

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository:
Pre-Application Matters)

Docket No. PAPO-01

**ANSWER OF CLARK COUNTY, NEVADA TO PETITION OF
NUCLEAR ENERGY INSTITUTE TO CERTIFY QUESTION TO THE
COMMISSION**

Clark County, Nevada (“Clark County”) hereby files this Answer opposing the petition of the Nuclear Energy Institute (“NEI”) filed on November 24, 2008. NEI petitions the Board to certify to the Commission the question of who, besides the Department of Energy (“DOE”) and Nuclear Regulatory Commission Staff (“NRC Staff”), may answer a request for hearing, a petition to intervene, and/or filing of contentions under the Commission’s regulations governing hearings, intervention and/or contentions at 10 C.F.R. 3.209. NEI’s petition should be denied as failing to meet the elements articulated under 10 C.F.R. 2.323(f). The petition raises no significant and novel legal or policy issue for which a Commission determination is necessary.

I. ANSWER

NEI moved for certification under Section 2.323 (f)(2) of the NRC’s regulations, which provides in pertinent part, “A party may petition the presiding officer to certify an issue to the Commission for early review. The presiding officer shall apply the alternative standards of § 2.341(f) in ruling on the petition for certification.” Section 2.341(f)(1)

provides, “A question certified to the Commission [] will be reviewed if the certification or referral raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding.”

NEI’s petition fails to raise any significant and novel legal issues. NEI relies on a self-serving interpretation of the Commission’s regulations governing who may answer requests for hearing, requests to intervene, and/or contentions. Section 2.309 (h)(1) provides, “The applicant/licensee, the NRC staff, and any other party to a proceeding may file an answer to a request for a hearing, a petition to intervene and/or proffered contentions...” NEI interprets this to mean that only the Department of Energy (“DOE”) or the NRC Staff may file an answer to a request for hearing, petition to intervene, and/or proffered contentions, because at this stage of the proceeding, there are no other “parties,” only potential parties.

NEI’s position would render the Commission’s language “any other party” meaningless. NEI argues that the language “any other party” does have meaning, but only when or if there is a later request to intervene, or a late-filed contention, at which point persons other than the DOE and NRC Staff who have been admitted as parties may answer such late requests or petitions. This argument fails to comprehend the significance of Section 2.309. Section 2.309 does not address mere generic motions that arise from time to time during the adjudicatory process; rather, it provides procedures for requesting hearings, petitions for intervention and/or contentions which are critical matters that shape the focus and scope of the hearing. Precluding Affected Units of Local Government (AULGs) from participating in such significant matters at the outset of the

proceeding is contrary to the Commission's purpose of designating AULGs as parties in the first instance.

The Commission's purposeful inclusion of the phrase "and any other party" in Section 2.309 (h)(1) must therefore be given meaning in the context of the stage of the proceeding in which the regulation applies. If the Commission did not intend to permit anyone but the DOE or NRC Staff to answer requests for hearing, petitions to intervene, and/or contentions, then it would not have included such language.

Indeed, as the NEI acknowledges in its petition, the NRC regulations specifically define AULGs as "parties" for the high level waste proceeding. Section 2.1001 defines "party" as,

the DOE, the NRC staff, the host State, any affected unit of local government as defined in Section 2 of the Nuclear Waste Policy Act of 1982, as amended (42 U.S.C. 10101), any affected Indian Tribe as defined in section 2 of the Nuclear Waste Policy Act of 1982, as amended (42 U.S.C. 10101), and a person admitted under § 2.309 to the proceeding on an application for construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, and an application for a license to receive and possess high level radioactive waste at a geologic repository operations area under parts 60 and 63 of this chapter; provided that a host State, affected unit of local government, or affected Indian Tribe files a list of contentions in accordance with the provisions of § 2.309.

