

June 16, 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

**RESPONSE OF THE NUCLEAR ENERGY INSTITUTE  
OPPOSING THE STATE OF NEVADA'S PETITION TO REJECT  
DOE'S YUCCA MOUNTAIN LICENSE APPLICATION**

**1. Introduction**

The Nuclear Energy Institute (“NEI”) hereby files this opposition to the State of Nevada’s (hereinafter “the State’s”) June 4, 2008 Petition to Reject DOE’s Yucca Mountain License Application as Unauthorized and Substantially Incomplete (“Petition”).<sup>1</sup> NEI supports the Department of Energy’s (“DOE”) response opposing the Petition and submits this opposition to address two of the State’s arguments further. First, the Petition requests that the Commission reject the Yucca Mountain license application (“LA”) because DOE did not file the LA within the 90-day deadline specified in Section 114(b) of the Nuclear Waste Policy Act (“NWPA”). The State’s requested relief is contrary to controlling U.S. Supreme Court precedent—which the

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<sup>1</sup> The Petition fails to identify the authority under which the State requests the Commission to act. Two possibilities are (1) a 10 C.F.R. § 2.206 petition requesting that the Commission to take action; and (2) a 10 C.F.R. § 2.323 motion seeking relief. Commission regulations require answers to motions to be filed within 10 days, 10 C.F.R. § 2.323(c), whereas no deadline is specified for answers to Section 2.206 petitions. Out of an abundance of caution, NEI treats the Petition as a Section 2.323 motion and files this Response accordingly. This regulation provides that “a party may file an answer in support of or in opposition to the motion.” Although not technically a “party” to the high-level waste repository proceeding, NEI is a member of the Licensing Support Network (“LSN”) Advisory Review Panel and has participated as a “potential party” in the proceeding since its inception. NEI will seek party status in the Yucca Mountain licensing proceeding at the time called for in the Commission’s regulations.

State fails to acknowledge in its Petition—holding that, where a statute does not specify a consequence for non-compliance with a statutory timing provision, agencies are not precluded from acting after the deadline’s expiration. Here, the NWPA specifies no consequence for DOE’s failure to meet the Section 114(b) deadline, and thus DOE is not foreclosed from filing the LA after that deadline. Second, the State alleges that the LA does not contain sufficient information regarding the proposal to install drip shields in the repository, and that, as a result, the LA should be returned to DOE, or an early round of summary disposition should be scheduled to address the issue. However, any deficiency the State perceives to exist in the LA regarding drip shields is speculative at best. Further, it would be more appropriate for the State to seek to frame a contention on this issue, rather than seek summary disposition of it now. The Petition is without merit, and the Commission should reject it.

**2. DOE is not precluded from filing the LA after the expiration of the NWPA Section 114(b) 90-day deadline.**

NWPA Section 114(b) provides that the “Secretary [of Energy] shall submit to the Commission an application for a construction authorization for a repository at such site not later than 90 days after the date on which the recommendation of the site designation is effective.” The Yucca Mountain site recommendation became effective on July 23, 2002.<sup>2</sup> DOE did not file the LA within 90 days after July 23, 2002, but nearly six years later on June 3, 2008. The question is whether DOE’s failure to meet the Section 114(b) deadline precludes it from filing the LA after the expiration of the deadline. It does not.

The U.S. Supreme Court has long held that the “failure of an agency to observe a procedural requirement” does not “void[] subsequent agency action, especially when important

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<sup>2</sup> Pub. L. No. 107-200 (July 23, 2002).

public rights are at stake.”<sup>3</sup> Rather, ““if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.””<sup>4</sup> Thus, statutory language (such as NWPA Section 114(b)) that provides that an agency “shall” act within a specified time but does not provide for any consequence should the agency miss the deadline does not foreclose an agency’s power to act after the expiration of the deadline.<sup>5</sup> Absent a specified consequence for failure to meet the deadline—or some other “clear indication that Congress intended otherwise”—a statutory deadline is directory, not mandatory.<sup>6</sup>

In this case, the NWPA sets forth no specified consequence for DOE’s failure to meet the 90-day deadline provided in Section 114(b), and the State makes no assertion to the contrary. Therefore, the Section 114(b) 90-day deadline is directory, not mandatory, and no basis exists for the Commission to reject the application despite DOE’s failure to meet the 90-day deadline. Further, Congress has not indicated that DOE’s failure to meet the deadline should foreclose it from filing the LA after the expiration of the deadline. Indeed, since the expiration of this deadline in October 2002, Congress has made its intent clear that DOE should continue work on the Yucca Mountain repository program, including preparing and submitting an LA, by repeatedly appropriating funds for the Yucca Mountain program.<sup>7</sup>

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<sup>3</sup> *Brock v. Pierce County*, 476 U.S. 253, 260 (1986).

