

December 16, 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ADVISORY PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD

In the Matter of )  
 ) Docket No. PAPO-001  
U.S. DEPARTMENT OF ENERGY )  
 ) ASLBP No. 08-861-01-PAPO-BD01  
(High-Level Waste Repository: )  
Pre-Application Matters) )

NRC STAFF REPLY TO NUCLEAR ENERGY INSTITUTE'S  
DECEMBER 8, 2008 MOTION FOR LEAVE TO FILE REPLIES

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the NRC staff hereby responds to the Nuclear Energy Institute's ("NEI") motion filed with the Advisory Pre-Application Presiding Officer Board ("Board"). "The Nuclear Energy Institute's Motion for Leave to File Replies and Replies to the NRC Staff and Eureka and Lincoln Counties," December 8, 2008 ("NEI Motion"). In its Motion, NEI requests permission to file replies to answers from the NRC staff ("Staff") and Eureka and Lincoln Counties to an earlier NEI petition requesting certification of a procedural question to the Commission. NEI Motion at 1. As indicated by counsel for NEI, the Staff opposes the Motion. *Id.* The reasons for the Staff's opposition are discussed below.

DISCUSSION

On November 24, 2008, NEI filed a petition requesting that the Board certify to the Commission the question of whether anyone other than the Staff and DOE may file responses to petitions to intervene and contentions pursuant to 10 C.F.R. § 2.309(h). "The Nuclear Energy Institute's Petition to Certify Issue to Commission," November 24, 2008 ("Petition"). The Staff opposed the Petition, noting, among other reasons, that the issue raised by NEI is "not ripe for decision because no one has sought to file answers to petitions to intervene and contentions."

"NRC Staff Reply to Nuclear Energy Institute's November 24, 2008 Petition to Certify Issue to Commission," at 2, December 4, 2008 ("NRC Reply").

Pursuant to 10 C.F.R. § 2.323(c), "the moving party has no right to reply" to answers to a motion, "except as permitted . . . by the presiding officer. Permission may be granted only in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply." NEI argues that such compelling circumstances exist in the present instant, because NEI could not reasonably anticipate the Staff's position that the question to be certified is not yet ripe. However, the facts cited by NEI in support of its position directly contradict NEI's argument that it could not have anticipated the Staff's ripeness argument.

The Staff argued in its response to NEI's initial motion that the issue was not yet ripe because no potential participant had sought to file answers to intervention petitions. NRC Reply at 2. NEI argues, here, that the Staff's position is erroneous because of "multiple statements made on the record by other proceeding participants that they intend to file answers to intervention petitions, even though they will not be admitted parties in this proceeding at that time." NEI Motion at 1-2. Since NEI knew that non-party participants planned to file answers, NEI, should have anticipated that ripeness would be an issue and should have addressed ripeness in its initial pleading. The "statements" cited by NEI date back to March 2008, and were available to all potential parties to the proceeding, including NEI. Yet, NEI did not mention these statements when arguing in support of certification in its initial Petition, despite the fact that it appears now that NEI believes that these statements support NEI's position that certification is warranted. Nor did NEI discuss any potential impact on its Petition from the fact that, regardless of what any potential party has stated their future actions may be, no potential party has at present filed an answer to an intervention petition. Raising the issue of ripeness now does not constitute a "compelling circumstance" necessitating a reply by a moving party

pursuant to § 2.323(c).

In addition, NEI refers to Eureka and Lincoln Counties' response to NEI's original motion, in which they cited to a worksheet provided by the Staff to Affected Units of Local Government (AULGs) and other members of the public at a public workshop on the hearing process held for AULGs on April 17, 2008 in Las Vegas. NEI Motion at 3-4, citing "Joint Response by Eureka County and Lincoln County to the Nuclear Energy Institute's Petition to Certify Issue to the Commission," at 2, December 4, 2008.<sup>1</sup> The worksheet, entitled "NRC's process for deciding whether or not to authorize construction of a repository at Yucca Mountain, Nevada: Estimated Timeline and Deadlines for Participants," was an informational tool intended to illustrate the timeline for various events during the licensing and hearing process. In illustrating the deadline for filing answers to hearing requests, the worksheet erroneously replaced the term "party" with "potential party or participant." Although the worksheet accurately states the relevant deadline, this language contradicts the plain language of 10 C.F.R. § 2.309(h) and 10 C.F.R. Part 2, Appendix D.

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<sup>1</sup> The referenced document was not placed on ADAMS following the workshop. However an earlier version of the document containing substantially the same information has been available on ADAMS and was sent to AULGs and other potential participants, including NEI, following a 2007 workshop. See ADAMS Package ML072610859. Additional information from the April 17, 2008 workshop was placed on ADAMS, including an attendance sheet confirming that a representative of NEI attended the meeting. ADAMS Package ML081370096.

