

OFFICE OF THE SECRETARY
CORRESPONDENCE CONTROL TICKET

Date Printed: Apr 03, 2003 17:30

PAPER NUMBER: LTR-03-0205
ACTION OFFICE: OGC

LOGGING DATE: 04/03/2003

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SUBJECT: Provides petition by the State of Nevada to establish procedures necessary for a fair and credible
Yucca Mountain Licensing Hearing

ACTION: Signature of General Counsel
DISTRIBUTION: Chrm. Comrs, OCAA, ASLBP, EDO, OCA, OPA

LETTER DATE: 04/03/2003

ACKNOWLEDGED No

SPECIAL HANDLING:

NOTES:

FILE LOCATION: ADAMS

DATE DUE: 04/18/2003 DATE SIGNED:

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EPIDS say 06

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April 3, 2003

COPY

Delivered Via Messenger

Ms. Annette L. Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, DC. 20555-0001

ATTN: Rulemakings and Adjudications Staff

RE: Petition by the State of Nevada to Establish Procedures Necessary
for a Fair and Credible Yucca Mountain Licensing Hearing

Dear Ms. Vietti-Cook:

Enclosed please find an original and two copies of the above-referenced Petition, which we hereby respectfully file on behalf of our client, the State of Nevada. Would you please date-stamp a copy of this cover letter as proof of service and return it to our messenger.

Thank you.

Sincerely,



Martin G. Malsch

MGM/ec
Enclosures

c: Chairman Nils J. Diaz (w/ enclosure)
Commissioner Greta Joy Dicus (w/ enclosure)
Commissioner Edward McGaffigan, Jr. (w/ enclosure)
Commissioner Jeffrey S. Merrifield (w/ enclosure)
Karen Cyr, Esq. – General Counsel (w/ enclosure)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before
THE COMMISSIONERS

PETITION BY NEVADA TO ESTABLISH
PROCEDURES FOR A FAIR AND CREDIBLE
YUCCA MOUNTAIN LICENSING HEARING

APRIL 2003

TABLE OF CONTENTS

Petition by Nevada to Establish Procedures for a Fair and Credible Yucca Mountain Licensing Hearing

I.	<u>Introduction</u>	3
II.	<u>The Unique Importance of the Yucca Licensing Hearing</u>	6
III.	<u>Appointment of Independent and Highly Qualified Experts to Preside Over the Hearings</u>	8
	A. Current NRC Rules	8
	B. Why the Petition Should Be Granted	9
IV.	<u>DOE Should Bear the Burden of Proof in the Hearing Without Reliance on NRC Staff as a Party-Advocate</u>	13
	A. Current NRC Rules and Practice	13
	B. Why the Petition Should Be Granted	14
V.	<u>The Same Ethical Conflict-of-Interest Rules Should Apply to DOE and Its Witnesses as Apply to Other Parties, Including Nevada</u>	19
	A. The Current DOE Ethical Loophole	19
	B. Why the Petition Should Be Granted	21
VI.	<u>NRC Should Confirm that Rules on <i>Ex-Parte</i> Communications and Separation of Functions Are Now in Effect</u>	23
	A. Current NRC Rules	23
	B. Need for the Petition	24
VII.	<u>Conclusion</u>	25

**PETITION BY NEVADA
TO ESTABLISH PROCEDURES FOR A FAIR AND CREDIBLE
YUCCA MOUNTAIN LICENSING HEARING**

I. Introduction

The State of Nevada—host State for the Department of Energy’s (“DOE’s”) proposed geologic repository for disposal of spent fuel and high-level radioactive waste at Yucca Mountain (the “Yucca Repository”)—hereby petitions the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) to establish procedures necessary for a fair and credible Yucca Repository licensing hearing.

This license proceeding is unique because of the magnitude and technical and social complexity of the issues. It is also a case in which the applicant is itself the federal government, and there is a history of federal agencies treating each other sympathetically as compared with outside parties. The circumstances of the Yucca Mountain proceeding require additional measures to assure fairness, competence, and credibility. The closest precedent in NRC’s history is the complex “GESMO” hearing in which NRC went outside the agency to appoint an independent Board of exceptionally qualified experts.