<sup>4</sup> *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003), quoting *U.S. v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993).

<sup>5</sup> *Id.* at 158-59.

<sup>6</sup> *Bhd. of Ry. Carmen Div. Transp. Commc’ns. Int’l Union v. Pena*, 64 F.3d 702, 704 (D.C. Cir. 1995). See also *Gottlieb v. Pena*, 41 F.3d 730, 733 (D.C. Cir. 1994).

<sup>7</sup> See, e.g., Pub. L. No. 110-161 (Dec. 26, 2007) (appropriating \$395 million for the repository program in Fiscal Year 2008).

In sum, although Congress directed DOE to file the LA within 90 days of site selection, controlling U.S. Supreme Court precedent—which the State ignores<sup>8</sup>—holds that DOE’s failure to meet the deadline does not prohibit DOE from acting after the expiration of the deadline. Congress specified no consequence for DOE’s failure to meet the Section 114(b) deadline, and the Commission should not impose its own coercive sanction (such as rejecting the LA) particularly where, as here, Congress has made it clear that DOE should proceed with the Yucca Mountain program. This basis for the State’s Petition has no merit.

**3. The State’s allegations that the LA omits required information are factually baseless and legally unsupported and do not warrant the Commission’s rejection of the LA.**

The State alleges that the LA fails to include required information and that, as a result, the Commission should summarily dismiss the application. The allegations are factually baseless and legally unsupported. Indeed, the State’s allegation that the LA does not contain sufficient information on drip shields<sup>9</sup> is sheer speculation and does not warrant rejection of the LA. The State’s suggestion that, if the LA is docketed, summary disposition should be scheduled on this issue<sup>10</sup> is a thinly veiled request that the Commission rewrite the regulations governing the high-level waste repository proceeding. The Commission should reject the State’s request.

The State offers nothing more than speculation and argument of counsel for its allegation that information is missing from the application regarding drip shields. The State offers no expert support for its claim that it is uncertain whether the necessary “metals would be available 100 years from now and whether governmental authorities will want to spend the enormous sums

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<sup>8</sup> See Petition at 3.

<sup>9</sup> See *e.g.*, Petition at 8-9.

<sup>10</sup> Petition at 5.

involved” and what systems may have to be built and maintained to install the drip shields.<sup>11</sup>

Such speculation offered without expert or other technical support is no basis for the Commission to reject the LA.

Should the LA be docketed, the State requests that the Commission schedule “an early round of motions for summary disposition” to address its drip shield issue.<sup>12</sup> Summary disposition is an appropriate method for adjudicating contentions after they have been admitted into the high-level waste repository proceeding.<sup>13</sup> Summary disposition is not appropriate where, as here, no contention has yet been admitted into the proceeding, and particularly where, as here, the issue that the State seeks to litigate is based on nothing more than sheer speculation and argument of counsel. With nothing more, no basis exists for the State to request an early round of summary disposition.

#### 4. Conclusion

For the reasons set forth above, the State’s Petition should be denied.

Respectfully submitted,



Michael A. Bauser  
Deputy General Counsel  
Nuclear Energy Institute  
1776 I St., NW  
Suite 400  
Washington, DC 20006  
Tel: 202-739-8144  
Fax: 202-533-0231  
E-mail: mab@nei.org

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<sup>11</sup> Petition at 8.

<sup>12</sup> Petition at 5.

<sup>13</sup> See 10 C.F.R. § 2.1000 (providing that 10 C.F.R. § 2.710, Motions for Summary Disposition, will apply in the high-level waste repository proceeding).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing "Response of the Nuclear Energy Institute Opposing the State of Nevada's Petition to Reject DOE's Yucca Mountain License Application" has been served via the Nuclear Regulatory Commission's Electronic Information Exchange (EIE) upon those on the Service List maintained by the EIE for the above-captioned proceeding.

Respectfully submitted,



Michael A. Bauser  
Nuclear Energy Institute  
1776 I Street, N.W.  
Washington, D.C. 20006  
Tel: (202) 739-8144  
Fax: (202) 533-0231  
E-mail: [mab@nei.org](mailto:mab@nei.org)

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