

December 4, 2008

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ADVISORY PRE-LICENSE APPLICATION
PRESIDING OFFICER BOARD**

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

**JOINT RESPONSE BY EUREKA COUNTY AND LINCOLN COUNTY
TO THE NUCLEAR ENERGY INSTITUTE’S PETITION
TO CERTIFY ISSUE TO THE COMMISSION**

Pursuant to 10 C.F.R. § 2.323(c), Eureka County and Lincoln County, Nevada (“the Counties”) hereby respond to the merits of the arguments raised in Nuclear Energy Institute’s Petition to Certify Issue to the Commission (November 24, 2008) (“NEI Petition”).¹ The Counties respectfully submit that NEI errs in arguing that the Commission must hew to an interpretation of the term “party” that is so rigid as to deprive them of a fair and meaningful opportunity to participate in this proceeding by responding to the hearing requests and contentions filed by other parties, including NEI.

Both Counties plan to participate in the Yucca Mountain licensing proceeding as interested local governments (“ILGs”) pursuant to U.S. Nuclear Regulatory Commission (“NRC”) regulation 10 C.F.R. § 2.315(c). Section 2.315(c) entitles ILGs to “a reasonable opportunity to participate in a hearing.” *Id.* The NRC, with the approval of the U.S. Court of

¹ Eureka County did not object to the filing of NEI’s Petition, but reserved the right to contest the merits of the Petition.

Appeals for the First Circuit, has refused to define the term “party” in so narrow a fashion as to deprive an interested government of a reasonable opportunity to participate in a licensing proceeding. In *Commonwealth of Massachusetts v. NRC*, 522 F.3d 115, 129 (1st Cir. 2008), the Court of Appeals upheld a ruling by the Commission that language in an NRC procedural regulation (10 C.F.R. § 2.802(a)), which restricts to “parties” the right to seek a stay of a licensing decision pending the outcome of a rulemaking proceeding, should not be interpreted to deprive a non-party interested state government of the right to seek a stay. As the Court concluded, the NRC reasonably used a broad interpretation of the term “party” to treat Massachusetts – technically a non-party under the language of 10 C.F.R. § 2.315(c) -- as a party equivalent:

Dispositive here is the agency’s own reasonable reading of the term [“party”], which treats an interested governmental entity as the equivalent of a “party” for purposes of § 2.802(d). “Party” can both be defined in one context as a term of art, *e.g.*, as one who has demonstrated standing and whose contention has been admitted for hearing in a licensing adjudication, *see 10 C.F.R. § 2.309(a)*, and deployed in its more general sense of one who participates in a proceeding or transaction, *see Webster’s Third New International Dictionary 1648 (1993)* (defining “party” to include one who “takes part with others in an action or affair” or an individual “involved in the case at hand”). The NRC has not defined the term “party” uniformly throughout its regulations. *See, e.g., 10 C.F.R. § 2.4* (containing regulatory Definitions” but not including one for “part”). We must pay deference to this agency’s interpretation of its own regulations. *Auer, 519 U.S. at 461.*

522 F.3d at 129.

In this case, arguments made for or against the admission of issues to the Yucca Mountain licensing proceeding may have a dispositive effect on whether those issues will be heard. Therefore the Counties reasonably seek an opportunity to respond in opposition to or in support of hearing requests and contentions in which they have an interest. Notably, the Counties’ position is consistent with a guidance document distributed to AULGs at a meeting in Las Vegas on April 17, 2008, which states that NRC regulations in Appendix D to 10 C.F.R. Part

2 allow “DOE, the NRC staff, and any other potential party or participant” in the Yucca Mountain licensing proceeding to respond to hearing requests and contentions. “NRC’s process for deciding whether or not to authorize construction of a repository at Yucca Mountain, Nevada: Estimated Timeline and Deadlines for Participants [April 2008 Update]” at 3 (April 2008) (emphasis added). A copy of the guidance document, which could not be located in ADAMS or the LSN data base, is attached.

Accordingly, the Counties respectfully submit that 10 C.F.R. § 2.315(c) should be interpreted to give the County and other ILGs the equivalent of party status for the purpose of responding to hearing requests and contentions filed by other parties in the Yucca Mountain licensing proceeding.