The Commission's definition clearly provides that an AULG is a "party." Although the definition requires the AULG to file a list of contentions when it requests a hearing under Section 2.309, the definition clearly and deliberately refers to the State, and any AULG as a "party" in the very same clause in which the DOE and NRC Staff are referred to as parties.

NEI's argument that Section 2.309 (h)(3) supports its position also fails. According to NEI, 2.309(h)(3) implies that the Commission intended to limit who may

respond to hearing requests. However, 2.309(h)(3) actually serves to limit an endless string of answers to answers or answers to replies - meaning, if and when a party files an answer in accordance with subsection (h)(1), and if and when requestor/petitioner files a reply to such answer in accordance with subsection (h)(2), then (h)(3) serves to prevent the applicant, NRC Staff or any other party from filing yet another response to such reply.¹

As to the element of whether NEI's question raises a significant or novel policy issue, the NEI poses the question under the guise of eliminating what the NEI calls "unnecessary elements" including "a multitude of answers by entities not even yet established as parties, as well as related replies." NEI Petition at 4. As a proponent of the construction of high-level waste facility at Yucca Mountain, NEI is chief among those who would likely benefit under its interpretation in that such an interpretation would allow parties with which NEI shares similar interests to answer its possible request for intervention; and would prevent potentially adverse parties such as the State and AULGs from possibly challenging NEI's standing or contentions.

In the end, NEI's position would foreclose substantive and meaningful participation by affected units of local government at a crucial stage in this complex proceeding. As an AULG, Clark County has material and substantial interests in the proceeding which may be directly affected by positions taken by other participants seeking intervention and/or raising contentions. Clark County's right to challenge another person's standing or answer contentions is not only sound policy in that it will

¹ As noted herein, Section 2.309(h)(1) identifies who may file an answer to requests for hearing, petitions to intervene, and/or contentions, and the time for filing such answers. Section 2.309(h)(2) then provides that the petitioner may reply to any such answers, and when such replies must be filed. Finally, Section 2.309(h)(3) reads, "no other written answers or replies will be entertained." See, 10 C.F.R. 2.309 (h)(1)-(3).

assist in developing a sound record, it is provided for under the regulations NEI argues would preclude such participation.

II. CONCLUSIONS

For the foregoing reasons, Clark County respectfully urges the Board to reject NEI's petition on the grounds that it raises no novel legal or policy matters for which Commission action is needed.

Respectfully submitted,

signed electronically _____

Alan I. Robbins

Debra D. Roby

Marc Gordon

Jennings Strouss & Salmon, PLC

1700 Pennsylvania Ave, NW

Suite 500

Washington, DC 20006

202-464-0539

arobbins@jsslaw.com

droby@jsslaw.com

mgordon@jsslaw.com

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CERTIFICATE OF SERVICE

I hereby certify that on this day, December 4, 2008, the foregoing was served on all parties listed on the official service list for this proceeding as maintained by the Nuclear Regulatory Commission's Electronic Information Exchange, including:

US NRC
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
Washington, DC 20555-0001
Thomas S. Moore, Chair
Administrative Judge
Email: PAPO@nrc.gov
Alex S. Karlin
Administrative Judge
Email: PAPO@nrc.gov
Alan S. Rosenthal
Administrative Judge
Email: rsnthl@comcast.net
G. Paul Bollwerk, III
Administrative Judge
Email: PAPO@nrc.gov
Anthony C. Eitreim, Esq.
Chief Counsel
Email: PAPO@nrc.gov
James M. Cutchin
Email: PAPO@nrc.gov
Jered Lindsay
Email: PAPO@nrc.gov
Marcia Carpentier
Email: PAPO@nrc.gov
Margaret Parish
Email: PAPO@nrc.gov
Debra Wolf
Email: PAPO@nrc.gov
Bradley S. Baxter
Email: bxh@nrc.gov

