April 14, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
U. S. DEPARTMENT OF ENERGY	)	Docket Nos. PAPO-00, PAPO-001
	)	
(High-Level Waste Repository:	)	ASLBP No. 04-829-01-PAPO
Pre-Application Matters)	)	ASLBP No. 08-861-01-PAPO-BD01

NRC STAFF RESPONSE TO STATE OF NEVADA MOTION TO DISQUALIFY LAW FIRM

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the Nuclear Regulatory Commission ("Staff") hereby responds to the State of Nevada's April 3, 2008, motion asking the Commission to disqualify the law firm of Morgan, Lewis & Bockius LLP ("Morgan Lewis") from representing the Department of Energy ("DOE") in all Yucca Mountain proceedings before the U.S. Nuclear Regulatory Commission ("NRC"). *See* Motion of the State of Nevada to Disqualify the Law Firm of Morgan, Lewis & Bockius LLP Because of Conflicts of Interest (Apr. 3, 2008) ("Motion"), at 1, 7.

For the reasons set forth below, the Motion should be denied.[1]

DISCUSSION

Nevada claims that Morgan Lewis should be disqualified from representing DOE in all

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[1] As the above-caption indicates, copies of this response are being filed with the Pre-License Application Presiding Officer (PAPO) and the Advisory Pre-License Application Presiding Officer (Advisory PAPO) since Nevada served its Motion in both proceedings. Motion 1-2.

NRC proceedings regarding Yucca Mountain based on information in the DOE Office of the Inspector General, "Special Report: Review of Alleged Conflicts of Interest Involving a Legal Services Contractor for the Yucca Mountain Project License Application," DOE/IG-0792 (Apr. 2008) ("IG Report"), which is appended as Exhibit A to the Motion.[2] Nevada argues that by awarding a legal services contract to Morgan Lewis, DOE accepted "a firm with a conflict of interest" due to Morgan Lewis' representation of nuclear utilities that are suing DOE for violation of the Standard Contract that requires DOE to accept commercial spent nuclear fuel. *Id.* at 2, 3. Nevada also asserts that DOE cannot lawfully waive or mitigate the conflict, but, even if it could be waived, DOE "unlawfully failed to explain its departure from past determinations" that Morgan Lewis "was irreconcilably conflicted out of representing DOE" in Yucca Mountain licensing. *Id.* at 3.

Nevada's request, in essence, asks the Commission to examine whether internal decisions made in the DOE contracting process were appropriate, particularly DOE's decisions that its litigation needs could only be met by the firms with extensive NRC licensing expertise and the DOE Office of General Counsel's determination that the conflict is waivable and the conflict mitigation plan is sufficient. *See* IG Memorandum at 2; Motion at Exhibit C.

Nevada's motion should be denied. As discussed below, (1) the Commission's standards of conduct regulation does not address the matter that Nevada raises, (2) the IG Report does not support the relief requested, and (3) the general authority of the Commission should not be used to second guess DOE with respect to contracting decisions within DOE's discretion.

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[2] The IG Report consists of a Memorandum from Gregory H. Friedman, DOE IG, to the Secretary of Energy, dated April 2, 2008 ("IG Memorandum) and a 16 page report. Unless otherwise indicated, the citations to the IG Report are to the body of the report.

Nevada properly filed its Motion before the Commission because the Commission has inherent supervisory authority over the conduct of all NRC proceedings. *See Public Serv. Co. of New Hampshire* (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503, 516-517 (1977). Although the Commission is empowered to decide matters regarding the ethics of attorneys who represent parties in NRC proceedings, these requests generally should be brought in the first instance before the proceeding in which the attorney appears. *Cincinnati Gas & Elec. Co.* (William H. Zimmer Nuclear Power Station, Unit 1), CLI-82-36, 16 NRC 1512, 1514 & n.1 (1982). The motion, however, seeks a remedy beyond the authority of the Advisory PAPO (the only Commission proceeding in which Morgan Lewis has entered an appearance) to grant. *See* 73 Fed. Reg. 9,358 (Feb. 20, 2008) (the Board is constituted to consider and submit to the Commission case management proposals for litigation on the DOE license application). Commission consideration is therefore appropriate.

A motion for disqualification should be judged in light of Commission regulations and applicable precedent. The standard of conduct in NRC proceedings is that parties and their representatives are "expected to conduct themselves with honor, dignity and decorum as they would before a court of law." 10 C.F.R. § 2.314(a). Prior to the 1980 rulemaking which amended the Commission's Rules of Practice governing discipline in adjudicatory proceedings 45 Fed. Reg. 69877 (Oct 22, 1980), attorneys were required to conform to the standards of conduct required" in United States courts and presiding officers could "suspend or bar" an attorney for the failure to conform to such standards. 10 C.F.R. § 2.713(c) (1980), *See Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-332, 3 NRC 785 (1976). The 1980 rulemaking, however, severely limited the scope of the regulation. *See* Changes in Rules of Practice Governing Discipline in Adjudicatory Proceedings [Final Rule], 45 Fed. Reg.

69,877 (Oct. 22, 1980).[3] Now, the presiding officer "may, if necessary for the orderly conduct of the proceeding, reprimand, censure or suspend from participation in the particular proceeding" any party or party representative "who refuses to comply with its directions, or who shall be guilty of disorderly, disruptive, or contemptuous conduct." 10 C.F.R. § 2.314(c)(1). This regulation focuses on suspensions based on conduct of a party within the confines of a particular proceeding and does not encompass or authorize the relief Nevada seeks.