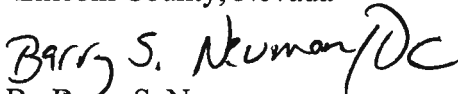
Respectfully submitted,

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December 4, 2008

NRC's process for deciding whether or not to authorize construction of a repository at Yucca Mountain, Nevada:

Estimated Timeline and Deadlines for Participants [April 2008 Update]

NOTE: A schedule for NRC's HLW hearing is set forth in the NRC's regulations at 10 CFR Part 2, specifically at Appendix D. The following event and deadline dates are estimates only, based on the schedule outlined in Appendix D. These estimates assume: 1) that DOE will submit a license application in June 2008; and 2) that the NRC staff can accept the application for review, and docket the application, three months later, as is now planned. Any changes affecting these assumptions or events not anticipated in adopting Appendix D may affect the schedule. While we highlight a number of major activities, potential participants are strongly encouraged to review the Commission's regulations and consult with counsel. Because the regulations are controlling, the following timeline is meant to be illustrative.

Certification of Compliance with NRC Document Access Rules

EVENT:

DOE Certifies that documentary material (as defined in 10 CFR 2.1001) regarding the forthcoming license application is available in NRC's Licensing Support Network (LSN) [DOE certified its compliance on October 19, 2007]

Six months prior to submission of a license application, DOE must certify its compliance with NRC's requirements, in accordance with Sections 2.1003 and 2.1009 of 10 CFR Part 2, for making documentary material available in the Licensing Support Network (LSN).

PARTICIPANT DEADLINE:

Potential parties and interested governmental participants must certify their compliance with NRC's LSN document access requirements, in accordance with Sections 2.1003 and 2.1009, not later than 90 days after DOE makes its certification [January 19, 2008].

Submission of License Application

EVENT:

DOE submits a license application for a geologic repository at Yucca Mountain to NRC [June 2008]

If DOE submits an LA in June 2008, the NRC staff will review the application for completeness and decide whether it contains all required information and whether DOE has updated its certification that it complies with NRC's LSN requirements for documentary material. In addition, there are other requirements with which DOE must comply before the staff can accept the application for review (See Section 2.1012).

NRC Docketing Decision

EVENT:

NRC decides whether or not to accept the application for review

Within approximately 3 months (90 days) of LA submittal, the NRC staff expects to decide whether it is able to accept the application for review. If the NRC staff cannot accept the application for review, the application will be returned to DOE with explanation and instructions, as appropriate.

EVENT:

NRC docket the license application and publishes a Notice of Hearing

[September 2008]

If the NRC staff accepts the application for review, NRC will docket the application and publish a Notice of Hearing in the *Federal Register*. The Notice will announce that the staff has accepted the application for review and that the staff's independent safety review will begin. The Notice will also include the staff's position on whether it is

practicable to adopt DOE's Final Environmental Impact Statement without further supplementation.

PARTICIPANT DEADLINE:

Potential parties may petition for leave to intervene and request a hearing. The petition for leave to intervene and request for hearing must include proposed contentions with regard to the license application. Potential parties that wish to contend that it is not practicable for NRC to adopt the DOE EIS may also file proposed contentions to that effect. Alternatively, local units of government or Tribes may request status as interested government participants. Petitions for leave to intervene or requests for interested governmental status must be filed within 30 days of the Notice of Hearing. No person may be granted party status or status as an interested governmental participant if it cannot be demonstrate "substantial and timely compliance" with NRC's document access requirements at section 2.1003 of 10 CFR Part 2 [October 2008].

PARTICIPANT DEADLINE:

Appendix D indicates that DOE, the NRC staff, and any other potential party or participant may file an answer to a petition to intervene and request for hearing or a petition for interested governmental participation status within approximately 25 days. [November 2008]

PARTICIPANT DEADLINE:

Appendix D indicates that the requestor or petitioner has 7 days to respond to the answers submitted by other potential parties. [~early December 2008]

First Pre-hearing Conference and Order

EVENT:

First pre-hearing conference is held [~December 2009]

Appendix D indicates that a pre-hearing Conference may be held with parties, petitioners for intervention and interested government participants approximately 2 months after publication of the Notice of Hearing.

EVENT:

Licensing Board issues first pre-hearing conference order [~January 2009]

Appendix D indicates that the Licensing Board may issue a pre-hearing conference order approximately 3 months (100 days) after publication of the Notice of Hearing. This order may identify the participants in the hearing and the admitted contentions as well as set discovery and other hearing-related schedules.