Daniel J. Graser
LSN Administrator
Email: djg2@nrc.gov
ASLBP HLW Adjudication
Email:
ASLBP_HLW_Adjudication@nrc.gov
U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop - O-16 C1
Washington, DC 20555-0001
Hearing Docket
Email: hearingdocket@nrc.gov
Andrew L. Bates
Email: alb@nrc.gov
Adria T. Byrdsong
Email: atbl@nrc.gov
Emile L. Julian, Esq.
Email: elj@nrc.gov
Evangeline S. Ngbea
Email: esn@nrc.gov
Rebecca L. Giitter
Email: rll@nrc.gov
U.S. Nuclear Regulatory Commission
Office of Congressional Affairs
Mail Stop O-17A3
U.S. Nuclear Regulatory Commission
Office of Public Affairs
Mail Stop O-2A13
David McIntyre
Email: dtm@nrc.gov

U.S. Nuclear Regulatory Commission

Edward P. Noonan, Esq.

Office of the General Counsel
Mail Stop - O-15 D21
Washington, DC 20555-0001
Karen D. Cyr, Esq.
General Counsel
Email: kdc@nrc.gov
Gwendolyn D. Hawkins
Email: gxh2@nrc.gov
Janice E. Moore, Esq.
Email: jem@nrc.gov
Trip Rothschild, Esq.
Email: tbr@nrc.gov
Mitzi A. Young, Esq.
Email: may@nrc.gov
Marian L. Zobler, Esq.
Email: mlz@nrc.gov
Andrea L. Silvia, Esq.
Email: alc1@nrc.gov
Daniel Lenehan, Esq.
Email: dwl2@nrc.gov
Margaret J. Bupp
Email: mjb5@nrc.gov
David E. Roth
Email: der@nrc.gov
Jessica A. Bielecki
Email: jessica.bielecki@nrc.gov
Nina E. Bafundo
Email: neb1@nrc.gov
OGCMailCenter
Email: OGCMailCenter@nrc.gov

Hunton & Williams LLP
Counsel for the U.S. Department of Energy
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
W. Jeffery Edwards, Esq.
Email: jedwards@hunton.com
Kelly L. Faglioni, Esq.
Email: kfaglioni@hunton.com
Melissa Grier
Email: mgrier@hunton.com
Donald P. Irwin, Esq.
Email: dirwin@hunton.com
Stephanie Meharg
Email: smeharg@hunton.com

Email: enoonan@hunton.com
Audrey B. Rusteau
Email: arusteau@hunton.com
Michael R. Shebelskie, Esq.
Email: mshebelskie@hunton.com
Pat Slayton
Email: pslayton@hunton.com
Belinda A. Wright
Email: bwright@hunton.com

U.S. Department Of Energy
Office of General Counsel
1551 Hillshire Drive
Las Vegas, NV 89134-6321
George W. Hellstrom
Email: george.hellstrom@ymp.gov

U.S. Department of Energy
Office of General Counsel
1000 Independence Avenue, S.W.
Washington, DC 20585
Martha S. Crosland, Esq.
Email: martha.crosland@hq.doe.gov
Angela M. Kordyak, Esq.
Email: angela.kordyak@hq.doe.gov
Mary B. Neumayr, Esq.
Email: mary.neumayr@hq.doe.gov

Carter Ledyard & Milburn, LLP
Counsel for Lincoln County
1401 Eye Street, N.W., Suite 300
Washington, DC 20005
Barry S. Neuman, Esq.
Email: neuman@clm.com

U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

Eric Knox, Associate Director, Systems
Operations and External Relations, OCRWM
Email: eric.knox@hq.doe.gov
Dong Kim, LSN Project Manager, OCRWM
Email: dong.kim@rw.doe.gov

Churchill, Esmeralda, Eureka, Mineral
and Lander Counties
1705 Wildcat Lane
Ogden, UT 84403
Loreen Pitchford, LSN Coordinator
for Lander County
Email: lpitchford@comcast.net

Robert List
Armstrong Teasdale LLP
1975 Village Center Circle, Suite 140
Las Vegas, NV 89134-62237
Email: rlist@armstrongteasdale.com