CONCLUSION

For the foregoing reasons, the Staff requests that the Board deny NEI's Motion.

Respectfully submitted,

**/Signed (electronically) by/**

Margaret J. Bupp

Counsel for NRC Staff

U.S. Nuclear Regulatory Commission

Office of General Counsel

Mail Stop O-15D21

Washington, D.C. 20555-0001

(301) 415-3722

[mjb5@nrc.gov](mailto:mjb5@nrc.gov)

Dated at Rockville, Maryland  
this 16<sup>th</sup> day of December, 2008

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF REPLY TO NUCLEAR ENERGY INSTITUTE'S DECEMBER 8, 2008 MOTION FOR LEAVE TO FILE REPLIES" in the above-captioned proceeding have been served on the following persons this 16<sup>th</sup> day of December, 2008, by Electronic Information Exchange.

Thomas S. Moore, Chair  
Administrative Judge  
U.S. Nuclear Regulatory Commission  
Atomic Safety and Licensing Board  
Mail Stop: T-3F23  
Washington, DC 20555-0001  
E-mail: [tsm2@nrc.gov](mailto:tsm2@nrc.gov)

G. Paul Bollwerk, III  
Administrative Judge  
Atomic Safety and Licensing Board  
Mail Stop: T-3F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: [gpb@nrc.gov](mailto:gpb@nrc.gov)

Alan S. Rosenthal  
Administrative Judge  
U.S. Nuclear Regulatory Commission  
Atomic Safety and Licensing Board  
Mail Stop: T-3F23  
Washington, DC 20555-0001  
E-mail: [axr@nrc.gov](mailto:axr@nrc.gov)  
[rsnthl@comcast.net](mailto:rsnthl@comcast.net)

Paul S. Ryerson  
Administrative Judge  
Atomic Safety and Licensing Board  
Mail Stop: T-3F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: [paul.ryerson@nrc.gov](mailto:paul.ryerson@nrc.gov)

Alex S. Karlin  
Administrative Judge  
U.S. Nuclear Regulatory Commission  
Atomic Safety and Licensing Board  
Mail Stop: T-3F23  
Washington, DC 20555-0001  
E-mail: [ask2@nrc.gov](mailto:ask2@nrc.gov)

Office of the Secretary  
ATTN: Docketing and Service  
Mail Stop: O-16C1  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
E-mail: [HEARINGDOCKET@nrc.gov](mailto:HEARINGDOCKET@nrc.gov)

Office of Commission Appellate  
Adjudication  
[ocaamail@nrc.gov](mailto:ocaamail@nrc.gov)

Engelbrecht von Tiesenhausen  
Clark County Nuclear Waste Division  
500 S. Grand Central Parkway  
Las Vegas, NV 89155  
E-mail: [evt@co.clark.nv.us](mailto:evt@co.clark.nv.us)

Edward P. Noonan, Esq.  
W. Jeffrey Edwards, Esq.  
Kelly L. Faglioni, Esq.  
Donald P. Irwin, Esq.  
Michael R. Shebelskie, Esq.  
Stephanie Meharg  
Audrey B. Rusteau  
Belinda A. Wright  
Pat Slayton

Hunton & Williams LLP  
951 East Byrd Street  
Richmond, VA 23219  
E-mail: [enoonan@hunton.com](mailto:enoonan@hunton.com)  
[jedwards@hunton.com](mailto:jedwards@hunton.com)  
[kfaglioni@hunton.com](mailto:kfaglioni@hunton.com)  
[dirwin@hunton.com](mailto:dirwin@hunton.com)  
[mshebelskie@hunton.com](mailto:mshebelskie@hunton.com)  
[smeharg@hunton.com](mailto:smeharg@hunton.com)  
[arusteau@hunton.com](mailto:arusteau@hunton.com)  
[bwright@hunton.com](mailto:bwright@hunton.com)  
[pslayton@hunton.com](mailto:pslayton@hunton.com)

Michael A. Bauser, Esq.  
Associate General Counsel  
Anne W. Cottingham, Esq.  
Ellen C. Ginsberg, Esq.  
Nuclear Energy Institute  
1776 I Street, NW, Suite 400  
Washington, DC 20006-3708  
E-mail: [mab@nei.org](mailto:mab@nei.org)  
[awc@nei.org](mailto:awc@nei.org)  
[ecg@nei.org](mailto:ecg@nei.org)

Elizabeth A. Vibert, Esq.  
Deputy District Attorney  
Clark County District Attorney Office  
P.O. Box 553315  
Las Vegas, NV 89155-2215  
E-mail: [VibertE@co.clark.nv.us](mailto:VibertE@co.clark.nv.us)

