



Department of Energy

Washington, DC 20585

March 3, 2004

Karen D. Cyr, Esq.
General Counsel
Nuclear Regulatory Commission
Rockville, MD 20852-2738

Dear Ms. Cyr:

I am writing in regard to an issue that has arisen as a result of the Nuclear Regulatory Commission's (NRC) promulgation of recent revisions to its rules of practice, 10 CFR Part 2, published in the *Federal Register* at 69 Fed. Reg. 2182 (Jan. 14, 2004), as they relate to the process to adjudicate an application for a license to receive and possess high-level waste at a geologic repository licensed pursuant to 10 CFR Part 63. (69 FR 2275).

In the final rule, the NRC revised Appendix D to specify that the schedule set out there is applicable to both an application for construction authorization and an application for a license to receive and possess high-level radioactive waste at a geologic repository. See 10 CFR 2.1026(a); 10 CFR 2 Appendix D. As you are probably aware, our published schedule for completion of the repository has long assumed that the second hearing can be completed more expeditiously than the three year process the rules now appear to contemplate.

We understand why it is important for there to be an outer boundary on the time it believes should be allocated to the second hearing. To the extent that is the purpose of the revision, we are supportive of it. But we believe it is premature at this time to conclude that three years will actually be required.

In our view, it would be preferable to finalize the process and hearing schedule (if a hearing is necessary) for the receive and possess license in light of the facts and issues presented closer to the time of the application. The formal hearing on the construction authorization will provide the Commission, the Department of Energy and interested parties with a fair and comprehensive opportunity to address the central question of whether the Department can construct and operate a geologic repository at Yucca Mountain in conformity with NRC rules and regulations protecting public health and safety. As noted in DOE comments on proposed Part 63, NRC regulations and procedures should reflect that issues closed at the construction authorization stage will not be reopened at the license to receive and possess stage absent significant new safety-related information.

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In short, the precise nature and scope of the NRC proceeding necessary to adjudicate the license application to receive and possess waste at a repository is not known at this time, and need not be decided at this time. Accordingly, at an appropriate time in the future, the Department anticipates that it may request that the NRC revisit this matter.

Sincerely,



Lee Liberman Otis
General Counsel