



STATE OF NEVADA
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Karen Cyr, General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Dear Ms. Cyr:

I am writing on behalf of the State of Nevada to express concern about the Commission's failure to consider public comments and decide petitions for rulemaking filed by the State relating to the proposed Yucca Mountain repository. This failure could unnecessarily delay the Yucca Mountain licensing proceeding and burden the parties to that proceeding with the need to litigate policy and legal issues that should be resolved by rulemaking before the proceeding begins. I am also concerned with what appears to be discriminatory treatment by NRC in noticing (or *not* noticing) Nevada's petitions for rulemaking for public comment.

The focus of the State's concern is on five petitions for rulemaking filed on June 22, 1999, March 1, 2005, April 8, 2005, December 22, 2006, and June 19, 2007. The first (docketed as PRM-73-10) asked the Commission to upgrade its analyses and standards for protecting shipments of dangerous quantities of radioactive materials from sabotage. The time for public comments expired over six years ago, on January 28, 2000. Given the events of September 11, 2001, consequent efforts by the Commission to upgrade its physical protection analyses and standards, and the time that has elapsed, the least the Commission could do is explain what actions requested by Nevada remain unaddressed and why no further actions are needed, if that is the case.

The April 8, 2005, petition (docketed as PRM-51-9) seeks to revise the Commission's standards for reviewing and litigating NEPA issues discussed in the Department of Energy's Environmental Impact Statement for Yucca Mountain so that they clearly conform to the Court's decision in *NEI v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004). It was published for comment on August 12, 2005, and the comment period expired on October 26, 2005. No further action has been taken, even though (1) over one year has elapsed, (2) only three comments were filed, (3) notice and comment

rulemaking will likely require more than one year, (4) the Yucca Mountain license application is scheduled to be filed less than one year from now, and (5) that application cannot be noticed for hearing (the first step in the licensing proceeding) unless the standards for reviewing and litigating NEPA issues are specified. Moreover, in recent discussions between NRC Staff and interested State and local governmental units, the NRC Staff advised that the scope of the NRC's Yucca Mountain NEPA review and hearing will be very limited, contrary to Nevada's petition and *NEI v. EPA*. Under the circumstances, the Commission inaction on Nevada's petition unduly discourages these governmental stakeholders from raising important and legitimate NEPA issues before the NRC.

A third petition (docketed as PRM-63-2) addressed the critical issue of the Department's proposed "aging pad" for commercial spent fuel at Yucca Mountain. It was filed on December 22, 2006, and supplemented on January 23, 2007. Although six months have elapsed, the NRC's website listing of pending petitions offers no indication to the public that any such petition was ever even filed, and it has not been noticed for comment in the Federal Register despite Nevada's specific requests that it be published. We are unaware of any other sovereign government having filed a petition for rulemaking with NRC that was not noticed for public comments. Moreover, we note that the nuclear industry's petitions for rulemaking are routinely published by NRC (indeed, we can identify only one precedent one was not).

NRC's disregard of Nevada's "aging pad" petition was consistent with its earlier disregard of a March 1, 2005, petition (PRM-51-8) for rulemaking by Nevada to Amend the Commission's Waste Confidence Decision and Rule to Avoid Prejudging Yucca Mountain. Again, despite formal requests from senior Nevada officials that this proposed rule be noticed for public comment, and an exceptionally high level of public interest in the topic as documented by years of prior rulemaking history, it was never published, even though the substance of Nevada's petition ended up in litigation in the D.C. Circuit.

Nevada's latest rulemaking effort occurred on June 19, 2007, when the State filed a fifth petition for rulemaking designed to fill a gap in the Commission's Rules of Practice by specifying the issues for consideration in the "mandatory hearing" on the Yucca Mountain construction authorization application. This petition has been docketed but no other action has been taken. Obviously, the Commission may need more time to consider what the State has just filed, but given the Commission's track record on previous Nevada petitions, the State cannot be optimistic that any decision will be forthcoming in a reasonable period of time or that this petition will be publicly noticed.

I ask that you take the necessary steps to notice proposed rulemakings on all unnoticed Nevada petitions as soon as possible. If the first petition relating to physical security has been overtaken by other Commission actions to upgrade physical security, the Commission should simply say so. Delay in deciding these petitions is inconsistent

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with the Commission's professed commitment to the early resolution of Yucca Mountain issues so that the statutory deadline for a Commission decision on the Yucca Mountain license application can be met. And failure to involve the public in these important matters seems, at best, contrary to the public interest and, at worst, an effort to prejudice Nevada.

The State's efforts to raise and obtain resolution of important Yucca Mountain issues early, before the proceeding begins, should benefit all interested stakeholders by eliminating regulatory uncertainty and narrowing the scope of legal and policy issues that may be litigated in the hearing. Nevada is under no legal obligation to raise these issues at this point in time, and it could hold them in reserve so as to secure the maximum litigation advantage and delay. In a spirit of cooperation with the NRC, Nevada has not taken such an approach, but there is no utility in raising issues early if the Commission is unwilling to do its part by responding responsibly and promptly.

Sincerely,


CATHERINE CORTEZ MASTO
Attorney General

c: Chairman Dale E. Klein
Commissioner Edward McGaffigan, Jr.
Commissioner Jeffrey S. Merrifield
Commissioner Gregory B. Jaczko
Commissioner Peter B. Lyons
United States Senator Harry Reid
United States Senator John Ensign
United States Representative Shelley Berkley
United States Representative Jon Porter
United States Representative Dean Heller
Robert Loux, Executive Director, Agency for Nuclear Projects