In this case as well, Nevada asks NRC to:

(1) Announce that it will appoint special, independent, and highly qualified outside experts in the relevant disciplines to the Hearing Board (or Boards) to preside over the proceedings and issue the initial decision on DOE’s announced

application for an authorization to construct the repository. Nevada also asks the Commission to:

(2) Require DOE (the license applicant) to bear the burden of proof in the Yucca Repository hearing without reliance on the participation of NRC Staff as a party-advocate, so NRC Staff can remain impartial;

(3) Apply the same ethical conflict-of-interest rules to DOE and its representatives and witnesses as now apply to all other parties, including Nevada; and

(4) Confirm that NRC's standard rules on *ex-parte* communications and separation of functions are now in effect for the Yucca proceeding.

These four provisions are essential for a fair NRC licensing hearing and a credible licensing decision in this unique and extraordinarily important matter.¹ The public credibility of the decision will be especially at risk since this is a case in which one part of the federal government will be judging the performance of another part with which it has interacted on the substance of the project for more than two decades. It was this consideration especially—enhancing the credibility of the decision—that led the Commission of 25 years ago to reach outside the

¹ Three of these four requests could be granted simply by order. Curtailing NRC Staff's participation as a party may require an amendment to the definition of "party" in 10 C.F.R. § 2.1001. While modification of this definition would constitute a procedural rule exempt from notice and comment rulemaking, Nevada believes its petition should be published for public comment before NRC reaches a decision on it.

agency for an independent Hearing Board in the GESMO case. That matter, and the other three Nevada enumerates here, have not been addressed by NRC in its consideration of how the Yucca licensing proceeding will be conducted.² Nevada is ready to contest the technical issues with DOE on a level playing field. Accordingly, Nevada respectfully asks the Commission to assure such circumstances.

Nevada is petitioning now, though it will be over a year before DOE files its license application, because there is still time to put these measures into effect. It is essential that NRC establish these provisions now, well before DOE files its application, in order for DOE, NRC, and other interested parties to prepare for the hearing, budget resources, and determine which experts and other individuals will be qualified to appear before NRC in a representative capacity both in the NRC Staff pre-application and application safety reviews, and in the licensing hearing.

The specifics and grounds for Nevada's petition are set forth below.

² On January 17, 2001, Nevada's Agency for Nuclear Projects did express a similar concern in a letter to NRC's Chairman as that expressed here about the role of the Staff as a party-advocate, suggesting Staff should not be a party in the Yucca proceeding. On February 20, 2001, Chairman Meserve responded in a letter to Robert Loux, Executive Director of the Nevada agency, that it was not necessary for Staff to refrain in the Yucca proceeding from its traditional role as a party. Nevada does not believe this informal exchange constituted NRC's final word on this important subject, and thus, this petition raises the issue in far more substantive detail.

II. The Unique Importance of the Yucca Licensing Hearing

DOE has announced its intention to file an application for a construction authorization for the Yucca Repository in late 2004. In anticipation of this event, NRC has been devoting millions of dollars and hundreds of person-years to establishing Yucca Repository licensing rules (10 C.F.R. Part 63), special procedural rules (10 C.F.R. Part 2, Subpart J), and guidance to DOE (*e.g.*, the Yucca Mountain Review Plan, NUREG-1804, and NRC Staff issue-resolution status reports).

Nevada does not have to explain to the Commission the enormous importance of this upcoming proceeding. The possible disposal of tens of thousands of metric tons and billions of curies of spent reactor fuel and high-level radioactive wastes in the Yucca Repository has enormous implications, not only for Nevada, the citizens of Nevada, and the human environment, but for other important interests as well. NRC has said it will not continue to license nuclear reactors unless it has reasonable confidence that wastes from reactor operations (spent reactor fuel) can and will in due course be disposed of safely. *See* 42 Fed. Reg. 34391 (1977), *NRDC v. NRC*, 582 F.2d 166 (2d Cir. 1978). The Yucca Repository is presently the only legal *disposal* option, and DOE is already in default of its obligation to begin accepting reactor spent fuel in 1998. *See Indiana Michigan Power Company v. DOE*, 88 F.3d 1272 (D.C. Cir. 1996). In short, the

nation will be watching this proceeding carefully. If the result will be seen as having been arrived at in circumstances that are questionable in terms of fairness and without penetrating examinations of the scientific issues, it will in the end backfire for the prevailing party.

