

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

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Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
Kristine L. Svinicki

In the Matter of)
)
)
U.S. Department of Energy) Docket Nos. PAPO-00, PAPO-001
)
(High Level Waste Repository:)
Pre-Application Matters))

CLI-08-11

MEMORANDUM AND ORDER

Before us today is a motion by the State of Nevada to disqualify the law firm Morgan, Lewis & Bockius LLP (Morgan Lewis) from representing the Department of Energy (DOE) "in all NRC Yucca Mountain proceedings."¹ Nevada argues that Morgan Lewis has conflicts of interest that are "not susceptible to waiver or mitigation" and could affect "the integrity of the NRC's impending Yucca Mountain licensing proceedings."²

¹ Motion of the State of Nevada to Disqualify the Law Firm of Morgan, Lewis & Bockius LLP Because of Conflicts of Interest (April 3, 2008)(Nevada Motion) at 7. A number of Morgan Lewis attorneys have filed notices of appearance before the Advisory Pre-License Application Presiding Officer Board (Advisory PAPO Board)(Docket No. PAPO-001).

² Nevada Motion at 6, 7 n.9.

Both the NRC Staff and DOE oppose the motion to disqualify.³ For the reasons below, we deny the motion.

I. BACKGROUND

Nevada asks us to disqualify Morgan Lewis from NRC's Yucca Mountain proceeding (if it takes place) because the law firm also represents several nuclear utility companies that are suing DOE for violation of what is commonly known as the "Standard Contract," a contract committing DOE to take title to and dispose of commercial spent nuclear fuel.⁴ Nevada claims that Morgan Lewis's "actions on behalf of DOE" for the Yucca Mountain licensing "could harm the interests of its Standard Contract clients and vice versa."⁵

More specifically, Nevada argues that DOE has statutory public safety obligations under the Nuclear Waste Policy Act, which oblige DOE to suspend work on Yucca Mountain, decline to submit a license application or, if necessary, withdraw an application for construction authorization, if at any time DOE determines that Yucca Mountain would be unsuitable as a repository.⁶ As Nevada's argument goes, DOE's statutory obligations could require it to "giv[e] up on Yucca Mountain," but this "would be contrary to the overarching interests of [Morgan Lewis's] Standard Contract clients, who

³ See U.S. Department of Energy's Answer in Opposition to the State of Nevada's Motion to Disqualify the Law Firm of Morgan, Lewis & Bockius LLP (April 14, 2008)(DOE Answer); NRC Staff Response to State of Nevada Motion to Disqualify Law Firm (April 14, 2008).

⁴ See 10 C.F.R. Part 961 (codifying the terms of the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste).

⁵ Nevada Motion at 4.

⁶ *Id.* at 4 (citing § 113(c)(3) of the Nuclear Waste Policy Act, 42 U.S.C. § 10133).

would be understandably upset for having paid millions of dollars to DOE for a repository at Yucca Mountain but not getting one.”⁷ In short, Nevada claims that Morgan Lewis’s “duty to its client DOE” may conflict with its “duty of loyalty to its Standard Contract clients.”⁸ Nevada further claims that because of “DOE’s overriding statutory duty to protect the environment and public health,” the “apparent conflict of interest [is] not susceptible to waiver or mitigation.”⁹

In support of its motion, Nevada points to a recent DOE Inspector General (IG) “Special Report” that examined alleged conflicts of interest involving DOE’s choice of Morgan Lewis to assist in Yucca Mountain licensing matters. The report concluded that DOE’s procurement for legal services “appeared to follow the conflicts of interest requirements set forth in the Federal Acquisition Regulations [FAR], Department of Energy Acquisition Regulations [DEAR], and District of Columbia Bar Rules of Professional Conduct.”¹⁰ Specifically, the report noted that DOE required and approved a Morgan Lewis plan to avoid or mitigate any legal ethics or organizational conflict of interest; granted a waiver of the conflict of interest, pursuant to applicable regulations; and “also consented to the Morgan Lewis legal representation of the agency under the District of Columbia Rules of Professional Conduct.”¹¹

⁷ *Id.* at 4.

⁸ *Id.* at 5.

⁹ *Id.* at 6.

¹⁰ *Special Report, Review of Alleged Conflicts of Interest Involving a Legal Services Contractor for the Yucca Mountain Project License Application*, U.S. Department of Energy, Office of Inspector General, Office of Audit Services, DOE/IG-0792 (April 2008)(IG Report), cover memorandum by Gregory H. Friedman (April 2, 2008) at 2.

¹¹ *Id.*, IG Report at 6-7; see also Cover Memorandum at 2.

