July 8, 2003

The Honorable Brian Sandoval
Attorney General
State of Nevada
100 North Carson Street
Carson City, Nevada 89701

Dear Attorney General Sandoval:

On April 3, 2003, on behalf of the State of Nevada, you submitted a "Petition by Nevada to Establish Procedures for Fair and Credible Yucca Mountain Licensing Hearing." Enclosed is the Commission's response to that Petition.

The State's Petition proposed that outside experts preside over the hearing, that the NRC staff not be a party in the hearing, that the NRC bar any of its former employees from representing the Department of Energy in the licensing proceeding, and that the NRC's rules on ex parte communications and separation of functions be in effect now.

For the reasons given in the enclosed response, the Commission is denying the Petition. The NRC is fully committed to a fair adjudication and development of a sound record for decision. The Commission has concluded that its current procedures will ensure these ends.

Sincerely,

/RA/

Edward McGaffigan, Jr.
Acting Chairman

Enclosure: Commission's Response to Petition

U.S. NUCLEAR REGULATORY COMMISSION RESPONSE TO THE STATE OF NEVADA'S PETITION ON PROCEDURES FOR THE YUCCA MOUNTAIN LICENSING HEARING

Introduction

On April 3, 2003, the State of Nevada filed a "Petition ... to Establish a Fair and Credible Yucca Mountain Licensing Hearing." In the Petition, Nevada asks the agency to appoint outside experts to preside over the hearing, bar the NRC staff from the hearing, bar former NRC employees who have participated in Yucca Mountain matters from representing DOE in the hearing, and prohibit the NRC Commissioners now, before DOE has filed an application for the Yucca Mountain repository, from discussing Yucca Mountain issues with potential parties in the hearing, or with the NRC staff.

The Commission has studied Nevada's reasonings, and has reviewed existing law and practice. The Commission recognizes that the Yucca Mountain licensing matter will be a complex proceeding, potentially involving many parties and numerous novel technical, policy, and legal issues of national importance. The procedures it uses for this proceeding must result in the conduct of a fair and impartial proceeding that produces a comprehensive record upon which the agency can base its adjudicatory findings. Over the course of almost thirty years, the NRC has conducted many proceedings on novel and complex issues, the resolutions of which have had far-reaching implications. The procedures used in these complex proceedings have served the Commission well and have produced fair and impartial decisions. Nevada does not give us sufficient reason to so substantially deviate from past practice. We now take up Nevada's proposals one by one.

The Presiding Officer

As Nevada notes, "NRC contested hearings in complex licensing matters (for example, involving nuclear power reactors) have always been conducted by three-member Atomic Safety and Licensing Boards drawn from NRC's Atomic Safety and Licensing Board Panel." Petition (Pet.) at 8. Such multi-member boards are authorized by Section 191 of the Atomic Energy Act. Nonetheless, Nevada asserts that "the magnitude of this case transcends the usual NRC proceeding, both in terms of the expert knowledge and the independence that will be required." Pet. at 10. Nevada therefore believes that the NRC should go outside the agency to select board members who are independent of the NRC and recognized experts in their fields. Nevada notes that the NRC established a board of outside experts to conduct the legislative-style hearing in the proceeding on the Generic Environmental Impact Statement on Mixed Oxide Fuel (GESMO). Pet. at 11.

We take up first the issue of independence. We do not share Nevada's view that only persons who have no prior link to the NRC are sufficiently independent to preside over the Yucca Mountain hearing. Members of the ASLBP are no less independent than the Administrative Law Judges who preside in proceedings subject to the Administrative Procedure Act (APA). In both NRC and APA hearings, the presiding officers are agency employees and are not subject to supervision or evaluation by an agency employee with a litigating or investigating function. Moreover, NRC judges are experienced in the adjudication of technical issues, knowledgeable about NRC regulations, adjudicatory decisions and rules of practice, well-compensated, hired by the Commission but not evaluated by it, and not removable except for cause. Indeed, some of the Panel's part-time members have in fact been persons whose

permanent links were to other, usually non-Federal, institutions. The APA certainly does not imagine that for every proceeding of significance above a certain threshold, the agency will not use anyone who has ever been an employee of the agency. Thus, the only significant difference between an Administrative Law Judge and an NRC panel of judges is that an NRC panel typically will have at least two judges who have "such technical or other qualifications as the Commission deems appropriate." Atomic Energy Act, § 191, 42 U.S.C. 2241. The whole point of section 191 is to assure that the NRC will have available both legal *and* technical expertise in its judges. And this should be wholly consistent with Nevada's avowed concern that the panel that presides over the Yucca Mountain proceeding have the necessary expertise.