NRC's conduct of the Yucca licensing proceeding will also have broad international implications. In recent years, similar disposal programs in the United Kingdom, Germany, France, Switzerland, Canada, Spain, Netherlands, and Argentina have either failed or suffered dramatic setbacks. In some cases, these failures or setbacks have been the result of site selection without full and public consideration of alternatives, much like the abbreviated process that led to the selection of the Yucca Repository. In other cases, there was insufficient public confidence in the selection and safety review processes. *See* National Research Council, "One Step at a Time: The Staged Development Geologic Repositories for High-Level Radioactive Waste," Appendix D (National Academy of Sciences Press, 2003). The world community will also be watching NRC's licensing proceeding to see if the precedents set by these other countries will be avoided or followed in the United States.

Nevada would add that NRC's Yucca Repository licensing hearing will also be the first time Yucca proponents will be called upon to defend their safety case in an adjudicatory setting, with discovery, testimony under oath, and cross-

examination. As planned, it will also present the nation's first all-electronic adjudicatory hearing, using new techniques for managing tens of millions of pages of complex technical information.

For all these reasons, NRC's Yucca construction authorization hearing and decision will be *the* most important licensing hearing NRC has ever undertaken.

III. Appointment of Independent and Highly Qualified Experts to Preside Over the Hearings

A. Current NRC Rules

When DOE's Yucca application is filed and docketed, NRC will publish a notice of hearing on the application (10 C.F.R. §§ 2.101(f)(8) and 2.104(a)). Nevada, DOE, NRC Staff, affected units of local government, and Indian Tribes will be parties in the hearing (10 C.F.R. §§ 2.714(d) and 2.1001), and other interested persons may (and almost certainly will) also petition to intervene as full parties (10 C.F.R. §2.1014).

NRC's rules provide for licensing hearings to be conducted by one or more members of the Commission, an Atomic Safety and Licensing Board, or another named presiding officer with delegated authority (10 C.F.R. § 2.704). In practice, NRC contested hearings in complex licensing matters (for example, involving nuclear power reactors) have always been conducted by three-member Atomic Safety and Licensing Boards drawn from NRC's Atomic Safety and Licensing Board Panel. The use of such boards is specifically authorized by Section 191 of

the Atomic Energy Act of 1954, as amended (“AEA”), 42 U.S.C. § 2241, which, by its terms, operates as an exception from the provision of the federal Administrative Procedure Act that would otherwise require NRC to appoint one or more independent Administrative Law Judges. Atomic Safety and Licensing Boards conduct the licensing hearings, control the admission of evidence, evaluate the witnesses and the evidence, and issue an initial licensing decision (10 C.F.R. § 2.718). The initial decision may be appealed to the Commission (10 C.F.R. § 2.786). However, an initial decision favorable to DOE will authorize the issuance of a construction authorization (and commencement of construction of the Yucca Repository) even though Nevada and other parties believe their rights were denied and have appealed to the Commission or the courts (10 C.F.R. §§ 2.718, 2.760, 2.1023).

B. Why the Petition Should Be Granted

The selection of members of the Hearing Board for the Yucca proceeding will be critical to the conduct of a fair hearing and to issuance of a scientifically sound and credible initial licensing decision. Members of such Boards are currently drawn from an Atomic Safety and Licensing Board Panel of about twenty members. Six (including the Chairman of the Panel and the Chief Administrative Judge) are full-time, permanent NRC employees, and the rest are part-time NRC

employees. Most have considerable experience in NRC licensing hearings, but none have any experience in a case of this nature and importance.

In calling for independent experts, Nevada does not intend to demean the competence and integrity of the existing members of the Panel. It is simply that the magnitude of this case transcends the usual NRC proceeding, both in terms of the expert knowledge and the independence that will be required. While NRC has taken steps to protect the independence of existing Panel members, it remains that they are still NRC employees who work in the same office building complex as Commissioners and NRC Staff, receive their pay and benefits from NRC, and are subject to general Commission oversight of important continuing matters such as working conditions, budgets, and general efficiency.

The Yucca Repository hearing and decision will be highly contentious and, as explained above, the most important and publicly visible in NRC's history. Board members will be subject to unprecedented scrutiny and pressure in the Yucca Repository hearing. The use of NRC employees as Hearing Board members in this instance will inevitably raise questions about the independence and credibility of the NRC hearing and decision process.

