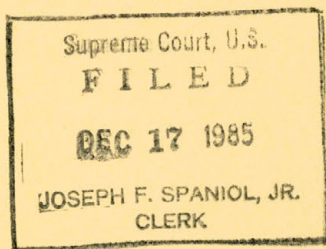


No. 104, Original



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

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STATE OF NEW JERSEY,

*Plaintiff,*

v.

STATE OF NEVADA,  
THE NEVADA PUBLIC SERVICE COMMISSION,  
AND THE CITY OF LAS VEGAS, NEVADA

*Defendants.*

---

**ANSWER**

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No. 104, Original

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In The  
SUPREME COURT OF THE UNITED STATES  
October Term, 1985

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STATE OF NEW JERSEY,  
Plaintiff,  
v.

STATE OF NEVADA,  
THE NEVADA PUBLIC SERVICE COMMISSION,  
and THE CITY OF LAS VEGAS, NEVADA,  
Defendants.

---

ANSWER

---

Defendant the Public Service  
Commission of Nevada ("PSC") hereby  
Answers the Complaint of Plaintiff State  
of New Jersey ("New Jersey") as follows:

Jurisdiction

I

The PSC admits that the Supreme Court  
of the United States has original and  
exclusive jurisdiction over a dispute  
between two states pursuant to

Article III, Section 2, Clause 2 of the Constitution of the United States and 28 U.S.C. §1251(a) and (b)(3). The PSC denies that New Jersey has been harmed as a result of the PSC's promulgation of Emergency General Order No. 52 ("Emergency Order").

### Parties

#### II

The PSC admits each and every averment in paragraph II except that the PSC denies that all permits required under Nevada law to dispose the contaminated soil at Beatty have been applied for and received.

#### III

The PSC admits each and every averment in paragraph III.

#### IV

The PSC admits each and every averment in paragraph IV.

## V

The PSC admits each and every averment in paragraph V except that the PSC denies that, as of yet, it has been determined that the shipments of the contaminated soil will pass through the City of Las Vegas.

## Summary of Claims

## VI

The PSC denies that its Emergency Order is invalid and unenforceable. The PSC denies that its Emergency Order applies to New Jersey. Rather, the Emergency Order, by its very terms, requires a railroad company, not the State of New Jersey, to obtain a permit to transport radioactive materials in Nevada when permanent storage of such radioactive materials will take place in Nevada.

## VII

The PSC admits each and every averment in paragraph VII.

## VIII

The PSC admits each and every allegation set forth in paragraph VIII except the PSC is without knowledge or information sufficient to form a belief as to the truth of the averment that the Barnwell disposal site is unable to accept the contaminated dirt.

## IX

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph IX.

## X

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph X except the PSC denies that any

official of the PSC has stated that the PSC will refuse to allow the shipment of the contaminated dirt into Nevada for disposal at Beatty. Rather, PSC officials have stated that the purpose of the Emergency Order is to ensure that the transportation of radioactive materials in Nevada for permanent disposal at Beatty is accomplished in as safe a manner as is possible.

## XI

The PSC admits each and every averment in paragraph XI except it denies that the PSC convened a meeting on short notice.

## XII

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph XII.

## XIII

The PSC denies each and every averment in paragraph XIII.

## XIV

The PSC denies each and every averment in paragraph XIV.

## The Contaminated Soil

## XV

The PSC admits each and every averment in paragraph XV.

## XVI

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph XVI.

## XVII

The PSC admits each and every averment in paragraph XVII.

## XVIII

The PSC admits each and every averment in paragraph XVIII.



History of New Jersey's Cleanup Efforts  
for the Contaminated Soil in Northeast  
New Jersey

XIX

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph XIX.

XX

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph XX.

XXI

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph XXI.

XXII

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in

paragraph XXII except the PSC denies that it has frustrated the cleanup effort in New Jersey and denies that it opposes shipments of the soil.

## XXIII

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph XXIII.

## XXIV

The PSC admits each and every averment in paragraph XXIV except the PSC does not have knowledge or information sufficient to form a belief as to the truth of the averment that the Barnwell Facility is unable to accept the contaminated soil.

## XXV

The PSC is without knowledge or information sufficient to form a belief as

to the truth of the averments in paragraph XXV.

The Nevada Statutes, Regulations and PSC Order and the Las Vegas Ordinance

XXVI

The PSC admits each and every averment in paragraph XXVI.

XXVII

The PSC admits each and every averment in paragraph XXVII.

XXVIII

The PSC admits each and every averment in paragraph XXVIII.

XXIX

The PSC admits each and every averment in paragraph XXIX.

XXX

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph XXX.