Directly on the issue of expertise, the GESMO proceeding offers little precedent for using outside experts to preside over the Yucca Mountain proceeding. The GESMO proceeding was a legislative-style hearing the purpose of which was to develop the basis for a rulemaking. The NRC formed a panel of outside experts to conduct the hearing mainly because the potential use of mixed oxide fuel raised some issues on which the NRC at that time had insufficient expertise, issues such as national security and nonproliferation of nuclear weapons. *See In the Matter of Nuclear Regulatory Commission*, CLI-76-23, 4 NRC 494, 509-10 (1976). Accordingly, among the panel members were a former FBI Special Agent and two experts in arms control. Indeed, the Commission contrasted its lack of expertise on some GESMO-related issues with its primary expertise in waste management. *Id.* at 510.

In short, we deny Nevada's request that we appoint "outside experts" to preside in any hearing on an application to license a high-level radioactive waste repository at Yucca Mountain. Existing practices and procedures assure the necessary independence and qualifications of those who may sit as administrative judges in the Yucca Mountain proceeding.

The Role of the NRC Staff

Nevada argues that the NRC staff should be a "neutral evaluator" rather than a "party advocate" in the Yucca Mountain hearing. Nevada sees several advantages in this for both it and the NRC. First, believing that DOE should not be allowed to build and operate a repository unless it can argue its case unaided, and presuming that the NRC staff will support DOE on every issue in the hearing, Nevada wants DOE to be required to argue its case without any "assistance" from the NRC staff on any issue. Pet. at 15. Second, Nevada believes that, unless the staff is not a party, the staff will "cease[ ] to keep an open mind on the issues." Pet. at 16. Third, Nevada points out that under its proposal the Commission would have unencumbered access to its staff, because there would be no need to observe the separation of functions rule, which requires that, when the staff is a party, the Commission must treat it as it would any other party and not discuss litigated issues with it apart from the other parties. The agency would, Nevada suggests, save the resources that the staff would otherwise spend on the hearing, or that the Commission would spend on setting up a "separated" staff that could advise it on the positions of the parties, including the staff. Pet. at 17.

The alternative, according to Nevada, is a situation in which DOE and the NRC, using the "full resources of the Federal government and the legions of DOE and NRC consultants," would "double-team" Nevada, "creat[ing] a vast and fundamentally unfair disparity in the resources of the opposing parties." Pet. at 15. Nevada also argues, more by implication than openly, that the staff's participation in the hearing could be evidence of a lack of an arms-length

relationship between the regulator and the regulated, and thus could be grounds for judicial reversal of the Commission's licensing decision. Pet. at 16.

The NRC staff has participated in licensing proceedings before the agency since the inception of its regulatory program. The Commission did consider the role of the NRC staff in formal hearings at some length in the 1980s, because of concern that the staff's advocacy of a particular position in a hearing could have the effect of lending support to the case in favor of the license applicant and, therefore, could create the impression that the staff was functioning as an advocate for the applicant. *See* 48 Fed. Reg. 50550 (November 2, 1983) (advanced notice of proposed rulemaking (ANPR)). However, the Commission decided at that time to retain the staff's status as a party in formal hearings. *See* 51 Fed. Reg. 36811 (October 16, 1986) (withdrawal of ANPR). More recently, Robert Loux, Executive Director of Nevada's Agency for Nuclear Projects, made the same proposal Nevada now makes about the staff. *See* letter from Director Robert Loux to NRC Chairman Richard Meserve, January 17, 2001. As Nevada notes in its Petition, the Commission declined to adopt Director Loux's proposal. Pet. at 5, n. 2. Having reconsidered the arguments in the light of Nevada's proposal, the Commission declines to adopt the proposal now. The core of the Commission's reasons is set forth in Chairman Meserve's February 20, 2001 response to Director Loux:

> .... As envisioned in [the] procedures [in 10 CFR Part 2, Subparts J and G] and in the Commission's regulations for the licensing of a repository, the NRC staff, with the assistance of the Center for Nuclear Waste Regulatory Analyses (CNWRA), will conduct an independent technical review of DOE's license application and Safety Analysis Report if and when they are received and will prepare a Safety Evaluation Report (SER) documenting the review and conclusions. Then, the NRC staff, as a party in the hearing, will independently present and support its technical analyses and SER insofar as it bears on the issues placed in controversy in a potential hearing and will take and support a position on those issues based on the staff's and CNWRA's expert analyses. The staff's analyses, positions, and regulatory conclusions will be wholly independent of those of DOE. The Commission believes that the staff's participation as a party is useful to the Atomic Safety and Licensing Board, the other parties, and the public as it will provide an independent regulatory perspective for the record. Both the Commission and the NRC staff are fully aware of and committed to maintaining objectivity in regulating the activities of DOE or any other regulated entity. That objectivity will not be undercut -- indeed, it will be enhanced -- by the presentation by the staff of its independent views as a party in a potential hearing.

Nothing Nevada says in its Petition causes the Commission to retreat from this view. One measure of the extraordinary nature of Nevada's proposal is that, in no case of a formal, trial-type, licensing hearing at the NRC has the staff not participated. Indeed, Nevada acknowledges that we might not be able to bar the staff without changing our rules. Pet. at 4, n. 1. Moreover, Nevada's suggestion that the staff's participation as a party would somehow be grounds for judicial reversal is without foundation. No case has been brought to our attention in which a court has even hinted that the staff's presence in the hearing, or its agreement with the licensee that the license should be granted, would be grounds for reversal. Moreover, there is nothing novel about the staff's participation in a hearing on a Federal license. The staff has

participated in several license hearings in which the Tennessee Valley Authority, a Federal corporation, was the applicant.

The reason for the staff's traditional role as a party in formal proceedings is precisely that element so emphasized in the Chairman's response to Director Loux, and unacknowledged by Nevada's Petition, namely, that the staff is independent and has an extraordinary knowledge of the application and the issues surrounding it. It is difficult to imagine not putting that independence and knowledge to use in such an important hearing, where decisions need to be rooted in a comprehensive record that contains the testimony of the most knowledgeable experts. Even in the agency's informal hearings on certain matters, where the rules provide that the staff may choose not to participate, the presiding officer may direct the staff to participate, if "the resolution of any issue in the proceeding would be aided materially by the staff's participation ... as a party ...." 10 C.F.R. 2.1213. Presiding officers frequently require that the staff participate.

It has often been recognized that whatever appearance of staff-applicant teamwork there may be is the result of a long and very public process, the core of which is the staff's diligent and extended inquiry into the application, an inquiry that requires many meetings with the applicant, meetings that are routinely announced to the public, so that interested persons can attend and participate. In 1986, the Commission, addressing the appearance issue, said,

> .... [The appearance] is attributable not to bias on the staff's part but to the nature of the staff's extensive prehearing review of the application. The applicant often makes changes in the application in order to secure the staff's approval, so that by the time the hearing commences, many of the staff's concerns have been accommodated. Intervenors might otherwise have to argue for such changes in the application during the hearing.

51 Fed. Reg. 36811. *See also* former Commissioner Gilinsky's similar views early in the GESMO proceeding, CLI-76-23, 4 NRC 494, 517-18 ("I find nothing objectionable in the advocacy role our staff thus, and naturally, assumes with regard to safety matters.")

Moreover, the staff's review of the application -- not any hearing on the application -- is the key element in the regulatory process for ensuring that the disposal of high-level radioactive waste will be safe. But in Nevada's talk about the "full resources of the Federal government" (Pet. at 15), there is a suggestion that it was somehow inappropriate for the NRC to work so hard to understand Yucca Mountain, and that the public might have been better served if the Federal Government had simply provided the forum in which DOE and Nevada could contend with each other before a judge, without the interference of expert views apart from those brought forward by DOE or Nevada. In Nevada's view, the litigation on the application resembles a matter of private law, having too little a public dimension to justify an active regulatory presence in the hearing. The NRC does not view its mission so narrowly. For these reasons, the Commission continues to believe that it is essential that the NRC staff be a party in any hearing on DOE's Yucca Mountain application.