For these reasons, Nevada requests NRC to follow its prior practice in cases of exceptional importance and announce now that it will go outside of the agency to select Board members who are independent of NRC and are nationally or

internationally recognized experts in the relevant scientific fields. Like existing Panel members, these special members should of course have no financial stake in the Yucca Repository or financial ties to the applicant or the utility industry.

The special appointment of Hearing Board members is already authorized by Section 191 of the AEA, 42 U.S.C. § 2241, which empowers NRC to appoint three-member boards without regard to provisions of law applicable to the qualifications and appointment of Administrative Law Judges. Moreover, the appointment of special members to the Hearing Board (or Boards) for the Yucca Repository would be squarely in accord with the Commission's 1976 decision in the so-called "GESMO" case. GESMO involved hearings on NRC's proposed generic environmental impact statement on the wide-scale use of mixed plutonium and uranium fuel in nuclear reactors (Docket No. RM-50-5). GESMO attracted a degree of attention from both governmental and non-governmental sources that was unprecedented at the time, was different in kind from other NRC proceedings, and involved issues fundamental to the future structure of the nuclear industry and critical to public health and safety and the common defense and security. In recognition of the degree of public interest in the proceeding and the gravity and magnitude of the issues, the Commission announced on July 28, 1976, that a special board of distinguished outsiders had been appointed to preside over the GESMO hearing (see attached press release). The board included a highly

respected former law school dean who had been both general counsel of the U.S. Arms Control and Disarmament Agency and a negotiator of the Nuclear Non-Proliferation Treaty, a distinguished member of the faculty of Harvard University who had advised the U.S. Government on arms limitation talks with the Soviet Union, and an eminent university professor and member of the National Academy of Sciences.

The Yucca Repository licensing hearing will be even more important and pivotal than the GESMO proceeding. The Yucca proceeding will involve a degree of public interest, here and abroad, and a magnitude and gravity of issues that likely far surpasses GESMO. In addition, the Yucca proceeding has several unique and important attributes and political overtones that GESMO did not have, including a specific recommendation by the President, necessary action by the Congress to authorize the filing of the application, and the intense interest and participation of a State (Nevada), which will be uniquely and critically affected by the proposal.

NRC should follow its GESMO precedent here. Only by doing so will NRC be able to issue a Yucca Repository licensing decision that is perceived by reasonable and disinterested citizens and states, and international observers, as fair and credible.

Nevada recognizes that selection of individuals of this caliber will take some time, and also that the magnitude of the issues and the deadline in the Nuclear Waste Policy Act for a licensing decision may require appointment of more than one Board. Thus, NRC should announce its decision to use special boards as soon as possible so the selection process can begin.

IV. DOE Should Bear the Burden of Proof in the Hearing Without Reliance on NRC Staff as a Party-Advocate

A. Current NRC Rules and Practice

Under NRC's current rules, NRC Staff will be a party-advocate in the Yucca Repository licensing hearing, along with DOE (the applicant), Nevada, affected units of local government and Indian Tribes, and other interested persons. What this means is that NRC Staff will have the same rights to advocate DOE's position in the hearing as DOE does. The law does not, however, require NRC Staff to participate as a party-advocate in an initial licensing proceeding like this one.³ Indeed, historically (beginning with NRC's predecessor the Atomic Energy Commission), Staff was given the role of party-advocate in licensing hearings only because applicants were inexperienced and ill-equipped to handle all of the regulatory issues posed by the new nuclear power industry. In this proceeding, given a governmental applicant with extensive knowledge and resources

³ For example, NRC Staff need not appear as a party in NRC licensing hearings conducted under NRC's rules in 10 C.F.R. Part 2, Subpart L.

concerning the matters at issue, Staff's original role of party-advocate is clearly an anachronism. Nevada believes the public interest would be served if NRC Staff maintained a neutral role during the hearing—one that does not lock it into an adversarial position on the various issues.

NRC Staff has been very actively involved for years in the review of DOE's site characterization activities. It has taken preliminary positions on the adequacy and completeness of almost all of DOE's technical work in support of the future license application, and has advised DOE, the President, and the Congress that its review thus far has revealed no reason to cancel the project. Assuming NRC Staff continues to support DOE's advancement of the project, it will eventually issue a Safety Evaluation Report in favor of issuance of a construction authorization, and it will offer evidence at the hearing (including expert witnesses) in support of its report. Since the Safety Evaluation Report will recommend granting DOE's application, Staff's support of NRC's Safety Evaluation Report at the hearing will necessarily support DOE's application as well. This has a number of implications for the conduct of the hearing.

