable." Letter to the President from Secretary of Energy Spencer Abraham, February 14, 2002, at 3.

Nevada believes that extended storage of spent fuel is quite safe and that the disposal of spent fuel in Yucca Mountain would be unsafe, unnecessary and unwarranted. When NRC denied Nevada's Petition to amend the Waste Confidence rule, it not only refused to independently assess the safety of extended on-site storage of spent fuel, leaving some doubt whether it agreed with DOE and the President about the connection between Yucca Mountain and "homeland security," but it also confirmed Nevada's worst fears by stating that denial of a Yucca Mountain license application would be "significant and unexpected." Nevada is rightfully concerned that the untested proposition advanced by the President and DOE Secretary that Yucca Mountain must be licensed to protect "homeland security" constitutes a proverbial "elephant in the room" that looms over and influences the NRC's approach to licensing of Yucca Mountain.

Thus, Nevada's concerns about a fair and neutral decision maker are not speculative or conjectural. They go to the ultimate fairness and transparency of the Yucca Mountain licensing proceeding because they raise the serious question whether NRC is already poised to grant the license application based on the considerations advanced by the President and DOE Secretary.

## CONCLUSION

NRC's denial of Nevada's Petition was arbitrary, capricious, and unlawful, and the Court should remand the matter to NRC with instructions to initiate the rulemaking requested by Nevada.

Respectfully submitted,

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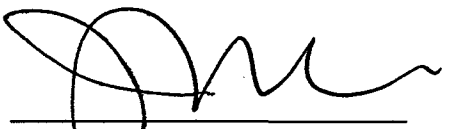
## CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of FRAP 32(a)(7)(B) and Circuit Rule 32(a)(2), which authorizes Petitioners to file a brief of not greater than 7,000 words. In reliance on the word count of the word-processing system used to prepare this brief, I hereby certify that the portions of this brief subject to the type-volume limitation contain 4,429 words.



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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Reply Brief was served this 22nd day of May, 2006 via Federal Express, on the following individuals:

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