Post-Employment Restrictions

Nevada's third request is that the NRC, as a matter of policy, bar any former NRC employee from representing DOE in the licensing proceeding, if that employee has "personally

and substantially" participated in Yucca Mountain matters while an NRC employee. Nevada makes this proposal because it believes that a Federal statute that imposes post-employment restrictions on former Federal employees (18 U.S.C. § 207), and a recent Federal Office of Government Ethics (OGE) memorandum that interprets that statute, "give DOE an artificial and grossly unfair advantage in dealing with and testifying before NRC." Pet. at 22. To illustrate its point, Nevada says that DOE may hire a certain named former NRC officer to represent DOE, even though he worked on Yucca Mountain issues while he was an NRC employee, but that Nevada cannot hire a certain named former DOE officer to represent Nevada, because he worked on Yucca Mountain issues while he was at DOE. Pet. at 21. Nevada also attributes the OGE memorandum to "extensive joint consultation among NRC, DOE and OGE," after which, "OGE dramatically reversed its position." Pet. at 20.

The NRC cannot grant this part of Nevada's Petition. Nevada, in effect, is asking the NRC to carve out for the State a special exemption from the long-standing statute of Government-wide application, an exemption, moreover, the implementation of which would require that the NRC deny some former NRC employees a permission granted them by that statute. As reasons for such an extraordinary action, Nevada offers only misinterpretations of the statute, an overstated claim of disadvantage under the statute, and an implied suggestion of unfair dealing.

The statutory requirement Nevada complains of says, in pertinent part,

> Any person who is an officer or employee ... of the executive branch of the United States ... , and who, after the termination of his or her service or employment with the United States ... , knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States ..., on behalf of any other person (except the United States ...) in connection with a *particular matter*-- (A) in which the United States ... is a party or has a direct and substantial interest, (B) in which the person participated personally and substantially as such officer or employee, and (C) which *involved a specific party or specific parties* at the time of such participation,

is subject to criminal and civil prosecution. 18 U.S.C. § 207(a); 18 U.S.C. § 216 (emphasis added). (There are certain other restrictions in section 207, but this is the one on which Nevada focuses.)

Nevada rightly points out that, under this provision, a former NRC employee who has personally and substantially participated in the NRC's prelicensing reviews of Yucca Mountain matters may represent DOE in the NRC's licensing proceeding but may not represent Nevada in the same proceeding. The impact of this difference is made worse, in Nevada's view, by OGE's interpretation of the statute as applied to the Yucca Mountain proceeding. In a July 31, 2002 memorandum to Designated Agency Ethics Officials at DOE and the NRC, the Director of OGE declared that the "particular matter involving specific parties" in the Yucca Mountain proceeding began when Congress, in 1987, narrowed the focus of site characterization to Yucca Mountain. Memorandum at 7. It is this interpretation -- which says that the "particular matter" began more than 15 years ago -- that bars the former DOE or NRC employees that Nevada names from representing Nevada in the proceeding.

According to Nevada, the statute and OGE's interpretation together give DOE a "grossly unfair advantage." Though Nevada hints that OGE may have been led to its interpretation by DOE and the NRC, Nevada does not ask that the interpretation be revised. Instead, Nevada asks us to close a "loophole" in the statute. According to Nevada, when section 207 permits a former Federal employee to represent the Government back before the Government, section 207 does not contemplate a situation in which one part of the Federal Government could be regulating another part. Pet. at 21-22. Nevada wants the NRC to remove this "loophole" by barring any of its former employees who have personally and substantially participated in the Yucca Mountain proceeding from later representing DOE in the same proceeding. In other words, if Nevada is not allowed to hire former Federal experts to represent it, then neither should DOE be allowed to hire former NRC employees to represent DOE.

Before turning to this alleged "loophole" and Nevada's proposal for closing it, we wish to set the record straight concerning the circumstances surrounding OGE's July 31, 2002 memorandum, for even if Nevada does not propose that the NRC take any action with respect to the memorandum, the memorandum clearly was a significant factor prompting Nevada to file its Petition, and Nevada's insinuations about the origins of the memorandum should not go unaddressed.