New Jersey's Compliance  
with Nevada Law

XXXI

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph XXXI.

XXXII

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph XXXII.

XXXIII

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph XXXIII.

XXXIV

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in

paragraph XXXIV except the PSC denies that it has been determined that the contaminated dirt will be unloaded at Arden, Nevada for transport by motor vehicle to Beatty.

## XXXV

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph XXXV.

## XXXVI

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph XXXVI.

## XXXVII

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph XXXVII.

## XXXVIII

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph XXXVIII.

## XXXIX

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph XXXIX.

## The Las Vegas Case

## XL

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph XL.

New Jersey's Pending Case Against  
Nevada and Las Vegas

## XLI

The PSC admits each and every averment in paragraph XLI except the PSC

is without knowledge or information sufficient to form a belief as to the truth of the averments that an additional report is not required as a condition of shipment and that the additional report was nevertheless furnished to the Nevada Division of Human Resources on August 30, 1985. The PSC avers that the shipment into Nevada of the contaminated dirt cannot take place until the Union Pacific Railroad applies for and receives the appropriate permit from the PSC.

#### XLII

The PSC admits each and every averment in paragraph XLII except that, as of this date, a written order has been received from the District Court.

#### Effect of Nevada's New Requirements and the Las Vegas Ordinance

#### XLIII

The PSC denies that its Emergency

Order has an adverse effect on New Jersey because the PSC's Emergency Order does not prohibit the shipment of the contaminated dirt into Nevada. Rather, the Emergency Order merely requires that the Union Pacific Railroad obtain a permit before transporting the contaminated dirt into Nevada. The PSC denies that a justiciable controversy exists between New Jersey and the PSC because the Emergency Order applies to railroads, not to New Jersey. Moreover, the Emergency Order expires by operation of law on December 31, 1985, at which time the alleged controversy with respect to the Emergency Order will be moot.

First Claim for Relief  
Preemption: The Hazardous Materials  
Transportation Act

XLIV

The PSC admits each and every averment in paragraph XLIV.



## XLV

The PSC admits each and every averment in paragraph XLV.

## XLVI

The PSC denies that the Hazardous Materials Transportation Act precludes state regulation of the transportation of hazardous materials. The Emergency Order is not inconsistent with the Hazardous Materials Transportation Act. The Emergency Order regulates aspects of transportation of hazardous materials not covered by the Hazardous Materials Transportation Act and the regulations promulgated thereunder. Moreover, the Federal Railway Safety Act, 45 U.S.C. §421 et seq. permits state regulation of railway safety when necessary to eliminate or reduce a local safety hazard. Because Beatty is only one of three disposal sites in the United States, the unloading,

interim storage and intermodul transfer of radioactive materials for permanent disposal at Beatty presents local safety hazards which Nevada is authorized to regulate.

#### XLVII

The PSC admits that the United States Department of Transportation ("USDOT") regulates certain aspects of the packaging, labeling, and transportation of low specific activity radioactive materials. The PSC denies that the areas of transportation of radioactive materials covered by the Emergency Order are regulated by the USDOT pursuant to the Hazardous Materials Transportation Act and the regulations promulgated thereunder. The PSC denies that its Emergency Order is inconsistent with the Hazardous Materials Transportation Act and the regulations promulgated thereunder.

## XLVIII

The PSC admits that it has not made an application to the Secretary of the USDOT for a non-preemption ruling. A non-preemption ruling is only required when a state regulation is inconsistent with Federal laws and regulations. The Emergency Order is not inconsistent with the Hazardous Materials Transportation Act and the regulations promulgated thereunder. The PSC denies that its Emergency Order unreasonably burdens interstate commerce.

## XLIX

The PSC is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph XLIX.

## L

The PSC admits that the Union Pacific Railroad must first apply for and receive

a permit from the PSC before transporting the contaminated dirt into Nevada for permanent disposal at Beatty. On December 5, 1985, the PSC received an application for a permit from the Union Pacific Railroad pursuant to the Emergency Order. The PSC denies that its Emergency Order is inconsistent with the Hazardous Materials Transportation Act and the regulations promulgated thereunder. The PSC denies that its Emergency Order imposes redundant, additional, and non-uniform requirements which stand as an obstacle to the achievement of the purpose of the regulations adopted under the Hazardous Materials Transportation Act. The PSC denies that its Emergency Order is preempted by the Hazardous Materials Transportation Act. The PSC is without

knowledge or information sufficient to form a belief as to the truth of all other averments in paragraph L.

