

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. PAPO-00, PAPO-001
U.S. DEPARTMENT OF ENERGY	)	
	)	ASLBP No. 04-829-01 PAPO
(High Level Waste Repository:	)	ASLBP No. 08-861-01-PAPO-BD01
Pre-Application Matters)	)	
	)	December 4, 2008

**STATE OF NEVADA ANSWER TO NEI'S PETITION
TO CERTIFY ISSUE TO THE COMMISSION**

On November 24, 2008, the Nuclear Energy Institute ("NEI") petitioned the Pre-License Application Presiding Officer Board ("PAPO Board") to certify to the Commission the question whether only the NRC Staff and the applicant, the Department of Energy ("DOE"), are entitled to answer initial petitions to intervene in the Yucca Mountain licensing proceeding. For the reasons given below, the State of Nevada ("Nevada") opposes NEI's petition.

First, the PAPO Board lacks jurisdiction to entertain NEI's petition. The PAPO Board's jurisdiction and authority, including authority to certify questions, is expressly limited to "disputes over the electronic availability of documents, including disputes relating to claims of privilege and those relating to the implementation of recommendations of the Advisory Review Panel established under Section 2.1011 (d)." *U.S. Department of Energy (High-Level Waste Repository: Pre-Application Matters)*, CLI-04-20, 60 NRC 15, 18 (2004). The question sought to be certified has nothing to do with the electronic availability of documents.

However, the caption on NEI's petition (and on the associated certificate of service) suggests that NEI's motion may be directed instead to the Advisory Pre-License Application Presiding Officer Board ("APAPO"). If this is NEI's intention, NEI encounters a different but equally fatal jurisdictional problem. The APAPO's jurisdiction arguably extended to questions

such as the one sought to be certified but, by Commission direction, the APAPO's deliberations culminated in recommendations for including language in the Notice of Hearing and Opportunity to Petition for Leave to Intervene. COMSECY-07-0030, December 13, 2007; "Establishment of Atomic Safety and Licensing Board," 73 Fed. Reg. 9358, 9359 (Feb. 20, 2008). The Notice of Hearing and Opportunity to Petition for Leave to Intervene was issued on October 22, 2008 (CLI-08-25, 73 Fed. Reg. 63029), and therefore no further APAPO recommendations for inclusion of language in that Notice are possible and any possible APAPO jurisdiction has expired. Consequently, NEI's petition to APAPO comes too late.¹

The Commission provided in its Notice of Hearing and Opportunity to Petition for Leave to Intervene (CLI-08-25 at 9) that "the presiding officer(s) in this proceeding will be in the best position to establish and efficiently resolve case management issues, some of which the Commission-authorized Advisory PAPO Board resolved in LBP-08-10." Given the jurisdictional limits discussed above, it is clear that such presiding officer(s) will have exclusive jurisdiction to resolve questions such as the one NEI seeks to certify.

Second, NEI's suggested answer to the question it seeks to have certified is wrong. NEI is asking for a partial "free pass." Under NEI's theory, objections from Nevada and from many other parties or potential parties to NEI's possible timely intervention and proposed contentions will not be entertained. As a result, unless DOE or NRC Staff objects, NEI could be admitted as a party along with all of its proposed contentions. Nevada and others may be forced to litigate against an additional party (NEI) advocating the licensing of Yucca Mountain without being afforded any opportunity to object to that party's standing or contentions, which is patently unfair.

¹ *U.S. Department of Energy (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board)*, CLI-08-14, applies only to the organization of petitions to intervene, and grants no additional authority relevant to NEI's motion. See CLI-08-14 at 6. And *U.S. Department of Energy (High Level Waste Repository)*, CLI-08-21, applies only to classification matters.

Such an unfair result is easily avoided by a fair and reasonable reading of the regulations. NEI's theory hinges on the proposition that, when answers to timely petitions are due, only DOE and NRC Staff will qualify as "parties" who are entitled to file answers under 10 C.F.R. § 2.309 (h)(1). However, under the definition of "party" in 10 C.F.R. § 2.1001, Nevada, affected units of local government, and affected Indian Tribes are already designated as "parties." NEI wrongly assumes that to be a party under Section 2.1001, Nevada, affected units of local government, and affected Indian Tribes must always have been admitted as a party by some adjudicatory action. However, 10 C.F.R. § 2.1001 defines "party" to include DOE, NRC Staff, Nevada, affected units of local government, and affected Indian Tribes, and *then* provides that "a person *admitted* under § 2.309 to the proceeding" would also be a "party" [emphasis added]. The Commission must have considered whether "admission" should be a precondition to party status and decided in the affirmative for "persons," but in the negative for DOE, NRC Staff, Nevada, affected units of local government, and affected Indian Tribes.

To be sure, there is a proviso at the end of the definition of party in Section 2.1001 that Nevada, an affected unit of local government, or an affected Indian Tribes "files a list of contentions in accordance with the provisions of § 2.309." However, to be consistent with the preceding text, the proviso must be construed as a condition subsequent whereby party status is revoked if no contentions are filed. Moreover, the proviso language uses the word "files," looking to the future. If NEI were correct that the proviso is a condition precedent, the language here would have been "filed." The Commission knows the difference between tenses, and the corresponding difference between conditions subsequent and conditions precedent, because it used the past tense "admitted" when it established when "persons" would qualify as parties in the definition.

Finally, NEI cannot offer any reason why the Commission would have wanted to preclude Nevada and the others from answering timely petitions and contentions, but then allow them to answer untimely ones filed after they are admitted as parties.²

The text is clear: Nevada, affected units of local government, and affected Indian Tribes, all entities NEI wishes to exclude, are already designated as "parties" for the purpose of applying 10 C.F.R. § 2.309(h)(1), will remain so at least until after answers are due, and are entitled to file answers.

Finally, NEI ignores the opening language of 10 C.F.R. § 2.309(h), which provides that the provision in Section 2.309(h)(1) it relies upon applies "[u]nless otherwise specified by the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on requests for hearings and petitions for leave to intervene." Therefore, even if NEI's reading of Section 2.309(h)(1) were correct, the entities it wants to exclude from answering could still seek and obtain permission to file answers.

For the reasons given above, NEI's petition should be denied.

Respectfully Submitted,

(signed electronically)

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² The definition of "potential party" in 10 C.F.R. § 2.1001 is needed because "persons" who are not "parties" until they are admitted still need to participate as "potential parties" in the pre-application phase.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing State of Nevada's Answer to NEI's Petition to Certify Issue to the Commission has been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (*)).

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