Following the February 2002 recommendation of the Secretary of Energy to the President on the Yucca Mountain site, after DOE had raised post-employment issues with OGE, OGE initiated discussions with DOE and the NRC to gain a better understanding of how these agencies were applying the post-employment restrictions to former Federal employees who had been involved in Yucca Mountain matters. By initiating these discussions, OGE was acting as it is required to do. OGE is a separate agency whose Director serves a fixed five-year term and whose reputation for fairness is impeccable. The agency is required by the Ethics in Government Act of 1978 to provide overall direction to Executive Branch policies on preventing conflicts of interest on the part of the officers and employees of any executive agency. Ethics in Government Act of 1978, 5 U.S.C. App. § 402(a). OGE's direction is aimed at ensuring a uniform interpretation and application of Government-wide Federal ethics requirements. To this end, and in conjunction with the Attorney General and the Office of Personnel Management, OGE develops rules and regulations on ethics and on identifying and resolving conflicts of interest. *Id.* § 402(b). In particular, an Executive Order provides that OGE shall be responsible for promulgating, with the concurrence of the Attorney General, regulations interpreting the provisions of section 207, the post-employment statute. Executive Order 12674, "Principles of Ethical Conduct for Government Officers and Employees" (April 12, 1989), as modified by E.O. 12731 (October 17, 1990). *See* 5 C.F.R. Part 2637 (regulations implementing 18 U.S.C. § 207). OGE has also established a formal advisory opinion service. 5 C.F.R. § 2638.102(a).

In its discussions with DOE and the NRC, OGE found that the two agencies had provided different guidance to their former employees. OGE memorandum at 8 and following. Consistent with its responsibilities to provide uniform Government-wide guidance on significant ethics matters, OGE concluded that the two agencies should now treat the Yucca Mountain proceeding as one particular matter involving specific parties, and that the proceeding began in December 1987, when Congress focused on Yucca Mountain alone. At the request of the two agencies, OGE's Director set down OGE's views in Opinion Letter 02 x 5, issued on July 31, 2002, so that there would be an authoritative written interpretation that could be widely disseminated.

The NRC believes that the guidance issued by OGE represents a sound interpretation of ethics requirements. Moreover, the NRC is required by the Ethics in Government Act and by Executive Order of the President to follow OGE's interpretations of the post-employment and other conflict of interest laws. Nevada, by not asking us to ignore OGE's interpretation of "particular matter involving specific parties," implicitly recognizes our obligation here.

However, Nevada's proposal that we instead close the statutory "loophole" is neither legally sound nor practically necessary. Taking up the legal question first, Nevada does not fully acknowledge the seriousness of what it is asking the NRC to do. Nevada would have us think that it was just asking us to plug a "loophole" to remove an unintended unfairness. Nevada moreover thinks that we could plug that "loophole" in some meaningful way. However, these propositions are highly doubtful.

To begin with, there is no "loophole" in the statute. That is, there is no unintended way around the statutory prohibition. Instead of a "loophole," there is an "exception," clearly stated in the text of 18 U.S.C. § 207 and therefore clearly intended by the Congress. The exception is, moreover, fully recognized by OGE. *See* OGE memorandum at 8. The exception is therefore not to be set aside by an agency lightly, if at all. Moreover, it is simply not true that the statute does not contemplate a situation in which one part of the Executive Branch has some authority over another part. Otherwise, the statute would not speak of a former employee's representing the United States back before a "department, agency, court, or court-martial of the United States."

While the statute puts Nevada in a different position than a Federal department, the distinction was not tailor-made for Nevada. To the contrary, *all* persons other than the United States are similarly situated, and have long been so, well before Congress focused the national repository program on Yucca Mountain.

Moreover, it is not clear how this special exception for Nevada would be enforced. Section 207 authorizes criminal and civil prosecution, but of course the NRC could not ask the Department of Justice to prosecute former NRC employees for acts that are not violations of section 207. Not saying precisely what mode of enforcement it wants the agency to use, Nevada points to our general authority to control our proceedings. However, it is no small step for us to use our Atomic Energy Act authority to deny our former employees an option they have been given by a statute that applies to the whole of the Executive Branch, and to deny them this option for the benefit of Nevada alone.

Thus, Nevada's proposal is legally unconvincing. Moreover, it is unnecessary in practical terms. Nevada asks for special treatment because it believes that DOE has a "grossly unfair" advantage under section 207. This is simply not true. There are many reasons why Nevada should be able to work within the constraints of that statute.

First, the Office of Government Ethics (OGE) has made clear that former NRC employees who worked on Yucca Mountain issues may still be permitted to represent Nevada under the exceptions in section 207 for certain kinds of testimony under oath or statements under penalty of perjury, or for certain scientific and technological communications. *See* 18 U.S.C. § 207(a)(1), (a)(2), and (j); OGE memorandum at 8.

