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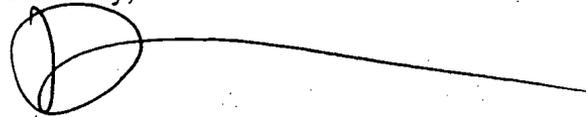
VIA MESSENGER

Secretary
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, Maryland 20852

Dear Madam Secretary:

Enclosed for filing with the Commission is the State of Nevada's Petition to Publish a Fair and Reasonable Notice of Hearing on Doe's Yucca Mountain Application.

Sincerely,

A handwritten signature in black ink, consisting of a stylized 'M' and 'G' followed by a long horizontal line extending to the right.

Martin G. Malsch
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Counsel for the State of Nevada

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE
THE COMMISSIONERS

**PETITION TO PUBLISH A FAIR AND
REASONABLE NOTICE OF HEARING ON DOE'S
YUCCA MOUNTAIN APPLICATION**

SEPTEMBER 9, 2008

TABLE OF CONTENTS

Absence of Standards	2
Mandatory Hearing Issues.....	4
Security Issues:.....	5

On September 8, 2008, the NRC Staff decided that the application for a construction authorization DOE tendered for the proposed repository at Yucca Mountain is sufficiently complete and could be docketed. The next significant step is for the Commission to draft and arrange for publication of the notice of hearing. In a more usual case, preparation of the notice of hearing is a routine matter that does not require the resolution of any significant questions because the terms of that notice are specified in the Commission's regulations. However, the circumstances associated with the docketing of the Yucca Mountain application are highly unusual, especially the absence of safety standards with which to judge safety, completeness and docketing. As a result, the terms of the notice of hearing are not specified in the Commission's regulations. As explained below, no notice of hearing can be published for the Yucca Mountain application unless the Commission resolves at least three important legal and procedural issues. This Petition sets forth the State of Nevada's views on those issues.

ABSENCE OF STANDARDS

The first issue arises because critical safety standards are still missing. EPA has yet to issue its final standards for the post-10,000 year portion of the performance assessment or even predict when they might be issued, and the Commission has yet to issue its own conforming rules. In CLI-08-18, the Commission established a 60-day deadline for the filing of contentions, and one

would expect that this 60-day deadline would be included in the notice of hearing. However, the absences of the EPA standards and of the NRC's conforming rules make the drafting of contentions with respect to DOE's post-10,000-year total systems performance assessment impossible because, without final standards and rules, petitioners cannot know what would constitute a material issue.

The Commission cannot ask the potential parties to draft contentions based on the agencies' proposed standards and rules because this would, in effect, accord immediate legal effect to these proposals without any consideration of adverse comments or completion of the normal rulemaking process. This would prejudice a fair and unbiased consideration of public comments, and violate both section 4 of the Administrative Procedure Act and 189a of the Atomic Energy Act.

The possible alternative would be to provide in the notice of hearing for a delay in the filing of contentions and a delay in the commencement of the hearing process with respect to all issues associated with the post-10,000-year performance assessment until a date to be determined later, after the standards and rules are published. Such date could not be determined now because, unless the Commission is in possession of some non-public knowledge about what the final standards and rules will be, it cannot now be known how much (if any) time will be required for DOE to revise the post-10,000-year performance assessment in its

application and for the parties to review DOE's new assessment and to prepare new contentions.

Of course all this complication and delay could be avoided if, as is true in most other aspects of the Commission's authority, the Commission declined to be bound by its own Staff's action, exercised its supervisory power over Staff action, and refused to docket the application until after final standards and rules are issued. Nevada believes that NRC Staff's docketing of the application, and its underlying determination that the application was reasonably complete notwithstanding the absence of critical standards and rules with which to judge completeness, was arbitrary, capricious, an abuse of discretion, and utterly incomprehensible. However, in light of CLI-08-20, Nevada will treat NRC Staff's docketing decision as administratively unreviewable.

MANDATORY HEARING ISSUES

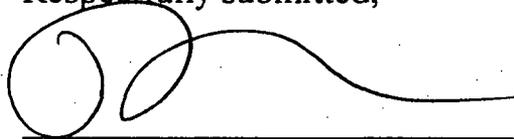
On June 19, 2007, over one year ago, Nevada filed a petition for rulemaking to amend the Commission's Rules of Practice in 10 C.F.R. Part 2 to specify issues for the mandatory formal hearing on DOE's application. There has been no decision on that petition and, at the least, the issues presented in that petition will need to be addressed and resolved in the notice of hearing.

SECURITY ISSUES

Notwithstanding timely applications, representatives of Nevada have yet to be informed of decisions regarding security clearances and access to classified information in the application. Therefore, as things now stand, no contentions about classified information can be prepared. The discussion above about a bifurcated contention and hearing schedule would appear to apply here as well.

Dated this 9th day of September, 2008.

Respectfully submitted,



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