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Department of Energy
Washington, DC 20585

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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

November 13, 2007

Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555
Attention: Rulemaking and Adjudications Staff

Re: **U.S. Department of Energy Comments on PRM-2-14, "Petition By the State of Nevada for Rulemaking to Specify Issues for the Yucca Mountain Mandatory Hearing"**

I. INTRODUCTION

The U.S. Department of Energy (Department or DOE) hereby submits its comments on the June 19, 2007 "Petition by the State of Nevada for Rulemaking to Specify Issues for the Yucca Mountain Mandatory Hearing," PRM-2-14 (Petition). DOE believes that the Petition is late, unwarranted, and unnecessary; inconsistent with applicable statutory and regulatory requirements; and seeks to impose requirements that go beyond those established by the Commission in other proceedings involving mandatory hearings. For the reasons discussed below, the Department opposes the Petition and respectfully requests that it be denied in its entirety.

II. BACKGROUND

The State of Nevada requests that the U.S. Nuclear Regulatory Commission (NRC) modify its regulations governing the findings and determinations to be made in a mandatory hearing on a construction authorization for a geologic repository, by proposing to add a new subsection (f) to 10 CFR § 2.104. That proposed new subsection would specify the safety and environmental findings to be made in a contested or uncontested proceeding before an NRC Atomic Safety and Licensing Board (ASLB or Board), in addition to the determinations to be made by the ASLB on admitted contentions. Petition at 5. *Generally*, the proposed changes to 10 CFR § 2.104 track the *prior* provisions of the rule applicable to mandatory hearings on construction permits and early site permits (ESPs) for commercial nuclear power plants,[1] as well as the language in the Notices of Hearing issued by the Commission in the *Louisiana Energy Services* and *United States Enrichment Corporation* uranium enrichment facility licensing proceedings.[2]

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[1] As discussed in Section V below, those provisions have now been changed significantly.

[2] *See* "In the Matter of Louisiana Energy Services, L.P. (National Enrichment Facility); Notice of Receipt of Application for License; Notice of Availability of Applicant's Environmental Report;

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The Department opposes the Petition on three well-founded grounds. First, it is late, unwarranted and unnecessary. Second, it conflicts with applicable statutory and regulatory provisions authorizing the NRC Staff to adopt the Department's Environmental Impact Statement (EIS) for the Yucca Mountain repository, and with the scope of any Board hearing on environmental issues. Finally, Nevada's proposed rule goes beyond the current provisions governing hearings on reactor construction permits, ESPs, and uranium enrichment facility licenses, by imposing certain mandatory hearing findings in contested as well as uncontested proceedings. Each of these reasons for denying the relief requested by the State of Nevada is discussed below.

III. THE PETITION IS LATE, UNWARRANTED AND UNNECESSARY

Nevada alleges that there is a "gap" in the NRC regulations governing licensing proceedings (*i.e.*, 10 CFR Part 2), because the precise findings and determinations to be made by the ASLB in a mandatory hearing on a construction authorization request for a geologic repository are not set forth in the regulations. Petition at 1.

Nevada has had years to raise this issue, and its Petition is now unjustifiably late. In April 2001, the NRC proposed to amend its Rules of Practice in 10 CFR Part 2 in order to make its hearing process more effective and efficient. *See* 66 Fed. Reg. 19610 (Apr. 16, 2001). As part of that proposed rulemaking, the NRC sought public comment on the amendments. The public comment period initially ran through July 16, 2001, but was later extended to September 14, 2001. *See* 66 Fed. Reg. 27045 (May 16, 2001). The final rule amending 10 CFR Part 2 was published in the *Federal Register* and became effective 2 ½ years later, on February 13, 2004. *See* 69 Fed. Reg. 2182 (Jan. 14, 2004).

The appropriate time for Nevada to have raised the issues it now raises was the comment period for the 2001-2004 rulemaking. Nevada did not submit comments any time between July 2001 and January 2004. Moreover, after the NRC issued the final rule, Nevada did not challenge it as violating the NRC's responsibilities under the Atomic Energy Act of 1954, as amended (AEA), the National Environmental Policy Act (NEPA), or the Nuclear Waste Policy Act of 1982, as amended (NWPA). Despite having failed to avail itself of these opportunities to raise its concerns, Nevada is now seeking *expedited* changes to the NRC's procedural rules for the geologic repository, even though it acknowledges that DOE intends to file its application under 10 CFR Part 63 with the NRC in the near future.[3]

Notice of Consideration of Issuance of License; and Notice of Hearing and Commission Order," 69 Fed. Reg. 5873 (Feb. 6, 2004) (LES Notice of Hearing); and "USEC, Inc. (American Centrifuge Plant); Notice of Receipt of Application for License; Notice of Availability of Applicant's Environmental Report; Notice of Consideration of Issuance of License; and Notice of Hearing and Commission Order," 69 Fed. Reg. 61411 (Oct. 18, 2004) (USEC Notice of Hearing).