Second, the prohibition in section 207 is against only "representation" of, not employment by, the non-Federal party. Neither 207 nor OGE's interpretation of "particular matter" bars a single former NRC employee from working for the State of Nevada on Yucca Mountain matters, provided the individual works in the "back room" and does not represent Nevada before the Federal Government on Yucca Mountain matters. Thus, any former NRC employee may work for Nevada, whatever that employee's involvement in Yucca Mountain matters may have been at the NRC, and the fact of that employment for Nevada can be public knowledge. Thus, Nevada is denied neither the expertise of former NRC employees nor a "representational" advantage from the public knowledge that a former NRC employee who had worked on Yucca Mountain issues for the NRC is now working for the State. Contrast Nevada's own law, which restricts for a period of time a former Nevada employee's even counseling a private party. Nevada Revised Statutes, Chapter 28, Section 491 (NRS 281.491).

Third, there is nothing in 18 U.S.C. § 207 or other Federal ethics statutes or regulations that bars Nevada from hiring former Federal contractor employees who have worked on Yucca Mountain matters from representing Nevada before the Federal Government on Yucca Mountain matters. It is our understanding that these contracts do not impose section 207-type restrictions on former contractor employees.

Fourth and last, whatever residual disadvantage Nevada may face would appear to have been more than compensated for by Nevada's success in hiring to represent it former senior NRC employees who have been judged not to have been personally and substantially involved in Yucca Mountain issues while at the NRC.

In sum, there are not sufficient reasons for the NRC to deviate from long-standing, Government-wide rules in order to provide a special exception for Nevada, an exception that would deny some former NRC employees opportunities that they are now permitted under Federal statute.

Ex Parte Communications and Separation of Functions

Finally, Nevada argues that the NRC's ex parte and "separations of functions" rules should apply now to the DOE licensing proceeding, even though DOE's application will not be filed for more than a year.

The ex parte rule, with certain exceptions, bars any "interested person outside the agency" from any non-public communications with an NRC "adjudicatory employee," if the communication is "relevant to the merits" of the adjudication. *See* 10 C.F.R. 2.780(a). NRC Commissioners, judges, and other employees who help draft or approve adjudicatory decisions are "adjudicatory employees." *See* 10 C.F.R. 2.4. The "separation of functions" rule applies a similar but somewhat more precise stricture to communications between the staff and NRC adjudicatory employees, barring communications on "any disputed issue" in the hearing. *See* 10 C.F.R. 2.781(a).

Under our rules, these bars fall in place either when a notice of hearing has been issued, or when a party to a communication "has knowledge that a notice of hearing ... will be issued ...." *See* 10 C.F.R. 2.780(e) and 2.781(d). Ordinarily the "notice of hearing" is the notice issued by an Atomic Safety and Licensing Board after the Board has ruled on what issues will

be considered at a hearing on a license application, for only then is it known that there will be a hearing. However, the licensing of a high-level waste repository presents a special case, for section 2.101(f)(8) of the Commission's regulations mandates a hearing on the application, for reasons of the public interest (*see* 46 Fed. Reg. 13971, 13974 (Feb. 25, 1981)), and section 114(d) of the Nuclear Waste Policy Act requires that the Commission take no more than three, in some circumstances four, years to rule on an application to construct a repository. Thus, section 2.101(f)(8) of the Commission's regulations requires that the notice of hearing be issued earlier, along with the notice that the application for the repository has been accepted for review. However, Nevada argues that because DOE has announced its intention to file an application, and is indeed now under a legal obligation to do so (Nuclear Waste Policy Act § 114(b)), the NRC and interested outside persons now "have knowledge that a notice of hearing will be issued," and so the prohibitions in the ex parte and separation of functions rules should be in effect now. Pet. at 24.

Nevada's reading of these rules, specifically the phrase "has knowledge that a notice of hearing will be issued," is neither practicable nor legally sound. To begin with, certainly neither rule says that its bar falls in place when a party expresses an intent to file an application, or when a party is under a legal obligation to file an application. Neither intent nor obligation add up to performance. If obligation did, DOE would already have filed its application, under the schedule laid out in section 114(b) of the Nuclear Waste Policy Act. We do not yet *know* that a notice of hearing *will* be issued.