U.S. Department of Energy
Office of Civilian Radioactive Waste Mgmt
Office of Repository Development
1551 Hillshire Drive
Las Vegas, NV 89134-6321
Timothy C. Gunter
Email: timothy_gunter@ymp.gov

City of Las Vegas
400 Stewart Ave.
Las Vegas, NV 89101
Margaret Plaster, Management Analyst
Email: mplaster@LasVegasNevada.gov

Clark County (NV) Nuclear Waste Division
500 S. Grand Central Parkway
Las Vegas, NV 89155
Irene Navis
Email: iln@co.clark.nv.us

Nuclear Waste Project Office
1761 East College Parkway, Suite 118
Carson City, NV 89706
Robert Loux
Email: bloux@nuc.state.nv.us
Steve Frishman, Tech. Policy Coordinator
Email: steve.frishman@gmail.com

Eureka County and Lander County
Harmon, Curran, Speilberg & Eisenberg
1726 M. Street N.W., Suite 600
Washington, DC 20036
Diane Curran, Esq.
Email: dcurran@harmoncurran.com

Nevada Nuclear Waste Task Force
P.O. Box 26177
Las Vegas, NV 89126
Judy Treichel, Executive Director
Email: judyntwf@aol.com

Talisman International, LLC
1000 Potomac St., N.W., Suite 300
Washington, D.C. 20007
Patricia Larimore
Email: plarimore@talisman-intl.com

Nuclear Energy Institute
1776 I Street, NW, Suite 400
Washington, DC 20006-3708
Michael A. Bauser, Esq.
Associate General Counsel
Email: mab@nei.org
Anne W. Cottingham, Esq.
Email: awc@nei.org
Ellen C. Ginsberg, Esq.
Email: ecg@nei.org
Rod McCullum
Email: rxm@nei.org
Steven P. Kraft
Email: spk@nei.org

Jay E. Silberg
Email: jay.silberg@pillsburylaw.com
Timothy J.V. Walsh
Email: timothy.walsh@pillsburylaw.com

White Pine County
City of Caliente
Lincoln County
P.O. Box 126
Caliente, NV 89008
Jason Pitts
Email: jayson@idtserives.com

Nuclear Information and Resource Service
6930 Carroll Avenue, Suite 340
Takoma Park, MD 20912
Michael Mariotte, Executive Director*
Email: nirnet@nirs.org

Radioactive Waste Watchdog
Beyond Nuclear
6930 Carroll Avenue, Suite 400
Takoma Park, MD 20912
Kevin Kamps
Email: kevin@beyondnuclear.org

Yucca Mountain Project, Licensing Group,
DOE/BSC
Regulatory Programs
1180 North Town Center Drive
Las Vegas, NV 89144
Jeffrey Kriner
Email: jeffrey_kriner@ymp.gov

Abigail Johnson
612 West Telegraph Street
Carson City, NV 89703
Email: abbyj@gbis.com

National Congress of American Indians
1301 Connecticut Ave. NW - Second floor
Washington, DC 20036
Robert I. Holden, Director
Nuclear Waste Program
Email: robert_holden@ncai.org

Ross, Dixon & Bell
2001 K Street N.W.
Washington D.C. 20006-1040
William H. Briggs
Email: wbriggs@rdblaw.com
Merril Hirsh, Esq.
Email: mhirsh@rdblaw.com

Churchill County (NV)
155 North Taylor Street, Suite 182
Fallon, NV 89406
Alan Kalt*
Email: comptroller@churchillcounty.org

Mineral County Board of Commissioners

Inyo County Water Department
Yucca Mtn Nuclear Waste
Repository Assessment Office
163 May St.
Bishop, CA 93514

Matt Gaffney, Project Associate
Email: mgaffney@inyoyucca.org
Mr. Pat Cecil
Inyo County Planning Director
P. O. Box L
Independence, CA 93526
Email: pcecil@inyocounty.us