[3] "The Department of Energy has recently reaffirmed its intent to file a Yucca Mountain construction authorization license application with NRC no later than June 30, 2008. Accordingly, the State requests that the Commission act on this rulemaking proposal in as expeditious a manner as possible." Petition at 6.

Nevada is silent as to why it waited so long to raise its concerns with the NRC. Absent some compelling justification for the regulatory revisions it now proposes—which is absent from the Petition—the NRC should reject them as being late.

Nevada's proposed changes are also unwarranted and unnecessary. Nevada's changes would specify the scope of the mandatory hearing for an NRC licensing proceeding on a geologic repository license application submitted pursuant to 10 CFR Parts 60 or 63. The scope of any mandatory proceeding is usually specified in the Federal Register Notice announcing the docketing of the license application and the opportunity for members of the public to file Petitions to Intervene.

Nevada believes that it would be inappropriate for the Staff to issue such a Notice for the Yucca Mountain repository because it believes the Staff "will be an adversary party in the proceeding." Petition at 1. Nevada implies that the Staff would somehow intentionally limit the scope of a hearing on the Department's application for Yucca Mountain. Nevada provides no support for its statement that the Staff will be "an adversary party" or for any suggestion that the Staff would act improperly. In fact, the Staff will have the same role it has had in hundreds of other licensing proceedings; namely, to provide information about its review of an application under the AEA and NEPA, as applicable. Accordingly, Nevada's Petition is unwarranted.

Nevada's Petition is also unnecessary. The Commission has recognized, in other contexts, that its Rules of Practice have not precisely specified the findings and determinations to be made by the Board in mandatory hearings. In both the *LES* and *USEC* enrichment facility licensing proceedings, rather than go through the process of amending its generally-applicable regulations, the Commissioners themselves chose to define the findings and determinations to be made by the Board by way of case-specific Notices of Hearing, after receipt and docketing of the applications. That is a perfectly appropriate way to proceed in the case of the repository construction authorization, and DOE would not object to appropriate direction by the Commission in such a Notice after receipt and docketing of its application. And it would address Nevada's allegation, stated above, regarding the Staff as an "adversary party" in the proceeding. Moreover, Nevada explicitly acknowledges that the regulatory "gap" that is the subject of its Petition "could be filled by a declaratory order" (Petition at 1), and it cites to the Commission's *USEC* Order in its Petition. *Id.* at 4. Nevada provides no legitimate reason why the NRC should divert its limited rulemaking resources to an expedited rulemaking Petition, when a single Commission Order would address the issue.

Indeed, the Commission proceeded by way of case-specific Notices of Hearing, rather than generic rulemaking for *LES* and *USEC*, even though it was aware that there would be more than one uranium enrichment facility application and proceeding. Changes to the Commission's regulations are even less warranted where, as here, there is only one repository application expected to be filed before next June. And, as discussed in Section V below, the NRC has now chosen to no longer define the specific content of mandatory hearing issues in its regulations. Accordingly, Nevada's request is late, unwarranted, and unnecessary.

IV. THE RELIEF REQUESTED BY NEVADA CONFLICTS WITH APPLICABLE STATUTORY AND REGULATORY PROVISIONS

Nevada's proposal would require the ASLB to make certain NEPA-related findings that are contrary to the NWPA and 10 CFR § 51.109. Section 114(f)(4) of the NWPA requires the NRC to adopt the Department's repository EIS to the extent practicable, and specifies that such adoption "shall be deemed to satisfy" the Commission's NEPA responsibilities and that "no further consideration [under NEPA] shall be required." 42 U.S.C. § 10134(d)(4). The NRC has implemented this statutory direction in 10 CFR § 51.109.