Jason Pitts  
White Pine County  
City of Caliente  
Lincoln County  
P.O. Box 126  
Caliente, NV 89008  
E-mail: [jayson@idtservices.com](mailto:jayson@idtservices.com)

Atomic Safety and Licensing Board Panel  
ASLB HLW Adjudication  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3F23  
Washington, DC 20555-0001  
E-mail: [ASLB\\_HLW\\_Adjudication@nrc.gov](mailto:ASLB_HLW_Adjudication@nrc.gov)

Martin G. Malsch, Esq.  
Susan Montesi  
Egan, Fitzpatrick & Malsch, PLLC  
2001 K Street, NW, Suite 400  
Washington, DC 20006  
E-mail: [mmalsch@nuclearlawyer.com](mailto:mmalsch@nuclearlawyer.com)  
[smontesi@nuclearlawyer.com](mailto:smontesi@nuclearlawyer.com)

Charles J. Fitzpatrick, Esq.  
John W. Lawrence, Esq.  
Egan, Fitzpatrick & Malsch, PLLC  
12500 San Pedro Avenue, Suite 555  
San Antonio, TX 78216  
Email: [cfitzpatrick@nuclearlawyer.com](mailto:cfitzpatrick@nuclearlawyer.com)  
[jlawrence@nuclearlawyer.com](mailto:jlawrence@nuclearlawyer.com)

James M. Cutchin  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, DC 20555-0001  
E-mail: [jmc3@nrc.gov](mailto:jmc3@nrc.gov)

Merril Hirsh  
State of Nevada  
Ross Dixon & Bell, LLP  
2001 K Street NW, Suite 400  
Washington, DC 20006  
E-mail: [Mhirsh@rblaw.com](mailto:Mhirsh@rblaw.com)

Martha S. Crosland, Esq.  
Angela M. Kordyak, Esq.  
Mary B. Neumayr, Esq.  
Nicholas P. DiNunzio  
U.S. Department of Energy  
Office of the General Counsel  
1000 Independence Avenue, S.W.  
Washington, DC 20585  
E-mail: [martha.crosland@hq.doe.gov](mailto:martha.crosland@hq.doe.gov)  
[angela.kordyak@hq.doe.gov](mailto:angela.kordyak@hq.doe.gov)  
[mary.neumayr@hq.doe.gov](mailto:mary.neumayr@hq.doe.gov)  
[nick.dinunzio@rw.doe.gov](mailto:nick.dinunzio@rw.doe.gov)

Anthony C. Eitrem, Esq.  
Chief Counsel  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, DC 20555  
E-mail: [ace1@nrc.gov](mailto:ace1@nrc.gov)

Daniel J. Graser  
Licensing and Support Network  
Administrator  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, DC 20555-0001  
E-mail: [djq2@nrc.gov](mailto:djq2@nrc.gov)

Judy Treichel, Executive Director  
Nevada Nuclear Waste Task Force  
P.O. Box 26177  
Las Vegas, NV 89126  
E-mail: [judynwtf@aol.com](mailto:judynwtf@aol.com)

George W. Hellstrom, Esq.  
U.S. Department of Energy  
Office of the General Counsel  
1551 Hillshire Drive  
Las Vegas, NV 89134-6321  
E-mail: [george.hellstrom@ymp.gov](mailto:george.hellstrom@ymp.gov)

Loreen Pitchford, LSN Coordinator  
for Lander, Churchill, Esmeralda and  
Mineral County  
1705 Wildcat Lane  
Ogden, UT 84403  
E-mail: [lpitchford@comcast.net](mailto:lpitchford@comcast.net)

Robert Loux  
Steve Frishman, Tech. Policy Coordinator  
Nuclear Waste Project Office  
1761 East College Parkway, Suite 118  
Carson City, NV 89706  
E-mail: [bloux@nuc.state.nv.us](mailto:bloux@nuc.state.nv.us)  
[Steve.frishman@gmail.com](mailto:Steve.frishman@gmail.com)

Diane Curran, Esq.  
Eureka County  
Harmon, Curran, Spielberg & Eisenberg,  
LLP  
1726 M. Street N.W., Suite 600  
Washington, DC 20036  
E-mail: [dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)

Chris Howard, GIS/LAN Administrator  
Inyo County (CA)  
Yucca Mountain Nuclear Waste  
Repository Assessment Office  
163 May St  
Bishop, CA 93514  
E-mail: [choward@inyowater.org](mailto:choward@inyowater.org)

Joe Kennedy, Chairman  
E-mail: [Chairperson@timbisha.org](mailto:Chairperson@timbisha.org)

Barry S. Neuman, Esq.  
Carter Ledyard & Milburn, LLP  
1401 Eye Street, NW  
Suite 300  
Washington, DC 20005  
E-mail: [neuman@clm.com](mailto:neuman@clm.com)