## LI

The PSC denies that its Emergency Order is incompatible with the program of the Nuclear Regulatory Commission for the regulation of the packaging, labeling and transportation of radioactive material pursuant to its delegation of the regulation of those areas to the USDOT. The PSC denies that its Emergency Order is incompatible with 42 U.S.C. §2021(d) (2) because the Emergency Order does not restrict the use of the Beatty disposal site. The PSC denies that its Emergency Order is preempted under the Hazardous Materials Transportation Act and the Atomic Energy Act. The PSC denies that its Emergency Order is unconstitutional. The PSC denies that the Emergency Order

has caused New Jersey immediate and irreparable injury. The PSC is without knowledge or information sufficient to form a belief as to the truth of all other averments in paragraph LI.

Second Claim for Relief  
Preemption: The Low-Level Radioactive  
Waste Policy Act

LII

The PSC admits each and every averment in paragraph LII, except that the PSC denies that the Low-Level Radioactive Waste Policy Act, 42 U.S.C. §2021 b-d relates to the Emergency Order because it does not prohibit the disposal of the contaminated dirt at Beatty.

LIII

The PSC admits each and every averment in paragraph LIII except that it denies that the Low-Level Radioactive Waste Policy Act relates to the Emergency Order.

LIV

The PSC denies each and every averment in paragraph LIV.

Third Claim for Relief  
Unreasonable Interference  
with Interstate Commerce

LV

The PSC admits each and every averment in paragraph LV except that it denies that it is precluded from regulating the transportation of radioactive materials in Nevada.

LVI

The PSC denies each and every averment in paragraph LVI.

LVII

The PSC denies each and every averment in paragraph LVII.

Affirmative Defenses

As and for separate and distinct affirmative defenses the PSC alleges as follows:

First Affirmative Defense

Plaintiff has failed to state a cause of action upon which relief can be obtained against the PSC.

Second Affirmative Defense

The PSC's Emergency Order is in full compliance with all federal and state laws and regulations relative to the issuance of a permit to dispose of low-level radioactive waste at the Beatty, Nevada repository.

Third Affirmative Defense

The Atomic Energy Act does not prohibit the promulgation of the Emergency Order in that its provisions do not have any application to the disposal of radium or radium-contaminated materials.

Fourth Affirmative Defense

The Low-Level Radioactive Waste Policy Act does not preempt enactment of the PSC's Emergency Order in that such act



is merely enabling legislation encouraging the establishment of regional disposal facilities pursuant to state compacts. Further, the PSC's Emergency Order does not seek to prevent the shipment of low-level radioactive waste to the Beatty, Nevada repository.

#### Fifth Affirmative Defense

The PSC's Emergency Order is not preempted by the Hazardous Materials Transportation Act because it is not in conflict with its provisions nor any regulations issued thereunder.

#### Sixth Affirmative Defense

The PSC's Emergency Order does not unduly burden or discriminate against interstate commerce nor does it erect an unlawful barrier to the free flow of interstate commerce.

#### Seventh Affirmative Defense

Because temporary storage in New

Jersey of the contaminated soil for substantial periods of time, which could even be years, is not precluded by federal law, there has been no frustration by the PSC of New Jersey's cleanup efforts and any cessation of the cleanup efforts has been, and continues to be, a voluntary decision by the State of New Jersey.

Eighth Affirmative Defense

The Complaint on file with respect to the PSC's Emergency Order will be moot as of December 31, 1985, the date whereby the Emergency Order shall expire by operation of Law. On January 1, 1986 a Permanent General Order No. 52 shall become effective. The Permanent General Order differs from the Emergency Order. Although the Permanent Order is not yet effective, a copy of the Permanent Order is attached hereto as Exhibit 1.

Ninth Affirmative Defense

New Jersey does not have standing to contest the validity of the PSC's Emergency Order or its Permanent General Order No. 52.

Tenth Affirmative Defense

The doctrine of exhaustion of administrative remedies precludes judicial review because Union Pacific Railroad filed for a permit with the PSC on December 5, 1985.

WHEREFORE, defendant, the Public Service Commission of Nevada, prays as follows:

1. The the Court dismiss the complaint against the PSC on the ground that the action is moot.

2. That the Court dismiss the complaint against the PSC on the ground that New Jersey does not have standing to sue.

3. That if the complaint against the Commission is not dismissed, the Court declare that the regulatory actions of the PSC are constitutional and enforceable.

4. That the Court grant to the PSC such other and further relief as the Court may deem necessary and proper, including costs and attorney's fees as appropriate.

DATED: December 16, 1985

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EXHIBIT 1

PERMANENT G.O. 52

Authority: 703.197, 704.120, 704.170,  
704.210, 704.260, 704.280

Section 1. Chapter 705. of NAC is hereby amended by adding thereto the provisions set forth as Sections 2 to 10, inclusive, of this regulation.