Moreover, Nevada's request for disqualification of the firm based upon inadequacies in procurement documentation appears to be a collateral attack on the adequacy of DOE's procurement decisions.[4] The Commission is not the appropriate body to consider challenges to decisions made in the DOE procurement process.[5] The Commission should refrain from using its general authority over NRC proceedings to conduct an inquiry that could result in the Commission substituting its judgment for that of DOE officials who have exercised their discretion in support of DOE's interests.

Even if the Commission chose to consider disqualification of counsel as a remedy for conflicts of interest, Nevada's assertion that a conflict of interest cannot be lawfully waived or

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[4] Nevada highlights the DOE Inspector General's conclusion that the procurement file did not contain an explanation of DOE's rationale for its change of position regarding conflicts of interest for the spent nuclear fuel litigation firms; and the selection of Morgan Lewis. *See* Motion at 6 n.8.

[5] Nevada's motion is not properly before the Commission, because 1) procurement decisions can be protested only to the awarding agency, Exec. Order No. 12,979, October 25, 1995 60 Fed. Reg. 55171 (1995), or to the GAO, 31 USC 3552 and 31 USC 3553, or to the U.S. Court of Federal Claims, 28 USC 1491 and 2) Nevada lacks standing to protest DOE's award of the legal services contract, since Nevada is neither an actual or prospective bidder whose direct economic interest was affected by the award. *American Fed'n of Gov't Employees, AFL-CIO v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001), cert. denied, 534 U.S. 1113 (2002).

mitigated is unfounded. *See* Motion at 3, 4-5.[6] Nevada cites no legal authority for the proposition that the conflict is not waivable, and Federal regulations and the D.C. Professional Code of Conduct allow a waiver in certain circumstances.[7] An agency head or a designee (no lower than a head of a contracting activity) may waive any general rule or procedure in Subpart 9.5 of the Federal Acquisition Regulations (FAR) by determining that its application in the particular circumstances would not be in the Government's interest. 48 C.F.R. § 9.503.[8] Contracting officers are to identify and evaluate potential organizational conflicts of interest, and avoid, neutralize or mitigate significant potential conflicts before a contract award. 48 C.F.R. § 9.504(a)(1) and (a)(2). Each individual contracting situation should be examined on the basis of particular facts and the nature of the proposed contract. 48 C.F.R. § 9.505.

To the extent that Nevada relies on the DOE IG Report to support its position that a conflict of interest cannot be waived or mitigated, its reliance is misplaced. *See* Motion at 5-6. The Inspector General found "the 2007 procurement for legal services appeared to follow the conflicts of interest requirements set forth in Federal Acquisition Regulations, the [DOE]

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[6] Nevada cites no legal authority for the proposition that the conflict is not waivable. Nevada asks the Commission to infer that a conflict of interest cannot be mitigated based on a Court's recitation of the fact that a 1999 DOE contract officer determination found a firm's firewall would not be adequate. *See* Motion at 5 (citing *LeBoeuf, Lamb, Greene & MacRae, L.L.P. v. Abraham*, 347 F.3d 315, 318 (D.C. Cir. 2003)). The mere inclusion of a fact in the Court's summary of a dispute's history does not indicate the Court's "approval" of that position.

[7] Rule 1.7(b)(2) of the District of Columbia Bar Rules of Professional Conduct, provides that, except as permitted by paragraph 1.7(c), a lawyer shall not represent a client with respect to a matter if "[s]uch representation will be or is likely to be adversely affected by representation of another client." Rule 1.7(c) provides that "A lawyer may represent a client with respect to a matter . . . if (1) [e]ach potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and (2) [t]he lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

[8] DOE regulations provide that Heads of Contracting Activities have the delegated authorities regarding waiver of organization conflicts of interest. 48 C.F.R. § 909.503.

Acquisition Regulations, and District of Columbia Bar Rules of Professional Conduct." IG Memorandum at 2. The Inspector General found the firm had implemented the mitigation plan in accordance with the contract requirements. *Id.* at 2. DOE Inspector General's concerns about the lack of a written record memorializing key procurement decision points, and that such documents would have assisted the Inspector General's review and better served the public interest, *id*. at 3-4, are not the same as a conclusion that the contract award was improper. [9] Thus, the cited report fails to provide sufficient grounds for Nevada's request or otherwise demonstrate the matter warrants Commission action.

In short, Nevada's attempt to have the Commission consider an issue that has already been reviewed at DOE on a matter within its primary responsibility (considered by the DOE contracting officials, the DOE General Counsel, and the DOE Inspector General), should be rejected. The Rules of Practice do not provide for the relief requested, Nevada has not proffered sufficient information to warrant an NRC examination of whether Morgan Lewis' representation of DOE is consistent with applicable regulations and professional standards, and the Commission should not accept Nevada's invitation to examine the procurement decisions of another agency. Therefore, the Motion should be denied.

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[9] If the DOE Inspector General had concluded that the contract award was unlawful (i.e., could not be waived), presumably the report would have included that statement.

CONCLUSION

For the foregoing reasons, the Motion should be denied.

Respectfully submitted,

Signed (electronically) by

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Dated at Rockville, Maryland
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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF RESPONSE TO STATE OF NEVADA MOTION TO DISQUALIFY LAW FIRM" in the above-captioned proceeding have been served on the following persons this 14th day of April, 2008, by Electronic Information Exchange.

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