Any other reading of "has knowledge" or "will be issued" is too abstract to be supported in practice. It in effect erodes the distinction between the adjudication and other aspects of the licensing review and thus tends, without sufficient justification, to introduce to those other aspects some of the cost and other burdens entailed in adjudication. Focusing first on separation of functions -- it would be extraordinary now, well over a year in advance of the possible filing of an application, let alone the staff's "docketing" of the application (that is, the staff's declaration that the application is complete and acceptable for processing (*see* 10 C.F.R. 2.101(f)), to bar the staff from discussing with the Commissioners "any disputed issue" in the hearing. For one thing, we do not even know what the disputed issues are until contentions have been admitted into the hearing. We therefore do not, strictly speaking, know in fact which communications would be barred by the rule on separation of functions. The main point of separation of functions, and indeed of the bar on ex parte contacts, is to ensure that all parties are aware of any information any one of them presents to the presiding officer, and that parties are given an opportunity to test that information and to present rebuttal testimony. In the present inchoate circumstances -- in which there are neither named judges, nor parties who have established standing before those judges, nor contentions that those parties have persuaded the judges meet the standards for admission into the litigation -- the only way to implement the separation is simply to cut off any discussion between the staff and the Commission on *any* issue that *might* come up at a hearing.

In the case of any high-level waste repository, where, as explained above, the circumstances require that the "notice of hearing" issue sooner than is usual, the Commission is willing to abide by such a broad separation for the relatively short period of time between the notice of docketing and the time the licensing board issues the usual notice of hearing. But that is already an earlier separation than the Administrative Procedure Act would require for proceedings under its provisions on adjudications. *See* 5 U.S.C. § 554(d). Further than this the Commission cannot reasonably be expected to go. The NRC is a small agency, given only

limited resources to carry out its functions. As Nevada recognizes, the separation of functions imposes resource burdens on the agency, because it must assign separated staff to advise the Commissioners on the issues in the litigation. The agency is experienced in planning for and bearing this burden. However, it is not a burden that should be extended for the length of the long prelude to the anticipated hearing on the Yucca Mountain application. But most important, policy questions may still arise between now and the notice of hearing -- perhaps, but not exclusively, as a result of implementation of any judicial decisions that would require the NRC to make changes in its regulations or policies. The Commission and its staff should remain able to discuss those issues as they normally would, without having to worry about whether the issues are, as section 2.781(a) puts it, "associated with the resolution of any proceeding" under the rules governing the conduct of formal hearings (10 C.F.R. Part 2 Subpart G).

Thus far we have focused mainly on communications between the staff and the Commission, but something of the same arguments can be made about communications between the Commission and outside parties, but with an added dimension of indeterminacy, and an added element of enforcement. First, the indeterminancy: Not only is it not clear under Nevada's proposal just what issues could not be discussed, it is also not clear who could not discuss them. Nevada, of course, states its intention to intervene in the licensing proceeding, but we do not know that it will, nor do we know who else will. Who then would be barred from ex parte contacts with the Commission? Nevada proposes that "interested persons" would be barred, but which persons are "interested" when there is as yet no notice of hearing? Moreover, who besides the Commissioners would now be "adjudicatory employees?" NRC employees frequently change positions, and thus some employees might be called "adjudicatory" today but not when a notice of hearing is issued, and vice versa. Second, enforcement: The ex parte rule provides for enforcement against outside parties who violate the prohibition. In some circumstances, the Commission may enforce the prohibition by dismissing a claim or interest. It is difficult to imagine how such enforcement would work so long before the hearing. Again, in the case of any high-level waste repository, the Commission has agreed to apply the ex parte prohibitions during the relatively short time between the notice of docketing and the licensing board's notice of an actual hearing, but the Commission cannot reasonably be expected to apply the restrictions before the notice of docketing goes out.

Nonetheless, even though the Commission is not adopting Nevada's proposal, the Commission will continue to conduct its Yucca Mountain activities with an openness that is unsurpassed in health and safety regulation, and that makes the imposition of the ex parte and separation of functions rules unnecessary at this point. The staff, in its dealing with DOE, will continue to adhere to the NRC's policy on open meetings (NUREG/BR-0297, August 2002) and the November 1998 Agreement between DOE and NRC on the conduct of prelicensing interactions between the staffs of the two agencies.