B. Why the Petition Should Be Granted

For one thing, Yucca Repository opponents will need to contend with *two* governmental entities (NRC Staff and DOE) advocating the DOE application at the hearing, not one, and both proponents of the DOE application will be backed by

the full resources of the federal government and the legions of DOE and NRC consultants, contractors and national laboratories who have earned billions of dollars on the Yucca project over the last decade or more. NRC Staff's participation as a party-proponent of DOE's application in the NRC licensing hearing will thus create a vast and fundamentally unfair disparity in the resources of the opposing parties. This will be especially so if (as seems currently to be the case) DOE acts affirmatively (and unlawfully) to deprive Nevada of its right to use money from the Nuclear Waste Fund to support independent scientific work and reviews of Yucca Repository safety issues.

Worse, such double-teaming by NRC Staff and DOE will dilute DOE's responsibilities as the license applicant and the potential constructor and operator of the Yucca Repository. NRC Staff will be able to compensate for gaps or weaknesses in DOE's safety case by offering expert evidence of its own, especially if it presents its case in the traditional "cleanup position" after DOE and project opponents have presented all of their evidence. DOE should not be authorized to construct and later operate the Yucca Repository even though it lacks the necessary skills and expertise to support the application by itself. When and if construction and operation of the Repository commences, DOE will surely be on its own, without project assistance from NRC.

Most important, as has been pointed out recently by the National Academy of Sciences, litigation has the effect of freezing the technical positions of the parties. The public interest is not served if NRC Staff, after having played its role as technical safety reviewer of DOE's application, then ceases to keep an open mind on the issues. It would be far preferable if Staff observed and listened and felt free to adjust its position on the basis of the evidence. NRC technical staff should keep its focus on public safety and security, and if it needs to change its position it should not have to check first with litigation counsel on how this would affect its adversarial position—for that is the reality of a party-advocate in a hearing role. Public perception and acceptance would be strongly advanced if the Staff remains a neutral evaluator rather than a redundant government advocate that might reasonably be viewed as an aggressive “partner” of the Yucca developer, DOE.

Despite the fact that DOE—the applicant—is a fellow government agency, NRC should not lose sight of the fact that proper adjudication *requires* an arms-length relationship between applicant and regulator. Failure to maintain a proper arms-length relationship strikes at the heart of the independent decision-making process and may be grounds for judicial reversal of an agency's decision.⁴ See

⁴ A recent letter to Nevada's counsel from DOE, referencing private and allegedly privileged discussions among NRC and DOE officials with the Office of Government Ethics concerning the Yucca proceeding, appears to take the legally

Press Broadcasting v. FCC, 59 F.3d 1365 (D.C. Cir. 1995); *Peter Kiewit Sons v. U.S. Army Corps of Engineers*, 714 F.2d 163 (D.C. Cir. 1983); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959).

Finally, NRC Staff's participation as a party in the hearing will require unnecessary extra resources (both NRC personnel and contractor support) because Staff's participation as a full party will entail substantial NRC effort and expense. It will also require unnecessary duplication of effort. On review of the initial Yucca licensing decision, the Commission will need the confidential assistance of specially qualified technical experts and opinion writers, but any NRC official who participated in the review and litigation at the hearing will obviously be disqualified from performing this function. As a result, the Commission will need to retain additional staff as adjudicatory employees. Conversely, if Staff is not a party, not only will NRC conserve money and resources and avoid duplication, it will stand a significantly better chance of meeting the statutory licensing deadlines specified in the Nuclear Waste Policy Act.

suspect view that the "Government" in this instance is a monolith which must act aggressively to protect its unified interests. See Susan F. Beard, Acting Assistant General Counsel for General Law, DOE, to Charles J. Fitzpatrick, Egan & Associates, PLLC, March 5, 2003. Accordingly, documents evidencing private exchanges between the three agencies about matters germane to the Yucca proceeding were withheld from Nevada by DOE and NRC under the Freedom of Information Act on grounds of an alleged joint "Government" privilege. Clearly, this sets an unfortunate precedent for events to come.