But the report also concluded that “the public interest would have been better served had [DOE] done more to document the key decision points relating to this procurement,” including documenting the reasons why DOE shifted from its policy position in 1999 that law firms representing utilities in spent fuel litigation be excluded from consideration for Yucca Mountain work.¹² As described in the IG report, DOE’s view during a similar procurement for legal services in 1999 was that “[a] law firm whose loyalties lie with the utility companies might urge a less thorough process that could conclude earlier, when the Department’s best interests lie with a careful approach that may indeed take longer and be a more expensive process.”¹³

In response, DOE claims that Nevada’s motion to disqualify Morgan Lewis is “tactical.”¹⁴ DOE states that it has complied with all federal procurement regulations and applicable rules of professional responsibility. DOE further stresses that federal regulations explicitly permit a waiver of conflicts of interest when it is in the overall interest of the United States to award a contract, and that “at every step of the procurement process, DOE adhered to FAR and DEAR regulations regarding organizational conflicts of interests.”¹⁵ DOE acknowledges that “there is some overlap of subject matter (disposition of spent nuclear fuel)” between the NRC licensing proceeding and the Standard Contract litigation, but claims that the two matters involve different forums and largely distinct legal and factual issues, and therefore applicable

¹² *Id.*, Cover Memorandum at 4.

¹³ *Id.*, IG Report at 2-3.

¹⁴ DOE Answer at 7.

¹⁵ *Id.* at 10,12.

rules of professional conduct for attorneys permit waiver of the Morgan Lewis conflicts of interest.¹⁶

Moreover, DOE emphasizes that the agency had no obligation to follow the same procurement policy followed in 1999, and that its views on conflicts and on its specialized needs for legal services have “evolved over time.”¹⁷ DOE states that its current “need for specialized legal services and the resulting limited pool of available firms with such expertise justified the acceptance and mitigation of a specific conflict of interest that the agency had defined as [] unacceptable at the time of the 1999 procurement.”¹⁸ DOE also states that it was not required by law to document and “justify the difference in procurement approaches” between 1999 and 2007.¹⁹

DOE additionally argues that: (1) Nevada lacks standing to seek disqualification of DOE’s chosen counsel; (2) the NRC is the wrong forum to raise challenges to DOE’s procurement decision and choice of counsel; and (3) Nevada simply has not met “its burden [to] establish[] that disqualification of DOE’s counsel, which is a discretionary remedy, is appropriate under the circumstances.”²⁰ DOE also suggests that the Nevada motion is untimely.²¹

¹⁶ *Id.* at 16-18.

¹⁷ *Id.* at 14.

¹⁸ *Id.* at 13.

¹⁹ *Id.* at 14.

²⁰ *Id.* at 1-2; *see also id.* at 5-7, 8-9, 20-21.

²¹ *Id.* at 3 n.4.

II. DISCUSSION

As we have outlined above in some detail, Nevada's motion to disqualify Morgan Lewis for conflict of interests involves many issues, including whether DOE properly executed conflict of interest waivers under agency and other federal procurement regulations, the overall propriety of DOE's procurement process in 2007, the adequacy of the Morgan Lewis conflicts mitigation plan, and whether the arrangements at issue implicate any legal ethics concern under District of Columbia Bar Rules of Professional Conduct. For the most part, these are matters outside the scope of the NRC's safety and environmental responsibilities.²²

Only one aspect of Nevada's motion goes to the NRC's statutory responsibility to protect public health and safety. That is the suggestion that Morgan Lewis's conflict of interest might adversely affect the "integrity" of the Yucca Mountain licensing proceedings.²³ We take seriously any allegation, such as Nevada's, that an unresolved conflict of interest or other ethical breach threatens the integrity of an NRC licensing proceeding, potentially leading to a biased result and potentially compromising public health and safety. We recognize that our regulations do not address conflicts of interest as such, but the absence of a specific rule "does not – and could not –interfere with our inherent supervisory authority over the conduct of adjudicatory proceedings before this

²² To the extent that Nevada may have a cognizable interest to challenge DOE's procurement process, there are other forums with the jurisdiction and expertise to review procurement protests. See, e.g., 31 U.S.C. § 3552 (jurisdiction of Government Accountability Office); 28 U.S.C. § 1491(a)(1)(jurisdiction of Court of Federal Claims). Further, the District of Columbia Bar's Board on Professional Responsibility is empowered to consider complaints on attorney discipline matters. See District of Columbia Bar Rules XI, § 4.

²³ Nevada Motion at 7 n.9.

Commission.”²⁴ If demanded by compelling circumstances, therefore, we would act to assure that a claimed conflict of interest not jeopardize the exercise of our health-and-safety responsibilities.