Section 51.109(e) requires the ASLB to make certain independent findings under NEPA – but *only* to the extent that the ASLB finds it is not practicable for the NRC Staff to adopt the Department's EIS.[4] Nevada's Petition does not discuss this limitation on the circumstances in which the ASLB is authorized to make NEPA findings. Although the language of its proposed rule does obliquely refer to Section 114(f) of the NWPA (without explanation), it is not at all clear what this reference is intended to require. *See* Petition at 5, proposed 10 CFR § 2.104(f)(3). As written, Nevada's proposal would require independent ASLB NEPA findings regardless of whether the NRC Staff has adopted DOE's EIS, and the ASLB has approved that adoption. As discussed above, this is inconsistent with both the NWPA and 10 CFR § 51.109. For this reason as well, Nevada's Petition must be denied.[5]

V. NEVADA SEEKS TO IMPOSE REQUIREMENTS BEYOND THOSE THE COMMISSION HAS ESTABLISHED FOR OTHER NRC MANDATORY HEARINGS

Finally, 10 CFR § 2.104(b)(2) previously required the ASLB to make certain findings in reactor cases regarding the sufficiency of the record, and the adequacy of the NRC Staff's review of the application – but only "if the proceeding is not a contested proceeding." This same limitation was set forth in the LES and USEC Notices of Hearing.[6]

In recent changes to the regulations, the Commission decided to *remove* any discussion of the issues to be addressed in a mandatory hearing, relying instead for the

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[4] In addition the ASLB must determine whether the Staff review under NEPA has been adequate only if: (1) it makes an "impracticability" finding; and (2) the proceeding is "uncontested." *See* 10 CFR § 51.109(e)(4).

[5] The Department notes that Nevada is clearly unhappy with the statutory and regulatory provisions governing NRC adoption of DOE's EIS and has separately sought changes to the relevant regulation. *See* State of Nevada Petition for Rulemaking, PRM-51-9, (April 8, 2005); 70 Fed. Reg. 47148 (Aug. 12. 2005).

[6] 69 Fed. Reg. at 5874 (Feb. 6, 2004); 69 Fed. Reg. at 61411 (Oct. 18, 2004).

future on case-specific Notices of Hearing.[7] The 10 CFR § 2.104 rule extant when Nevada filed its Petition specified the nature of the issues that the Board must address in both uncontested and contested proceedings. Since that time, the NRC has stated that it has "decided, based upon its experience in noticing hearings in the last decade...as well as its consideration of the nature of mandatory hearings under Section 189 of the AEA, that much of this detailed prescription of the content of the notice of hearing should be removed from § 2.104." 72 Fed. Reg. at 49412. Accordingly, "the language of § 2.104 has been considerably truncated from the former rule." *Id.* Specifically, 10 CFR § 2.104(b) "has been modified to include only the requirements of the notice of hearing which are common to all proceedings. All provisions in the former § 2.104 specifying the issues to be addressed by the presiding officer [have been] removed." *Id.*

Finally, Nevada's proposed rule would require ASLB determinations regarding safety and environmental findings to be made "[r]egardless of whether the proceeding is contested or uncontested." Petition at 5, proposed 10 CFR § 2.104(f)(2). Nevada acknowledges that its proposal "departs somewhat" from the provisions previously applicable to reactors and uranium enrichment facilities as well as "prior practice." Petition at 6. Nevada has provided no basis for the Commission to modify its long-standing requirements and practices. Such a proposal would clearly be counter to the Commission's stated intent to include "only the requirements of the notice of hearing which are common to all proceedings," and therefore should be rejected.

VI. CONCLUSION

Nevada's Petition is untimely, unwarranted, and unnecessary. It seeks relief inconsistent with applicable statutory and regulatory provisions, and to impose requirements beyond those established by the Commission for other mandatory hearings. For the reasons discussed above, Nevada's Petition should be rejected.

Respectfully submitted,

James B. McRae
Assistant General Counsel
for Civilian Nuclear Programs

[7] *See* Final Rule: License Certifications, and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49352, 49412 (Aug. 28, 2007).

From: "McRae, Ben" <Ben.McRae@hq.doe.gov>
To: <SECY@nrc.gov>
Date: Tue, Nov 13, 2007 4:14 PM
Subject: DOE Comments on PRM-2-14

The U.S Department of Energy hereby submits the attached comments in response to the petition for rulemaking submitted by the State of Nevada on June 19, 2007.

<<DOE's Comments on PRM-2-14.pdf>>

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