Under Nevada's proposal, NRC Staff would continue with its pre-application review of DOE's technical information and, as planned, perform a completeness review of the expected DOE license application and, when a substantially complete application is filed, perform a safety review of the application that culminates in the issuance of a public Safety Evaluation Report. Also as planned, Staff's Safety Evaluation Report would include the results of its own total systems-performance assessment. Staff would continue to participate in the Licensing Support Network under 10 C.F.R. Part 2, Subpart J. Moreover, since the Freedom of Information Act is always applicable, Staff would be subject to discovery for production of non-privileged documents. However, as a non-party, Staff personnel would not offer testimony at the hearing or be subject to depositions or subpoenas, except, as provided in 10 C.F.R. § 2.101(j), when an NRC Staff member has direct personal knowledge of a material fact (as opposed to an expert opinion) and no other witness is available.

For all these reasons, NRC should decide now that Staff need not and appropriately will not be a party in the Yucca Repository licensing hearing. DOE should be required to bear the burden of proof by itself as the applicant and government proponent of the application, and as the potential constructor and

operator of the Yucca Repository. NRC Staff should maintain an appropriate arms-length relationship.⁵

V. The Same Ethical Conflict-of-Interest Rules Should Apply to DOE and Its Witnesses as Apply to Other Parties, Including Nevada

A. The Current DOE Ethical Loophole

Many hundreds of U.S. Government employees have participated personally and substantially over the years in DOE and NRC activities pertaining to the Yucca Repository. This includes their participation as Government employees in DOE's planning and strategy for the Yucca site recommendation and for the NRC license application, in NRC's review and comment on DOE's plans for and conduct of site characterization, and in NRC's preparation for a DOE Yucca Repository license application. These efforts have spanned decades, so many of these individuals have now left employment at NRC or DOE.

Under current statutes and regulations on post-employment conflicts of interest, as recently re-interpreted by the U.S. Office of Government Ethics ("OGE"), a former employee of NRC or DOE such as one described above, who participated personally and substantially as an employee in matters involving the Yucca Repository, may potentially be prosecuted criminally if he or she now

⁵ While it is theoretically possible that NRC Staff's Safety Evaluation Report could oppose DOE's application, decades of NRC experience indicates that, when this occurs, the applicant withdraws and there is no hearing.

appears before NRC as a witness or representative for someone else (18 U.S.C. § 207 (a) and 5 C.F.R. § 2637.201).

Until recently, the effect of OGE's restrictions was limited by a longstanding OGE interpretation that distinguished certain Yucca Repository matters (*e.g.*, particular aspects of DOE's site characterization) from others (*e.g.*, the NRC licensing hearing), with the result that an employee's participation in one early matter likely did not disqualify him or her from appearing before NRC in a later matter. However, on July 31, 2002, after extensive joint consultation among NRC, DOE and OGE, OGE dramatically reversed its position. *See* OGE letter to Susan Beard, DOE Alternate Designated Agency Ethics Official and Karen D. Cyr, NRC General Counsel and Designated Agency Ethics Official, dated July 31, 2002. Now, according to OGE, any personal and substantial participation in DOE's planning, site characterization, or recommendation of the Yucca Repository, or in NRC's specific Yucca Repository activities, *at any time*, makes an employee potentially subject to the restrictions in 18 U.S.C. § 207(a).

But the Congressional drafters of 18 U.S.C. § 207(a) had earlier created a longstanding exception: The restriction and criminal penalties do not apply when the former employee testifies or appears on behalf *of the United States* (18 U.S.C. § 207 (a)(1)). The drafters' rationale for this exception was straightforward: There would be no conflict-of-interest if the former employee's

prior and current client were the same, *i.e.*, the United States. But the drafters of Section 207(a) never considered the possibility, like that presented here, that different agencies of the U.S. Government would be adverse to each other, functioning independently in an arms-length relationship of license applicant and independent regulatory agency.