Here, though, no such showing has been made. In awarding the contract to Morgan Lewis, DOE was fully aware of the conflict of interest and imposed mitigating measures ensuring separation between Morgan Lewis’s “Standard Contract” and “Yucca Mountain” litigating groups. DOE’s Inspector General found that these measures had been “implemented.”²⁵ Notwithstanding these measures, Nevada remains dissatisfied. Nevada postulates, for example, that Morgan Lewis may discover information indicating that the Yucca Mountain site is unsuitable to be a repository, but that its “duty of loyalty” to its Standard Contract clients may interfere with proper disclosures of significant information.²⁶ Nevada further presents a hypothetical scenario, questioning what Morgan Lewis might do if it discovered “DOE e-mails . . . suggesting serious quality assurance defects in scientific work supporting the Yucca Mountain license application, and DOE asked Morgan Lewis for advice whether the NRC should be notified and whether consideration of the affected parts of the license application should be suspended until the scientific work could be redone?”²⁷ Nevada argues that Morgan

²⁴ *United States Energy Research and Development Administration* (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 75 (1976). See also *Baltimore Gas and Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-15, 48 NRC 45, 53 (1998) (Commission has “plenary supervisory authority . . . to interpret and customize its process for individual cases”).

²⁵ See IG Report, Cover Memorandum at 2.

²⁶ Nevada Motion at 4.

²⁷ *Id.* at 4-5.

Lewis's "duty to its client DOE would surely require it to say 'yes' to both questions, but its duty of loyalty to its Standard Contract clients may suggest otherwise."²⁸

In other words, Nevada suggests that Morgan Lewis might advise DOE to conceal significant safety information from the NRC. But concealing such information would violate NRC regulations and might amount to criminal misbehavior.²⁹ Based merely on speculation in Nevada's motion, we will not proceed on an assumption that there is any significant possibility that Morgan Lewis or DOE would engage in serious misconduct by withholding significant health and safety information from the NRC. A "presumption of regularity attaches to the actions of Government agencies."³⁰ Absent "clear evidence to the contrary," we presume that public officers will "properly discharge[] their official duties."³¹ Nevada's motion provides no showing of actual or likely bad faith by DOE or Morgan Lewis, nor otherwise presents any concrete basis for us to assume that they would take actions verging on criminality.

We may not lightly interfere in arrangements made between parties and their lawyers. In investigations, for example, the D.C. Circuit has held that the NRC may not disqualify attorneys representing multiple witnesses, unless it has "concrete evidence"

²⁸ *Id.* at 5.

²⁹ See, e.g., 10 C.F.R. § 63.11 (deliberately submitting to NRC "inaccurate" or "incomplete" information on Yucca Mountain is misconduct suitable for enforcement action); 10 C.F.R. § 63.73 (requiring DOE to report Yucca Mountain "deficiencies" to NRC); 10 C.F.R. § 63.172 (making "willful" violations of sections 63.11 and 63.73, among others, subject to criminal penalties under section 223 of the Atomic Energy Act, 42 U.S.C. § 2273). See also 18 U.S.C. § 2001 (making "material false statements" to the government subject to criminal penalties).

³⁰ *United States v. Postal Serv.*, 534 U.S. 1, 10 (2001).

³¹ See, e.g., *Public Serv. Co. of New Hampshire*, LBP-89-04, 29 NRC 62, 73 (1989).

that the attorney will “obstruct and impede” the investigation.³² While this standard does not require proof of wrongdoing, it requires more than “mere concern or speculation.”³³ Nevada’s motion in this case presents nothing more than this.

If a Yucca Mountain license application is tendered, it will be the NRC’s responsibility to review the application to assure that all safety and environmental requirements are met. DOE will be responsible for the accuracy and completeness of that application throughout the licensing process.³⁴ As we indicated above, we could (among other remedies) disqualify DOE’s (or any other party’s) counsel from participating in an NRC proceeding upon a concrete showing that a conflict of interest or other ethics concern would obstruct our obtaining a full range of necessary safety or environmental information, or would otherwise threaten the integrity of our regulatory process. Nevada’s motion, however, makes no such showing.³⁵

³² See *Professional Reactor Operator Soc. v. NRC*, 939 F.2d 1047,1051-52 (D.C. Cir. 1991). NRC’s regulations on investigations reflect the D.C. Circuit’s ruling. See 10 C.F.R. § 19.18.

³³ See Final Rule, Exclusion of Attorneys From Interviews Under Subpoena, 57 Fed. Reg. 61,785, 61,782-83 (Dec. 29, 1992).

³⁴ See 10 C.F.R. § 63.10.

³⁵ Because we find insufficient basis for Nevada’s loss of “integrity” claim, we need not reach DOE’s arguments that Nevada does not have standing to seek the NRC to disqualify DOE’s choice of counsel, and that Nevada’s motion is untimely. See DOE’s Answer at 3 n.4, 5-7.