Sec. 2. As used in sections 2 to 10, inclusive, of this regulation, unless the context otherwise requires:

1. "Commission" means the public service commission of Nevada.

2. "Hazardous material[s]" means the following classifications of materials as defined in Title 49 of the Code of Federal Regulations.

1. Class A explosives; defined in 49 C.F.R. 173.53;

2a

2. Class B explosives; defined in 49 C.F.R. 173.88;

3. Poison A; defined in 49 C.F.R. 173.326;

4. Flammable solid, defined in 173.150 and

5. Radioactive material; defined in 173.403(Y)

3. "Storage" means keeping any hazardous material on property owned or controlled by the railroad, except through track, for more than 48 hours.

4. "Loading and unloading" means the removal from or placement of hazardous materials or containers carrying hazardous materials on from railroad equipment.

### Sec. 3.

A. No person may load, unload, store, or transfer hazardous materials to another mode of

transportation on any property either owned by or under the control of a railroad in Nevada without a permit issued by the Commission.

Sec. 4.

1. The following information is required to be filed with the application:

(a) A map of the proposed site for loading, unloading, storage or transfer, including the indicators of its location on the track and all structures at the site;

(b) A report identifying each switch, siding, spur, or branch of track at the site and its purpose;

(c) A copy of any report made by a federal or state inspector during the preceding 6 months on defects in the track and the remedial action taken;

(d) A summary of all major construction or other work on the track at the site during the preceding year;

(e) A summary of all hazardous material carried by the railroad during the preceding 12 months;

(f) A summary of all unintended releases of hazardous materials during the preceding 12 months which were reported by the applicant pursuant to 49 C.F.R. §§ 171.16 and 171.17;

(g) An outline of the procedure to be used in the loading, unloading, transfer or storage of the hazardous material;

(h) A description of the measures to be used by the railroad to ensure that the hazardous material is safe from vandalism, theft or sabotage; and

(i) An outline of all plans to be used in the event of an accident.



2. The application must be accompanied by a fee of \$200.

Sec. 5.

In evaluating an application for a permit, the commission will consider:

1. The topography of the proposed site;

2. The proximity of the proposed site to:

(a) Centers of population;

(b) Heavily traveled highways;

(c) Hospitals;

(d) Schools;

(e) Sources of water; and

(f) Other sites for the storage of hazardous material;

3. The expected duration of the operation at the site;

4. The availability of alternative sites;

5. The quality of the track;
6. The security at the site;
7. The plans to be used in the event of an accident at the site.
8. The equipment and resources available in the event of an accident at the site.
9. Any other pertinent information requested by the commission.

Sec. 6.

1. A permit issued by the commission is valid for 1 year. Upon a showing of compelling need, the commission may issue a temporary permit which is valid while the application for an annual permit is pending.

2. An annual permit may be renewed if the applicant:

(a) Certifies that the information submitted in the original or amended

application is still correct, or he files such amendments to previously submitted information as are necessary to keep the information current; and

(b) Files a statement:

(1) Describing any relevant accident or release since the issuance or renewal of the permit, or if an accident or release has not occurred, a certification to that effect; and

(2) Summarizing the loading, unloading, transfer or storage conducted pursuant to the permit, as well as any incident involving the hazardous material.

(3) An application for renewal must be submitted at least 60 days before the expiration of the permit and be accompanied by a fee of \$200.

(4) If, at least 60 days before the expiration of the permit, the holder of a permit files an application for

renewal which is complete and conforms with the requirements of this section, the permit does not expire until the application for renewal has been finally determined.

Sec. 7. A permit may be suspended or revoked by the commission if:

1. An activity is being performed in violation of the terms of the permit;

2. The suspension or revocation is necessary to protect against risks to life and property;

3. The permit was issued on the basis of false, fraudulent or misleading representations or information.

#### Sec. 8 Notice and Dismissal

1. The Commission will notice each application or renewal for at least 30 days prior to Commission action.

2. The commission will dismiss an application for a permit without prejudice if:

(a) There is insufficient information upon which to issue a permit;  
or

(b) Additional information is requested by the commission from the applicant but not submitted.

Sec. 9.

Title 49 of the Code of Federal Regulations, Parts 171, 172, 173, and 174 are hereby adopted.

A copy of a publication containing Parts 100 to 177, inclusive, of Title 49 of the Code of Federal Regulations may be obtained at a price of \$14 from the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402.

## Sec. 10.

With respect to hazardous materials covered by Emergency General Order 52, this regulation is effective upon filing with the secretary of state. With respect to other hazardous materials, this regulation becomes effective on March 31, 1986.