B. Why the Petition Should Be Granted

Because of the peculiar way that Section 207 was drafted, coupled with OGE's recent "reinterpretation," there is now a glaring loophole in Section 207(a) that DOE is free to exploit. DOE may hire former NRC officials who have participated personally and substantially in the internal and confidential development of NRC's approach to licensing of the Yucca Repository (even former Commissioners and Executive Directors) to represent it before NRC and to testify in support of its license application.⁶ In contrast, any similar former government employee who tried to perform this same function on behalf of Nevada (or any other non-U.S. party) would potentially be subject to criminal prosecution.⁷

⁶ For example, DOE has already hired NRC's former Executive Director of Operations, Joe Callan, who may appear before the Commission as an advocate of DOE's interests at Yucca Mountain.

⁷ Thus, for example, though Nevada has retained the former DOE Director of the Yucca Mountain project, Dr. John Bartlett, he is apparently foreclosed from testifying in the NRC license proceeding for the Yucca Repository.

Clearly, Congress never contemplated such perverse and unfair results when it enacted Section 207. The effect of the loophole is to give DOE an artificial and grossly unfair advantage in dealing with and testifying before NRC. Fortunately, NRC has the power to rectify this and must timely do so. NRC has broad statutory authority to control its review processes and proceedings, and to promulgate measures to assure fairness and avoid conflicts and the appearance of conflicts in particular cases. See AEA §§ 161c, 161i(3), and 161p, 42 U.S.C. §§ 2201(c), 2201(i)(3), and 2201; *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978); *Union of Concerned Scientists v. NRC*, 920 F.2d 50 (D.C. Cir. 1990); *BPI v. AEC*, 502 F.2d 424 (D.C. Cir. 1974).

Accordingly, Nevada requests NRC to exercise its broad authority to control its proceedings and apply the same conflict-of-interest rules to individuals who appear before it as witnesses or representatives of DOE as those which apply to witnesses or representatives of other parties such as Nevada. Former NRC (or DOE) employees should be subject to the same conflicts rules regardless of whether they are representing or testifying on behalf of DOE or on behalf of another party. Any other result would be unjustified and unfair.

VI. NRC Should Confirm that Rules on *Ex-Parte* Communications and Separation of Functions Are Now in Effect

A. Current NRC Rules

With very limited exceptions, NRC's rules of practice for the conduct of formal adjudications (such as the Yucca licensing hearing) prohibit *ex-parte* communications. An *ex-parte* communication here is a non-public communication relevant to the merits of DOE's Yucca application between (a) any interested person outside NRC (including the Secretary of DOE and other Executive Branch officials); and (b) any NRC adjudicatory employee (10 C.F.R. § 2.780). An NRC adjudicatory employee is an NRC Commissioner, Atomic Safety and Licensing Board member, or other NRC employee who will be involved in drafting and approving the initial or final adjudicatory decision. Similarly, with very limited exceptions, NRC's rules of practice applicable to the Yucca hearing prohibit non-public communications between (a) any NRC Staff employee performing an investigative or litigating function; and (b) any NRC adjudicatory employee. These restrictions on internal NRC communications constitute an internal NRC "separation of functions" (10 C.F.R. § 2.781).

The prohibition on *ex-parte* communications and the requirement for internal NRC separation of functions apply both to the person initiating the communication and to the NRC adjudicatory employee who receives it, and they come into effect as soon as the interested outside person (*e.g.*, DOE) or NRC

employee has knowledge that a notice of hearing will be issued (10 C.F.R. §§ 2.780(e)(ii) and 2.781(d)(ii)).⁸

B. Need for the Petition

DOE has announced it will file an application to NRC for authorization to construct the Yucca Repository, and NRC's rules require a notice of hearing to be published soon after that application is docketed (10 C.F.R. §§ 2.101(f)(8) and 2.104(a)).⁹ Accordingly, NRC employees and outside persons clearly now have "knowledge that a notice of hearing ... will be issued," the triggering event for the application of NRC's ex-parte and separation of functions rules (10 C.F.R. §§ 2.780(e)(1)(ii) and 2.781(d)(1)(ii)).¹⁰ Nevada's petition merely asks NRC to confirm this for the benefit of all interested outside persons and NRC employees so there will be no confusion about which rules apply, and in order to assure a fair hearing process.

⁸ The rules do not apply to communications between interested persons (including DOE) and NRC Staff (such as employees of the NRC Division of Waste Management) who are not adjudicatory employees, *i.e.*, employees not involved in drafting the initial or final adjudicatory decision. However, separate protocols do apply to such communications.

⁹ While docketing will require an NRC completeness review of DOE's application, there can be little doubt given the extensive interaction between NRC and DOE that DOE will know what is required for a reasonably complete application.

