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February 13, 2008

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attn: Rulemakings and Adjudications Staff

Dear Sir/Madam:

RE: REQUEST BY NEVADA FOR RECONSIDERATION AND CLARIFICATION OF NOTICE OF DENIAL

The State of Nevada is asking for reconsideration and clarification of several aspects of the Commission's January 25, 2008 Notice of Denial of Nevada's petition for rulemaking, docketed as PRM-51-9.

Background

Nevada's petition was intended to bring the Commission's regulation in 10 C.F.R. §51.109 into clear conformance with the Court's opinion in *NEI v. EPA*, 373. F. 3d 1251 (D.C. Cir. 2004). In *NEI v. EPA*, the Court construed §51.109 to allow challenges regarding the adequacy of DOE's final environmental impact statement for Yucca Mountain (Yucca EIS) to be raised in the NRC Yucca Mountain licensing proceeding. The challenges would be entertained within the context of a dispute over whether the NRC should adopt DOE's Yucca EIS as its own pursuant to section 114 of the Nuclear Waste Policy Act.

On the fundamental issue whether the NRC would allow challenges to the Yucca EIS in the Yucca Mountain licensing hearing, the Commission's Notice of Denial indicates no disagreement with the Court's construction of §51.109. Because the Commission's and the Court's constructions of the rule were therefore in accord, the Commission concluded that a rulemaking to amend the rule to conform to the Court's decision was unnecessary. The Commission dismissed Nevada's argument that *NEI v. EPA* required a reconsideration of the Commission's decision that its Staff would not review the Yucca EIS, stating that the petition raised no new issues. The Commission also dismissed Nevada's argument that application of criteria for

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reopening closed records to challenges to the Yucca EIS violated NEPA's requirement that environmental impact statements be considered in the existing agency review process, stating that NEPA does not require a uniform review process for all NEPA statements. Commissioner Jaczko approved in part and disapproved in part. He preferred granting Nevada's petition, but agreed with the Commission majority that §51.109 should be interpreted in the interim so that it was as in accord with the Court's decision.

Need for Reconsideration and Clarification

In its Notice of Denial the Commission agreed with the Court that claims attacking the validity of the Yucca EIS would constitute "new considerations" with respect to any NRC adoption decision, referring here to 10 C.F.R. § 51.109(c), which provides that the Commission will adopt the Yucca EIS unless there are (among other things) "new considerations [that] render such environmental impact statement inadequate." We assume that claims attacking the validity of the Yucca EIS would automatically satisfy the second prong of the test in §51,109(c) as well, that is, that claims attacking the validity of the Yucca EIS would be cognizable in the Yucca Mountain licensing hearing not only because they constitute "new considerations" in light of *NEI v. EPA*, but also because the "new considerations," if true, would render the Yucca EIS "inadequate." We make this assumption because we believe the Commission used the phrase "new considerations" as a shorthand reference to the full criterion for non-adoption cited above, and because if this were not to be the case, NEPA claims could not be raised at all under the subsection, contrary to what the Court understood the regulation meant.

Moreover, we also assume that the scope of possible substantive NEPA issues in the licensing hearing will not be limited merely by the fact that, under the NWPA, it will be the adoption decision that is contested rather than the adequacy of the Yucca EIS *per se*. The Commission must also believe that any substantive NEPA claim is a "new consideration" meeting the "non adoption" criterion in 10 C.F.R. §51.109(c)(2), regardless of whether it is based on new information or new considerations arising before or after DOE's site recommendation. We make these two assumptions because neither the Court nor the Commission suggested that any such limitations existed. Indeed, contrary assumptions would vitiate almost entirely the Court's conclusion that NEPA claims could be heard by NRC.

Nevada respectfully asks the Commission to confirm that these three assumptions are correct.

In its Notice of Denial, the Commission also decided that *NEI v. EPA* offered no reason for the Commission to reconsider its position that its Staff need not review

the Yucca EIS independently before deciding whether to adopt it, as Nevada requested in its petition. We understand the Commission's bottom line here, but we cannot comprehend its reasoning. Before *NEI v. EPA*, NRC Staff would have applied the test in §51.109(c) and decided whether to adopt the Yucca EIS based on matters extraneous to it, *i.e.*, on whether the proposed action had changed in some significant way or there were significant new considerations or matters rendering the Yucca EIS inadequate. In theory, this would have avoided any need for an NRC determination with respect to the adequacy of the Yucca EIS as of the time it was filed in support of DOE's site recommendation. The Commission must now agree with the Court that any substantive NEPA claim is a "new consideration" meeting the "non adoption" criterion in 10 C.F.R. §51.109(c)(2), regardless of whether it is based on new information or new considerations arising after DOE's site recommendation. But, if this is so, the Yucca EIS may be questioned based on information and considerations extant when it was issued, and an adoption decision can no longer be made based solely on matters extraneous to the Yucca EIS, as had been the case before *NEI v. EPA* was decided. This is not a matter decided previously when §51.109 was adopted over Nevada's objection, as the Commission suggests in its Notice of Denial, because *NEI v. EPA* and the considerations discussed above arose after that rule was adopted.

In light of the above, how is NRC Staff going to make its adoption decision without any independent review of the Yucca EIS? The Notice of Denial does not address this question. The Commission cannot interpret §51.109(c) one way for the licensing hearing and a markedly different way for its Staff. Without some explanation, Nevada can neither comprehend the Commission's decision on this point nor imagine how NRC Staff will make its adoption decision.

Nevada asks the Commission to explain its decision, and to provide some indication of how NRC Staff will make its adoption decision in the Notice of Hearing without any independent review of the draft Yucca EIS. We note in this respect that NRC Staff in fact reviewed and commented on the draft Yucca EIS. *See* Letter from William F. Kane to Ivan Itkin, February 22, 2000. Therefore, an independent NRC Staff review of the Yucca EIS would build on substantial work already done.

Conclusion

The Commission's Notice of Denial should be reconsidered and clarified, as argued above. Nevada styled this document as a request for reconsideration and clarification. However, if necessary to address the merits of this letter, Nevada asks that the letter be treated as a petition for rulemaking. Nevada recognizes that time is short for the completion of rulemaking if DOE files its Yucca Mountain application

by the end of 2008. However, there would have been ample time for careful consideration of the issues raised in this letter had the Commission responded more promptly to Nevada's 2005 petition.

Sincerely,

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