Environmental Protection Agency
Ray Clark
Email: clark.ray@epa.gov

Nuclear Waste Technical Review Board
Joyce Dory
Email: dory@nwtrb.gov

Intertech Services Corporation
(for Lincoln County)
P.O. Box 2008
Carson City, NV 89702-2008
Dr. Mike Baughman
Email: bigboff@aol.com

Nye County (NV) Department of Natural
Resources & Federal Facilities
1210 E. Basin Road, Suite 6
Pahrump, NV 89048

David Swanson
Email: dswanson@nyecounty.net
Lincoln County (NV) Nuclear Oversight
Prgm
100 Depot Ave., Suite 15; P.O. Box 1068
Caliente, NV 89008-1068
Lea Rasura-Alfano, Coordinator
Email: jcciac@co.lincoln.nv.us

Nye County (NV) Regulatory/Licensing
Adv.
18160 Cottonwood Rd. #265
Sunriver, OR 97707
Malachy Murphy
Email: mrmurphy@chamberscable.com

Alex S. Polonsky, Esq.

P.O. Box 1600
Hawthorne, NV 89415
Linda Mathias, Administrator
Office of Nuclear Projects
Email: yuccainfo@mineralcountynv.org

State of Nevada
100 N. Carson Street
Carson City, NV 89710
Marta Adams*
Email: maadams@ag.state.nv.us

White Pine County (NV) Nuclear
Waste Project Office
959 Campton Street
Ely, NV 89301
Mike Simon, Director
Email: wpnucwst1@mwpower.net

Fredericks & Peebles, L.L.P.
1001 Second Street
Sacramento, CA 95814
916-441-2700
FAX 916-441-2067

Darcie L. Houck
Email: dhouck@ndnlaw.com
John M. Peebles
Email: jpeebles@ndnlaw.com
Joe Kennedy, Chairman
Email: chairman@timbisha.org
Barbara Durham

Tribal Historic Preservation Officer
Email: dvdurbarbara@netscape.com

Counsel for the U.S. Department of Energy
Morgan, Lewis, Bockius LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004
Lewis Csedrik, Esq.
Email: lcsedrik@morganlewis.com
Jay Gutierrez, Esq.
Email: jgutierrez@morganlewis.com
Thomas Poindexter, Esq.
Email: tpoindexter@morganlewis.com

Email: apolonsky@morganlewis.com
Thomas A. Schmutz, Esq.
Email: tschmutz@morganlewis.com
Donald Silverman, Esq.
Email: dsilverman@morganlewis.com
Paul J. Zaffuts, Esq.
Email: pzaffuts@morganlewis.com
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
Susan Durbin
Deputy Attorney General

California Department of Justice
1300 I St.
P.O. Box 944255
Sacramento, CA, 94244-2550
Email: susan.durbin@doj.ca.gov

Brian Hembacher
Deputy Attorney General
California Department of Justice
300 S. Spring St
Los Angeles, CA 90013
Email: brian.hembacher@doj.ca.gov

Timothy E. Sullivan
Deputy Attorney General
California Department of Justice
1515 Clay St., 20th Flr.
P.O. Box 70550
Oakland, CA 94612-0550
Email: timothy.sullivan@doj.ca.gov

Kevin W. Bell
Senior Staff Counsel
California Energy Commission
1516 9th Street
Sacramento, CA 95814
Email: kwbell@energy.state.ca.us

.

Jeffrey D. VanNiel
530 Farrington Court
Las Vegas, NV 89123
Email: nbridvnr@gmail.com

Ethan I. Strell
Carter Ledyard & Milburn LLP
2 Wall Street
New York, NY 10005
Email: strell@clm.com

signed electronically
Debra D. Roby
Jennings Strouss & Salmon, PLC
1700 Pennsylvania Ave, NW
Suite 500
Washington, D.C. 20005
Tel: (202) 464-0539
email: droby@jsslaw.com