

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

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| STATE OF NEVADA, et al., |) | |
| |) | |
| Petitioners, |) | |
| |) | |
| v. |) | No. 02-1116 |
| |) | |
| UNITED STATES NUCLEAR REGULATORY COMMISSION, et al., |) | |
| |) | |
| Respondents, |) | |
| |) | |
| NUCLEAR ENERGY INSTITUTE, INC. |) | |
| |) | |
| Intervenor. |) | |
| |) | |

**RESPONSE OF INTERVENOR NUCLEAR ENERGY INSTITUTE, INC.
TO PETITIONERS' "SUGGESTION REGARDING ORDER
IN WHICH CASES SHOULD BE ARGUED"**

I. INTRODUCTION

Intervenor Nuclear Energy Institute, Inc. ("NEI") hereby responds to Petitioners' "Suggestion Regarding Order in Which Cases Should Be Argued" ("Suggestion"), dated December 10, 2002. Petitioners' Suggestion seeks to have three separate sets of cases – denominated as the "Recommendations Case" (No. 01-1516); the "EPA Case" (No. 01-1258); and the "NRC Case" (the instant case) – argued in that order. As discussed below, however, the

Suggestion is premature, illogical, and likely to result in confusion. Accordingly, it should be rejected.

II. ANALYSIS

At the outset, Petitioners' Suggestion is highly premature. Although the three sets of cases are to be heard *seriatim* "on the same day or the same week, and before the same panel, in September 2003,"¹ a merits panel has not yet been designated. Clearly, a decision on the order of oral argument should await establishment of the panel that will be hearing the cases and decided by it.

More substantively, however, hearing the cases in the order presented in the Suggestion would be illogical and, thus, likely to create confusion. The pending cases involve individual and discrete actions by: (a) three independent federal agencies; (b) the Secretary of Energy ("Secretary"); and (c) the President of the United States. These actions were taken in a methodical sequence, consistent with specific statutory prescriptions. The interrelationship and significance of each action is best understood if the cases are heard in an order consistent with the legislated framework.

In brief, the Energy Policy Act of 1992 ("EnPA")² first directs EPA to establish radiological standards for a radioactive waste disposal repository at Yucca Mountain, based on its rulemaking authority grounded in the Atomic Energy Act.³ The EnPA next requires the NRC to modify its regulations pertaining to radioactive waste disposal, as necessary, to be consistent with the EPA's Yucca Mountain radiological standards.⁴ Under the Nuclear Waste Policy Act

¹ See Order filed November 7, 2002.

² 42 U.S.C §§ 797c *et seq.*

³ 42 U.S.C. §§ 2011 *et seq.*

⁴ As with the EPA, the NRC's relevant rulemaking authority is grounded in the Atomic Energy Act.

("NWPA")⁵ DOE is then charged with establishing criteria for determining the suitability of Yucca Mountain as the location of a geologic repository. The NWPA – invoking the National Environmental Policy Act ⁶ – also provides for the preparation of an Environmental Impact Statement addressing the establishment of a repository at Yucca Mountain; as well as evaluation of the suitability of Yucca Mountain for a repository by the Secretary and recommendation of the site to the President, and a final determination concerning Yucca Mountain by the President in the form of a recommendation to Congress. These actions, in fact, all took place in the order described, one-by-one, each building upon the other.⁷ A clear understanding of the individual steps and their interrelationship will best be served through a consideration of each step in the order in which it occurred. Specifically, the EPA Case should be heard first; followed by the NRC Case; and concluding with the Recommendations Case.

Petitioners maintain that arguing the Recommendations Case 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," and that "[n]either NRC nor EPA has any role in . . . [the] decision" as to whether or not Yucca Mountain be developed as a repository.⁸ As discussed above, however, the actions under consideration in the pending cases do not involve just the NWPA, but other statutes as well. The overall process is best considered chronologically, within the context of the various applicable statutory prescriptions. Moreover, the NRC and EPA clearly *do* have a role in the Yucca Mountain site selection process. As discussed above,

⁵ 42 U.S.C. §§ 10101 *et seq.*

⁶ 42 U.S.C. §§ 4321 *et seq.*

⁷ EPA's standards (40 C.F.R. Part 197) were issued on June 13, 2001 (66 Fed. Reg. 32,074); NRC's regulations (10 C.F.R. Part 63) on November 2, 2001 (66 Fed. Reg. 55,732); and DOE's criteria (10 C.F.R. Part 963) on November 14, 2001 (66 Fed. Reg. 57,298). Subsequently, DOE issued its Environmental Impact Statement for Yucca Mountain, dated February 2002; the Secretary recommended the site to the President on February 14, 2002; and the President approved the site and recommended it to Congress on February 15, 2002.

⁸ Suggestion, p 4.

regulations of those two agencies were basic to the development of DOE's criteria – as set forth in 10 C.F.R. Part 963 – and the subsequent site-selection recommendations.

Petitioners further state: “As the December 2 brief [in Petitioners’ Recommendations Case] 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.”⁹ Regardless of any allegations in a brief of Petitioners to the contrary, however, it is incontrovertible that the promulgations of EPA’s and NRC’s regulations were separate, individual actions of independent federal agencies, wholly apart from any authority of DOE. In fact, as discussed above, it was (and continues to be) DOE that was subject to the statutorily prescribed regulations of EPA and the NRC, not vice versa.

III. CONCLUSION

For the foregoing reasons, the Court should reject Petitioners’ Suggestion.

Respectfully submitted,



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⁹ *Id.*

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No. 02-1116

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of the foregoing "Response of Intervenor Nuclear Energy Institute, Inc. to 'Suggestion Regarding Order in Which Cases Should Be Argued'" upon those listed on the attached service list by U.S. mail, first class, postage prepaid.



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