Ethan I. Strell, Esq.  
Carter Ledyard & Milburn LLP  
2 Wall Street  
New York, NY 10005  
E-mail: [strell@clm.com](mailto:strell@clm.com)

Margaret Plaster, Management Analyst  
City of Las Vegas  
400 Stewart Avenue  
Las Vegas, NV 89101  
E-mail: [mplaster@lasvegasnevada.gov](mailto:mplaster@lasvegasnevada.gov)

John M. Peebles, Esq.  
Darcie L. Houck, Esq.  
Fredericks & Peebles, LLP  
1001 Second St.  
Sacramento, CA 95814  
E-mail: [jpeebles@ndnlaw.com](mailto:jpeebles@ndnlaw.com)  
[dhouck@ndnlaw.com](mailto:dhouck@ndnlaw.com)

Barbara Durham  
Tribal Historic Preservation Officer  
E-mail: [Dvdurbarbara@netscape.com](mailto:Dvdurbarbara@netscape.com)

Malachy R. Murphy, Esq.  
18160 Cottonwood Rd. #265  
Sunriver, OR 97707  
E-mail: [mrmurphy@chamberscable.com](mailto:mrmurphy@chamberscable.com)

Jeffrey D. VanNiel, Esq.  
530 Farrington Court  
Las Vegas, NV 89123  
E-mail: [nbrijdvn@gmail.com](mailto:nbrijdvn@gmail.com)

Robert F. List, Esq.  
Jennifer A. Gores, Esq.  
Counties of: Churchill, Esmeralda, Mineral,  
Lander  
Armstrong Teasdale LLP  
1975 Village Center Circle, Suite 140  
Las Vegas, NV 89134-6237  
E-mail: [rlist@armstrongteasdale.com](mailto:rlist@armstrongteasdale.com)  
[jgores@armstrongteasdale.com](mailto:jgores@armstrongteasdale.com)

Kevin W. Bell, Esq.  
Senior Staff Counsel  
California Energy Commission  
1516 9<sup>th</sup> Street  
Sacramento, CA 95814  
E-mail: [kwbell@energy.state.ca.us](mailto:kwbell@energy.state.ca.us)

Brian Hembacher, Esq.  
Deputy Attorney General  
California Department of Justice  
300 S. Spring St  
Los Angeles, CA 90013  
E-mail: [brian.hembacher@doj.ca.gov](mailto:brian.hembacher@doj.ca.gov)

Debra D. Roby  
Alan I. Robbins  
Jennings Strouss & Salmon, PLC  
1700 Pennsylvania Ave, NW  
Suite 500  
Washington, D.C. 20005  
E-mail: [droby@jsslaw.com](mailto:droby@jsslaw.com)  
[arobbins@jsslaw.com](mailto:arobbins@jsslaw.com)

Marc Gordon  
Jennings Strouss & Salmon, PLC  
8330 W. Sahara Avenue, Suite 290  
Las Vegas, NV 89117-8949  
E-mail: [mgordon@jsslaw.com](mailto:mgordon@jsslaw.com)

Donald J. Silverman, Esq.  
Thomas A. Schmutz, Esq.  
Thomas C. Poindexter, Esq.  
Paul J. Zaffuts, Esq.  
Alex S. Polonsky, Esq.  
Lewis Csedrik, Esq.  
Thomas E. Reinert, Jr., Esq.  
Corinne A. Niosi  
Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
E-mail: [dsilverman@morganlewis.com](mailto:dsilverman@morganlewis.com)  
[tschmutz@morganlewis.com](mailto:tschmutz@morganlewis.com)  
[tpoindexter@morganlewis.com](mailto:tpoindexter@morganlewis.com)  
[pzaffuts@morganlewis.com](mailto:pzaffuts@morganlewis.com)  
[apolonsky@morganlewis.com](mailto:apolonsky@morganlewis.com)  
[lcsedrik@morganlewis.com](mailto:lcsedrik@morganlewis.com)  
[treinert@morganlewis.com](mailto:treinert@morganlewis.com)  
[cniosi@morganlewis.com](mailto:cniosi@morganlewis.com)



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

Susan Durbin, Esq.  
Deputy Attorney General  
California Department of Justice  
1300 I St.  
P.O. Box 944255  
Sacramento, CA, 94244-2550  
E-mail: [susan.durbin@doj.ca.gov](mailto:susan.durbin@doj.ca.gov)

/Signed (electronically) by/  
Margaret J. Bupp  
Counsel for NRC Staff  
U.S. Nuclear Regulatory Commission  
Office of General Counsel  
Mail Stop O-15D21  
Washington, D.C. 20555-0001  
(301) 415-3722  
[mjb5@nrc.gov](mailto:mjb5@nrc.gov)