

December 8, 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ADVISORY PRE-LICENSE APPLICATION  
PRESIDING OFFICER BOARD

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

**THE NUCLEAR ENERGY INSTITUTE’S MOTION FOR LEAVE TO FILE REPLIES**  
**AND REPLIES TO THE NRC STAFF AND EUREKA AND LINCOLN COUNTIES**

The Nuclear Energy Institute (“NEI”) respectfully requests leave to file replies to the NRC Staff Response<sup>1</sup> and to the Eureka & Lincoln County Joint Response<sup>2</sup> to NEI’s November 24, 2008 Petition to Certify Issue to the Commission (“Petition”).<sup>3</sup> NRC regulations provide for the filing and acceptance of replies “under compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to file a reply.” 10 C.F.R. § 2.323(c). Such circumstances are present here. Among other things, the NRC Staff asserts that the issue raised in the Petition is not yet ripe. NRC Staff Response at 2. The NRC Staff’s erroneous position, which NEI could not have anticipated, is belied by multiple statements made on the record by other proceeding participants that they

<sup>1</sup> NRC Staff Reply to Nuclear Energy Institute’s November 24, 2008 Petition to Certify Issue to the Commission (Dec. 4, 2008) (“NRC Staff Response”).

<sup>2</sup> Joint Response by Eureka County and Lincoln County to the Nuclear Energy Institute’s Petition to Certify Issue to the Commission (Dec. 4, 2008).

<sup>3</sup> Pursuant to 10 C.F.R. § 2.323(b), counsel for NEI certifies that any party or potential party that responded to the Petition was contacted regarding this Motion for Leave to File Replies. Counsel for the NRC Staff, the State of Nevada, Eureka and Lincoln Counties, and Clark County have been contacted. Of those responding, the NRC Staff objects to NEI’s Motion. The State of Nevada and Eureka and Lincoln Counties do not object to NEI’s Motion.

intend to file answers to intervention petitions, even though they will not be admitted parties in this proceeding at that time.

With respect Eureka and Lincoln Counties, one of their positions is that certain guidance,<sup>4</sup> provided by the NRC Staff, permits potential parties to file answers in response to contentions. NEI could not have anticipated this position because NEI had no knowledge of the Guidance Document, which had apparently been distributed only to some participants and which is also apparently unavailable on ADAMS or the LSN. Eureka & Lincoln County Joint Response at 3. The Guidance Document is important in this context because it contains an interpretation of 10 C.F.R. 2.309(h)(1) that is directly at odds with statements made by the NRC Staff in its Response, as well as the plain language in 10 C.F.R. Part 2 Appendix D.

For the foregoing reasons, NEI respectfully requests leave to file the following replies.

**I. NEI Reply to the NRC Staff**

Among other things, the NRC Staff asserts that the issue raised in the Petition is not yet ripe. NRC Staff Response at 2. The NRC Staff's position is contradicted by the record in this proceeding. Although it is true that no answers to intervention petitions have yet been filed because no intervention petitions have been filed, this proceeding's record is replete with statements made by other proceeding participants that they intend to file answers to intervention petitions, even though they will not be admitted parties to this proceeding at that time. For example, in response to this Advisory PAPO Board's March 6, 2008 request for information from potential parties regarding contentions, Nye County stated that it would not need longer

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<sup>4</sup> See "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] Revision 1" ("Guidance Document"), which is attached to the Joint Response by Eureka County and Lincoln County to the Nuclear Energy Institute's Petition to Certify Issue to the Commission (Dec. 4, 2008).

than 25 days to respond to contentions filed by other parties, and clearly indicated that it intended to file challenges.<sup>5</sup> Likewise, Clark County indicated to the Advisory PAPO Board that it would not need more than 25 days to file “challenges to contentions filed by other parties.”<sup>6</sup> Later in this proceeding, in response to a Commission request for input from potential parties, Nye County stated its belief that the Commission’s proposed extension of time to file answers to proposed contentions was “warranted and essential for the parties to craft well-reasoned Answers and Replies to the numerous anticipated contentions.”<sup>7</sup> In this light, NEI’s Petition does not pose a merely academic question. Accordingly, the NRC Staff’s position — that NEI’s Petition is not ripe — is wrong because of the clear expressions of intent by Nye and Clark counties to file answers to contentions submitted by other potential parties.

Further, if NEI’s position is correct, denying the Petition as unripe will only result in petitioners needlessly expending substantial resources to file answers, which NEI believes are unauthorized. NEI believes it would be best to the answer the question now rather than later in this proceeding when critical path activities (e.g., authorized answers and replies, pre-hearing conference, etc.) are underway.

## **II. NEI Reply to Eureka and Lincoln Counties**

One of the positions taken by Eureka and Lincoln Counties is that the Guidance Document permits potential parties to file answers in response to contentions. Eureka & Lincoln County Joint Response at 2-3. However, the Guidance Document contains an interpretation of 10 C.F.R. 2.309(h)(1) that is directly at odds with statements made by the NRC Staff in its

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<sup>5</sup> Nye County Response to Advisory PAPO Board Notice and Memorandum (Requesting Information from Potential Parties) at p.2 (Mar. 20, 2008).

<sup>6</sup> Clark County’s Response to Notice and Memorandum Requesting Information from Potential Parties (Mar. 21, 2008).

<sup>7</sup> Comments of Nye County (Aug. 22, 2008) (responding to CLI-08-18).

Response, as well as the plain language in 10 C.F.R. Part 2 Appendix D. The NRC Staff Response stated that section 2.309(h)(1) provides that “[t]he applicant/licensee, the NRC Staff, and any other party to a proceeding may file an answer to a request for hearing, a petition to intervene and/or proffered contentions,” and further stated that “‘potential parties’ are not listed among those permitted to file answers.” NRC Staff Response at 2 (emphases added). In contrast, the Guidance Document states “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 . . . .” Guidance Document at 2 (emphasis added).

Moreover, the Guidance Document misrepresents what is stated in 10 C.F.R. Part 2 Appendix D. Appendix D does not state that “any other potential party or participant” may file answers to intervention petitions. Appendix D does proscribe the time when “[a]nswers to intervention & interested government participant petitions” are due, but does not indicate that potential parties may file those answers. Indeed, Appendix D does not refer to “potential parties” at all. Appendix D does refer to “[p]etitioner’s” and proscribes the time when they may file “response[s] to answers,” but nowhere states that a petitioner may file answers to other petitioners’ intervention petitions and contentions.

Respectfully submitted,



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Dated: December 8, 2008

Counsel for NEI

December 8, 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

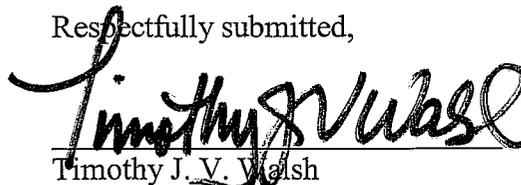
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing "The Nuclear Energy Institute's Motion for Leave to File Replies and Replies to the NRC Staff and Eureka and Lincoln Counties" was served this date via the Nuclear Regulatory Commission's Electronic Information Exchange ("EIE"), which to the best of my knowledge transmitted the foregoing upon those on the Service List maintained by the EIE for the above-captioned proceeding.

Respectfully submitted,



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