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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEVADA, CLARK)
COUNTY, NEVADA, and CITY OF)
LAS VEGAS, NEVADA)

Petitioners,)

v.)

Case No. 02-1116

UNITED STATES NUCLEAR)
REGULATORY COMMISSON)

Respondent.)

SUGGESTION REGARDING ORDER IN WHICH CASES SHOULD BE ARGUED

Petitioners, the State of Nevada, Clark County, Nevada, and the City of Las Vegas, Nevada (collectively, "Petitioners") hereby respectfully submit this suggestion regarding the order in which the three groups of pending cases that pertain to the federal government's Yucca Mountain project should be argued. For purposes of this suggestion, Petitioners will refer to these three sets of cases as the "Recommendations Case," the "EPA Case," and the "NRC Case," respectively. For the reasons discussed below, Petitioners believe that oral argument would be of the most assistance to the Court if the Recommendations Case were argued first, followed by the EPA Case and the NRC Case. Parallel suggestions have been filed in both the Recommendations Case and the EPA Case.

- (1) The Recommendations Case is a series of consolidated cases, by which the Petitioners seek review of (a) final regulations issued by the Department of Energy ("DOE") that establish guidelines governing the suitability of Yucca Mountain as a potential site for a repository; (b) the Secretary of Energy's decision, based upon DOE's application of its guidelines, to recommend the

Yucca Mountain site to the President; (c) the President's decision, based upon the Secretary's site recommendation, to designate Yucca Mountain for development as a repository; and (d) DOE's final environmental impact statement framing its final site recommendation to the President on the Yucca Mountain project, which the Nuclear Waste Policy Act of 1982 ("NWPA") required DOE to prepare and consider pursuant to the requirements of the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.* ("NEPA"). The petitions in the Recommendations Case also challenge DOE's failure to take certain actions required by the NWPA. *Nevada v. DOE*, No. 01-1516 (consolidated with Nos. 02-1036, 02-1077, 02-1179, and 02-1196). The Petitioners in the Recommendations Case contend that DOE's and the President's various actions, decisions, and failures to act violate applicable federal law, including the NWPA and NEPA.

(2) The EPA case is also a series of consolidated cases, all of which seek review of final regulations issued by the Environmental Protection Agency ("EPA") that establish the final radiation standards for the Yucca Mountain repository. *State of Nevada v. United States*, No. 01-1425; *Natural Resources Defense Council, et al. v. Whitman*, No. 01-1426; and *Nuclear Energy Institute, Inc. v. EPA*, Nos. 01-1258, 01-1268, and 01-1295. In two of these consolidated cases (Nos. 01-1425 and 01-1426), the State of Nevada and the Natural Resources Defense Council and its fellow environmental organization petitioners challenge the EPA's regulations as facially invalid and fundamentally inconsistent with federal laws governing public health and safety, including the NWPA, the Energy Policy Act of 1992, and the Safe Drinking Water Act.

(3) Finally, in the present NRC Case, Petitioners seek review of final regulations issued by the U.S. Nuclear Regulatory Commission ("NRC") that would govern the licensing of a repository at Yucca Mountain. *Nevada v. NRC*, No. 02-1116. Petitioners in the NRC Case contend, among other things, that the NRC's licensing regulations violate applicable provisions of the NWPA and the Atomic Energy Act.

Because certain of the legal issues raised in these three sets of cases by necessity interrelate with each other, and arise from the same factual, statutory, and regulatory background, Petitioners suggested that the Court should consider the cases "in tandem." By order dated November 7, 2002, the Court adopted Petitioners' suggestion in part, and directed the Clerk to calendar the cases "for oral argument on the same day or the same week, and before the same panel, in September 2003." As of the date of this filing, the cases have not yet been calendared for oral argument.

Neither Petitioners' suggestion for in tandem consideration nor this Court's November 7 Order addressed the issue of the order in which the three sets of cases should be argued. In light of the Court's decision to grant in tandem consideration, Petitioners respectfully suggest that the Court first hear oral argument in the Recommendations Case, to be followed by oral argument in the EPA Case and the NRC Case, respectively.

As discussed more fully in Petitioners' submissions in connection with their suggestion for in tandem consideration, all three sets of cases raise the issue of whether the NWPA requires that disposal of nuclear waste at Yucca Mountain be accomplished primarily through the geologic features of the Yucca Mountain site itself, rather than through so-called "engineered barriers." While the briefs in all three cases will therefore discuss this "geologic isolation" issue, this

issue is the central legal issue in the Recommendations Case and will be most fully developed in the briefs filed in that case. For that reason, as a logical matter it makes sense for this fundamental threshold legal question to be developed first through the oral argument in the Recommendations Case.

Moreover, allowing the Recommendations Case, which primarily involves decisions or actions of DOE, to be argued first is more consistent with the structure of the NWPA and the legal regime for the selection and licensing of a repository created by that statute. In particular, the threshold question of whether the Yucca site should be developed as a repository is entrusted by the NWPA to DOE. Neither NRC nor EPA has any role in that decision. Rather, the work of those agencies only becomes relevant once the repository project reaches the next stage, *i.e.*, licensing. For this reason as well, it makes sense for the Court to hear oral argument pertaining to the lawfulness of DOE's decisions and actions before it hears oral argument concerning the lawfulness of EPA's and NRC's regulations.

Furthermore, as Petitioners' December 2, 2002 brief in the Recommendations Case makes clear, DOE has played a longstanding and significant role in the formulation of federal policy regarding nuclear waste disposal in general, and in the enactment and implementation of the NWPA in particular. As the December 2 brief also makes clear, DOE also played a major role in the adoption of the EPA and NRC rules which are the subject of the EPA Case and the NRC Case, respectively. A proper understanding of the context in which all of the agency decisions and actions at issue in these cases took place therefore requires a thorough understanding of DOE's historical role, which can best be developed through the argument in the Recommendations Case.

As between the EPA Case and the NRC Case, it makes sense to hold argument in the

EPA Case first because the NRC rule at issue in the NRC Case is premised, at least in part, on the EPA rule at issue in the EPA Case. In particular, the Energy Policy Act of 1992 directed NRC to modify its rules to “be consistent with” the EPA’s rule. *See* 42 U.S.C. § 10101 note. Because, in this respect at least, questions regarding the lawfulness of the NRC rule may relate to matters involving the EPA rule, it makes sense to argue the EPA Case before the NRC Case.

For these reasons, Petitioners respectfully suggest that the Court calendar these cases for argument in the following order: (1) the Recommendations Case; (2) the EPA Case; and (3) the NRC Case.¹

¹ Petitioners further contemplate that, as briefing in these cases progresses and the argument date(s) approach, it would make sense, should the Court so desire, for the parties to submit proposals regarding the amount of time that should be allocated for oral argument in all three cases.

Respectfully submitted,

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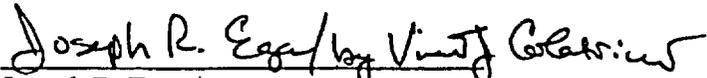
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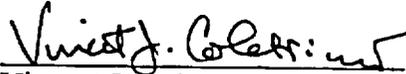
DATED: December 10, 2002

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served this
10th day of December, 2002 by facsimile and by first class mail, postage prepaid on:

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