PARTICIPANT DEADLINE:

Appendix D indicates that parties, potential parties and interested governmental participants have 10 days to appeal the first pre-hearing conference order and an additional 10 days after service of an appeal to file briefs opposing other appeals.

EVENT:

The Commission rules on appeals to the first pre-hearing conference order [~March 2009]

Appendix D indicates that the Commission may rule on appeals to the pre-hearing conference order in approximately 50 days of the order, which is five months (150 days) after publication of the Notice of Hearing.

Hearings on EIS Adoption

EVENT:

Hearings on NRC staff's adoption decision could begin as early as Spring 2009.

Safety Evaluation Report

EVENT:

NRC Staff issues Safety Evaluation Report [~March 2010]

Appendix D indicates that the NRC staff will document the results of its comprehensive, independent safety review in a public Safety Evaluation Report (SER) approximately 18 months (548 days) after publication of the Notice of Hearing.

Second Pre-hearing Conference and Order

EVENT:

Second pre-hearing conference is held [~April 2010]

Appendix D indicates that a second pre-hearing conference may be held approximately 19 months (578 days) after the Notice of Hearing.

EVENT:

Licensing Board issues second pre-hearing conference order [~May 2010]

Appendix D indicates that the Licensing Board may issue a second pre-hearing conference order approximately 20 months (608 days) after publication of the Notice of Hearing. This order may finalize the issues for any evidentiary hearings, and set schedules for submitting pre-filed testimony and conducting evidentiary hearings.

PARTICIPANT DEADLINE:

Appendix D indicates that parties and interested governmental participants have 10 days to appeal the second pre-hearing conference order and an additional 10 days to file briefs opposing other appeals. Also, 20 days from issuance of this pre-hearing

conference order is the last date for parties to file motions for summary disposition. Parties have 20 days to respond to other parties' summary disposition motions.
[~June 2010]

EVENT:

Commission rules on appeals to the second pre-hearing conference order

[~July 2010]

Appendix D indicates that the Commission may rule on appeals to the second pre-hearing conference order in approximately 50 days of the order, which is approximately 22 months (658 days) after publication of the Notice of Hearing.

Evidentiary Hearings

EVENT:

Licensing Board opens hearings on license application [~September 2010]

Appendix D indicates that evidentiary hearings may start no later than 24 months (720 days) after publication of the Notice of Hearing.

EVENT:

Licensing Board issues initial decision [~May 2011]

Appendix D indicates that a Licensing Board final initial decision to deny or authorize repository construction may be issued within approximately 32 months (955 days) after publication of the Notice.

PARTICIPANT DEADLINE:

Appendix D indicates that parties and interested government participants have 10 days to petition for reconsideration, file a motion to stay the decision, or file a notice of appeal

with the Commission; and an additional 10 days to respond to other parties' stay motions or petitions for reconsideration. Parties and interested governmental participants have 30 days after the filing of a notice of appeal to file a brief in support of that appeal. Any party or interested governmental participant that has not filed an appeal may file a brief in support or opposition to another participant's appeal within 30 days after the period has expired for the filing and service of the briefs of all appellants. [~June 2011]

Commission Review

EVENT:

Commission issues final decision [~October 2011]

Appendix D indicates that a final Commission decision may be issued within approximately 3 years after publication of the Notice of Hearing.

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

CERTIFICATE OF SERVICE

I certify that on December 4, 2008, I served the foregoing JOINT RESPONSE BY EUREKA COUNTY AND LINCOLN COUNTY TO NUCLEAR ENERGY INSTITUTE'S PETITION TO CERTIFY ISSUE TO COMMISSION on the parties to this proceeding by submitting it electronically to the NRC adjudicatory Electronic Information Exchange. It is my understanding that the pleading was served on the same parties who are listed on the attached certificate of service which accompanied the PAPO Board's Order (Granting the Department of Energy's Motion to Remove), dated November 20, 2008.


Diane Curran

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
U.S. DEPARTMENT OF ENERGY) Docket No. PAPO-00
)
(High-Level Waste Repository:)
Pre-Application Matters))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (GRANTING THE DEPARTMENT OF ENERGY'S MOTION TO REMOVE), issued November 20, 2008, have been served upon the following persons by Electronic Information Exchange.

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DOCKET NO. PAPO-00
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LB ORDER (GRANTING THE DEPARTMENT OF ENERGY'S MOTION TO REMOVE)

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Office of the Secretary of the Commission

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