

August 8, 2007

Robert E. Loux
Executive Director
Office of the Governor
Agency for Nuclear Projects
1761 E. College Parkway, Suite 118
Carson City, Nevada 89706

Dear Mr. Loux,

On July 3, 2007, you wrote to NRC Chairman Dale E. Klein expressing concerns about what role the Advisory Committee on Nuclear Waste and Materials (ACNW&M) might play in the Yucca Mountain licensing proceeding. Your letter has been referred to me for response.

You articulate two major concerns. First, you are concerned that the Commission may intend to denominate the whole ACNW&M an "adjudicatory employee", that is, an advisor to the Commission in the performance of its adjudicatory functions in the upcoming Yucca Mountain proceeding. Assuming such a role for the Committee, you ask whether the Commission would issue a public notice of such a role for the Committee, whether the Commission's rules on *ex parte* communications and "separation of functions" would apply to the Committee, whether the Committee, in its role as an adjudicatory advisor, would meet in secret, and so forth.

The Commission does not plan to have the ACNW&M be an "adjudicatory employee" in the Yucca Mountain proceeding. The Committee will continue to conduct its proceedings in accord with the Federal Advisory Committee Act (FACA). As in the past, the Committee will advise the Commission on Yucca Mountain matters consistent with the Committee's FY 2005 – FY 2009 Action Plan, for example, the Part 63 rulemaking, but the advice will be given in a manner that conforms to existing law and practice.

Your second major concern is that even individual members of the ACNW&M or its staff perhaps should be disqualified from being adjudicatory employees, on the grounds that the ACNW&M "has reviewed relevant information and offered opinions on numerous safety issues that will be the subject of the hearing" on the license application. You cite what you believe to be examples of the Committee's having offered opinions on matters that will likely be issues in the hearing, and you cite a Federal court case on agency prejudgment. You also believe that Committee members will be free to consider "extra-record" information before the hearings, and interested persons will be "free to lobby ACNW members privately in the hope that their lobbying efforts will bear fruit later when the ACNW [member] advises the Commission in an adjudicatory capacity." You ask what assurances can be given, and what measures put in place, to avoid prejudgment and its appearance.

The Commission may indeed seek to use one or more *individual* ACNW&M members or staff as adjudicatory employees, because, as you acknowledge in your letter, the Commission "will need expert adjudicatory advice to assist it in reviewing the pleadings and evidentiary record". The necessary expertise is scarce, and individual ACNW&M members are an important resource for

such expertise.

An individual's previous experience with the ACNW&M ought not categorically disqualify that individual from serving as an adjudicatory employee. For one thing, as we've said before in correspondence with you, we do not yet know precisely what issues will be in contention in a hearing on Yucca Mountain, and we will not know until an application has been docketed and contentions filed. Also, the work the ACNW&M has done thus far on Yucca Mountain has been either generic, as in the case of the rulemakings on Part 63, or preliminary, as in the case of the ACNW&M letter you discuss. As you correctly note, that June 9, 2006 letter says that the Committee "finds the direction of fluvial redistribution modeling generally acceptable." However, the modeling being discussed there is the NRC staff's, not the Department of Energy's, and it is the Department's modeling that will be judged in the licensing proceeding. Also, the Committee was not expressing final views even about the NRC staff's modeling. The very Federal court case you cite, *Cinderella Career and Finishing Schools v. FTC*, 425 F.2d 583 (D.C. Cir. 1970), did not find bias in preliminary views expressed before an adjudication. Moreover, the ACNW&M's proceedings, though not adjudicatory, are not the "extra-record" lobbying opportunities you depict them to be. They take place on the public record compiled in accordance with the Federal Advisory Committee Act, and, as the Committee's Charter says, under that Act the Committee "will interact with representatives of the public, NRC, Advisory Committee on Reactor Safeguards, other Federal agencies, State and local agencies, Indian Tribes, and private, international, and other organizations as appropriate"

As required by 10 CFR 2.4, there would be public notice of any appointment of someone to be an adjudicatory employee, and any such person would be subject to the Commission's rules on *ex parte* communications and separation of functions, which, in the case of the Yucca Mountain proceeding, take effect when the staff issues its notice of the docketing of the application, which is earlier than such rules take effect in any other NRC proceeding. See 10 CFR 2.101(e)(8). Moreover, no adjudicatory employee would be allowed to advise the Commission on an adjudicatory issue on which he or she had already taken a position, and the employee would be obliged to base his or her advice on the adjudicatory record that is compiled in the proceeding.

I trust this is responsive to your concerns. The Commission is committed to conducting the licensing proceeding in a fair and open way, and in compliance with all legal requirements.

Sincerely,

/RA/

Karen D. Cyr
General Counsel

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Karen D. Cyr
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