¹⁰ Indeed, the law itself presumes that we are now in the licensing phase of Yucca development, insofar as it required DOE to file a Yucca Repository license application by October 2002—a deadline DOE missed. *See* Nuclear Waste Policy Act Section 114(b).

VII. Conclusion

Everything requested of NRC in this petition is within NRC's current statutory authority, is in accord with prior NRC practice, and is manifestly necessary for a fair and credible Yucca Repository licensing hearing and decision process. Granting Nevada's petition will significantly improve the hearing process, make it less costly, more fair, more timely, and enhance its public acceptability. The time is now ripe to consider and grant Nevada's requests so that NRC, DOE, Nevada, and other interested persons can begin to make appropriate preparations for the NRC application review and hearing.

Nevada respectfully asks NRC to publish this petition for comment by interested persons, including DOE, and then to decide it promptly thereafter.

Dated this 3rd day of April 2003.

Respectfully submitted,

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A handwritten signature in black ink, consisting of a large, stylized 'M' followed by a long, horizontal, wavy line extending to the right.

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UNITED STATES NUCLEAR REGULATORY COMMISSION

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FOR IMMEDIATE RELEASE
(Mailed - July 28, 1976)

NRC NAMES MEMBERS OF HEARING BOARD FOR PLUTONIUM RECYCLE PROCEEDING

The Nuclear Regulatory Commission has appointed a five-member board to conduct a public hearing as part of its proceeding to decide whether to allow wide-scale use of plutonium mixed with uranium as fuel for nuclear power reactors.

The Hearing Board Chairman is George Bunn, from 1961 to 1969 general counsel of the U.S. Arms Control and Disarmament Agency and a negotiator of the Nuclear Nonproliferation Treaty. Mr. Bunn was in private practice in Washington, D.C., from 1951 to 1961, largely before regulatory agencies. Before entering private practice, he served for one year as an attorney for the former Atomic Energy Commission. Presently, he teaches administrative law at the University of Wisconsin, Madison. He is a former dean at that Law School.

Other members appointed to the board are: Dr. Albert Carnesale, Dr. Melvin W. Carter, Dr. Frank Leon Parker and Kline Weatherford.

Dr. Carnesale is Associate Director, Program for Science and International Affairs, and Gordon McKay Lecturer on Engineering and Applied Physics at Harvard University. He has served as senior advisor to the head of the U.S. Delegation to Strategic Arms Limitation Talks (SALT) with the Soviet Union.

Dr. Carter is Director, Office of Interdisciplinary Programs; Director, Bioengineering Center; and Professor of Nuclear Engineering at Georgia Institute of Technology, Atlanta. He formerly was Director of the National Environmental Research Center at Las Vegas, Nevada.

Dr. Parker is Professor of Environmental and Water Resource Engineering at Vanderbilt University. He is currently vice chairman of the Committee on Energy and the

Environment of the National Academy of Sciences, National Research Council, and a member of the National Council on Radiation Protection and Measurements.

Mr. Weatherford is a former president of Morton Salt Company. After joining Morton in 1955 as assistant to the president, Mr. Weatherford served as vice president-administration, executive vice president, and president of Morton's operations in Mexico, Peru, Ecuador and Puerto Rico. From 1941 to 1955, he was a special agent of the Federal Bureau of Investigation. Mr. Weatherford's assignments included special agent in charge of FBI field offices in Atlanta, Chicago, and Norfolk, Virginia. He retired from Morton Salt early this year and lives in Montrose, Alabama.

The schedule for public hearings will be established by the board based on a revised schedule for issuance of final portions of the environmental statement on mixed plutonium and uranium fuel and a draft supplement on safeguards alternatives. The hearing board will be responsible for the conduct of the hearing and the development of a detailed record on which the Commission will base its decision.

A draft environmental statement on health, safety and environmental matters was issued by the regulatory staff of the former Atomic Energy Commission in August 1974. The final statement on these matters now is expected to be issued by the NRC in the near future.

A draft supplement, with an analysis of the costs and benefits of alternative safeguards programs, will be issued in the near future also. After comments are received on the draft supplement, a final safeguards portion of the environmental statement will be issued.

A prehearing conference on the proceeding is expected to be announced by the board shortly.

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