



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

November 17, 2005

Mark J. Langer, Clerk
U.S. Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

RE: *State of Nevada v. USNRC, et al.*, No. 05-1350

Dear Mr. Langer:

Enclosed you will find the original and four copies of the Respondents' Reply to Opposition to Motion to Dismiss. Please date stamp the enclosed copy of this letter to indicate date of receipt, and return the copy to me in the enclosed envelope, postage pre-paid, at your convenience.

Respectfully submitted,

Steven F. Crockett
Special Counsel
Office of the General Counsel

Enclosures: As stated

cc: service list

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEVADA,)	
)	
Petitioner,)	
)	
v.)	No. 05-1350
)	
U.S. NUCLEAR REGULATORY COMMISSION)	
and the UNITED STATES OF AMERICA,)	
)	
Respondents.)	
)	

RESPONDENTS' REPLY TO OPPOSITION TO MOTION TO DISMISS

In Nevada's Opposition to our Motion to Dismiss for Lack of Standing, Nevada argues that its standing rests not solely on some *procedural* harm traceable to a procedural violation, Opposition at 8, but fundamentally on whether Nevada will suffer some "*substantive* harm that is fairly traceable to a possible outcome in the underlying proceeding where the procedures will apply." *Id.* at 9.

However, the fact remains that standing resting on procedural claims (bias, in this case) requires not just potential substantive harm but an actual procedural violation. Nevada has shown none. Even under case law cited by Nevada, the State must show that one of its procedural rights has been violated, and that "it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest." *Center for Law and Education v. Department of Education*, 396 F.3d 1152, 1159 (D.C. Cir. 2005). In *Center*, the Court concluded that "the chain of causation between the alleged procedural violation and the concrete interest is speculative at best." *Id.* The chain will certainly be speculative where, as here, there is not even a *prima facie* showing of procedural defect.

Nevada attempts to manufacture such a showing by asserting that the waste confidence decision and rule -- predicting that a permanent spent fuel repository will come on line by 2025 -- constitute an "egregious prejudgment of adjudicatory fact." Opposition at 7. However, as we said in our Motion to Dismiss, at 5, the waste confidence decision and rule do not even apply to the Yucca Mountain proceeding and do not bind the judges in that proceeding. To the contrary, the outcome of that proceeding determines the validity of the waste confidence decision and rule, not the other way around. Moreover, it is doubtful that the waste confidence decision is dealing with adjudicatory fact at all, rather than with "legislative fact," a fact of the sort established either by Congress or by agencies in the course of rulemakings such as the one that led to the waste confidence decision and rule. See Richard J. Pierce, Jr., *Administrative Law Treatise*, § 1.8, at 33-34 (4th ed., 2002) (distinguishing between legislative and adjudicatory facts).

In any event, Nevada's conclusory assertions of institutional bias arising out of the waste confidence decision and rule do not come close to overcoming what this Court frequently has called the "presumption of regularity." See, e.g., *Advanced Communications Corp. v. FCC*, 376 F.3d 1153, 1159 (D.C. Cir. 2004); *Turner v. Department of Navy*, 325 F.3d 310, 318 (D.C. Cir. 2003). "[C]ourts assume administrative officials 'to be men [and women] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Louisiana Ass'n of Independent Producers and Royalty Owners v. FERC*, 958 F.2d 1101, 1115 (D.C. Cir. 1992), quoting *Withrow v. Larkin*, 421 U.S. 35, 55 (1975). "[O]ur law assumes integrity in individual members, and requires direct evidence of bias, or some other personal interest, to overcome that assumption." *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1106 n.7 (D.C. Cir. 1988), cert. denied, 488 U.S. 869 (1988).

Nevada has offered no evidence that the Commissioners who will preside over a Yucca Mountain licensing proceeding will be biased in favor of issuing the license. We have already argued that the waste confidence decision and rule do not, as a legal matter, play any role in the Yucca Mountain proceeding. Nevada nonetheless speaks vaguely of a “subtle and pervasive effect of prejudgment.” Opposition at 7. But Nevada’s notion that the waste confidence decision and rule will somehow subtly pervade the Yucca Mountain proceeding is entirely speculative, and in effect asserts that the Nuclear Regulatory Commission will be significantly biased in the direction of licensing Yucca Mountain, in the face of contrary evidence, solely to keep the agency’s 1990 waste confidence prediction (a repository by 2025) from turning out wrong.

Nevada’s claim of procedural defect thus assumes a *lack* of agency integrity, directly contradicting established administrative law. The Commission’s denial of Nevada’s petition for rulemaking makes explicit what the law always implies, “that the Commission remains committed to a fair and comprehensive adjudication” 70 Fed. Reg. 48329, 48333 (August 17, 2005).¹

¹Nevada is correct that in this case the standing and merits inquiries overlap. But this overlap does not preclude threshold dismissal of Nevada’s petition for review for lack of standing. This Court often has “disposed of cases on standing grounds after [a] merits-laden determination that a plaintiff’s claim ‘ha[d] no foundation in law.’” *Taylor v. FDIC*, 132 F.3d 763, 767 (D.C. Cir. 1997), quoting *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997).

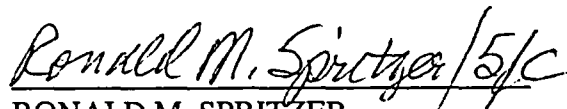
CONCLUSION

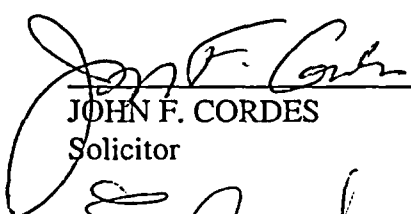
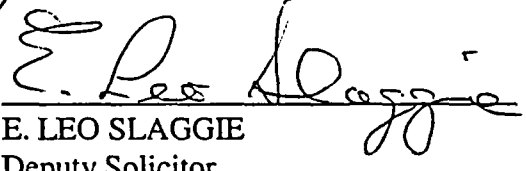
For the foregoing reasons, the Court should dismiss Nevada's petition for review for lack of standing.

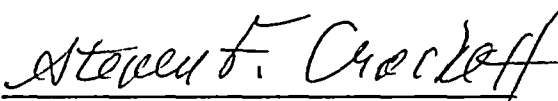
Respectfully submitted,

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Dated: November 17, 2005

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2005, copies of Respondents' Reply to Opposition to Motion to Dismiss were served by mail, postage prepaid, upon the following counsel:

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