

May 27, 2004

Mr. Robert R. Loux, Executive Director
Agency for Nuclear Projects
Office of the Governor
State of Nevada
1761 E. College Parkway, Suite 118
Carson City, Nevada 89706

Dear Mr. Loux:

This is in response to your April 22, 2004 letter, in which you express Nevada's concern that the Commission "...is not affording the State the rights and protections that is its due in the Yucca Mountain Licensing proceeding." You further assert that "By any common sense standard we are well into a licensing proceeding..." and that the Commission "...is avoiding the requirements of the Administrative Procedure Act by pretending this isn't a licensing review...." You ask that the Commission put on the public record any notes the Commissioners have kept of their "involvement with the ongoing NRC reviews," and that if such notes have not been kept, notes be kept of future communications and be made available to the public.

The Commission believes that the factual premise of your letter is incorrect, and the legal and policy conclusions drawn from that premise are therefore unsupported. The agency is not engaged in a licensing proceeding and will not be until the Department of Energy (DOE) has submitted its application for a license for Yucca Mountain and the application has been docketed for review.

Moreover, it is a mischaracterization of the staff's pre-application consultations to claim that the staff "...is in effect already signing off on the various modules of the prospective DOE application...." The U.S. Nuclear Regulatory Commission (NRC) staff's longstanding practice, recognized in NRC regulations (see 10 C.F.R. §§ 2.10(a)(1) and 63.16(g)), has been to allow prospective applicants to confer informally with the NRC staff prior to the filing of an application. These consultations are aimed at providing applicants guidance on what constitutes a complete application that would be acceptable for docketing purposes. Such consultations are particularly important in the case of Yucca Mountain because the NRC is under a tight statutory deadline for acting on the Yucca Mountain application. The NRC has repeatedly stressed that it is imperative that DOE submit a high-quality application if Congressional expectations for an NRC decision on the application are to be met. We cannot overemphasize that the NRC staff does not make substantive regulatory decisions in its pre-application consultations. As 10 C.F.R. § 63.16(g) makes clear -- and § 60.18(i) before it -- NRC activities during preapplication reviews "are not part of a proceeding under the Atomic Energy Act of 1954 ... [and] do not constitute a commitment to issue any authorization or license, or in any way affect the authority of the Commission, Atomic Safety and Licensing Board other presiding officers, or the Director [of the NRC's Office of Nuclear Material Safety and Safeguards], in any such proceeding."

The Commission is confident that its pre-application activities are being conducted in full compliance with the Administrative Procedure Act. As the Commission explained in its July 8, 2003 response to Nevada's petition to change the procedures for the Yucca Mountain licensing proceeding, there is no requirement that the NRC apply the ex parte and separation of functions rules at this time. See pages 8 to 10 of that response. Among the important points in the response is that the NRC's rules have long provided that separation of functions will fall in place once DOE's application has been submitted and accepted for docketing (10 C.F.R. § 2.101(f)(8)). And that is already earlier in the proceeding than is required by the Administrative Procedure Act or the agency's regulations on separation of functions in other licensing proceedings. As we said in that response,

[f]urther 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).

As for your request that we keep and make public notes of every interaction between the Commission and the staff working on the Yucca Mountain project, we decline to grant the request. As we stated in our July 8, 2003 response to Nevada's petition on procedures, we will continue to adhere to the NRC's policy on open meetings and the November 1998 Agreement between DOE and NRC on the conduct of pre-licensing interactions between the staffs of the two agencies. We are satisfied that the NRC is conducting its activities with a spirit of openness and routinely makes available to the public ample information about its activities.

As we said in response to Attorney General Sandoval's August 25, 2003 letter, which is much like yours, we have been, and remain, fully committed to full compliance with the Atomic Energy Act, the Nuclear Waste Policy Act, and the Administrative Procedure Act. We would expect that Nevada, and other potential Yucca Mountain litigants, would acknowledge the Commission's right to perform its necessary pre-application work.

Sincerely,

/RA/

Nils J. Diaz