

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

<b>In the Matter of</b>	)	
	)	<b>Docket No. 63-001</b>
<b>U.S. DEPARTMENT OF ENERGY</b>	)	
	)	
<b>(High level Waste Repository)</b>	)	<b>December 22, 2008</b>

**JOINT MOTION BY LINCOLN COUNTY AND EUREKA COUNTY FOR  
CLARIFICATION OF THE COMMISSION'S OCTOBER 22, 2008 NOTICE OF  
HEARING CONCERNING THE DEADLINE BY WHICH INTERESTED  
GOVERNMENTAL PARTICIPANTS MUST IDENTIFY THE CONTENTIONS  
ON WHICH THEY WISH TO PARTICIPATE**

**Introduction**

Lincoln County, Nevada and Eureka County, Nevada (collectively, the "Counties"), have each filed notices that they intend to participate in these proceedings as an interested governmental participant ("IGP") as authorized by 10 C.F.R § 2.315(c). They have each been designated as "Affected Units of Local Government" pursuant to 42 U.S.C. § 10136(c). By this motion, they ask the Commission to clarify the date by which they must identify the contentions on which each of them wishes to participate. The applicable regulations do not specify such a date, and recent pronouncements of the Commission have created additional uncertainty with respect to this issue. <sup>1</sup>

As stated in the attached Certificate of Counsel pursuant to 10 C.F.R. § 2.323(b), counsel for Lincoln County has contacted other counsel in this proceeding. Clark County

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<sup>1</sup> Under 10 C.F.R § 2.323(a), motions must be filed within ten days after the occurrence given rise to the motion. In this case, the hearing notice of which the Counties seek clarification was issued on October 22, 2008. While this motion does not meet the ten-day requirement, the Counties nevertheless request the Commission to consider it because the counties had not decided, at the time of the hearing notice, whether to participate as IGPs.

supports the relief requested herein. The Department of Energy, the State of California, Inyo County and the Nuclear Energy Institute consent to the relief requested herein. The State of Nevada and the counties of Nye, Esmeralda, Lander, Churchill and Mineral do not oppose the filing of this motion but have not taken a position with respect to the relief requested. NRC staff does not oppose the filing of this motion, but opposes granting the Counties 45 days from the date contention admissibility is determined.

## **Background**

NRC regulations allow interested state or local governments to participate in NRC licensing proceedings, providing in relevant part:

The presiding officer *will afford* an interested State, local governmental body (county, municipality or other subdivision), and affected, Federally-recognized Indian Tribe, which has not been admitted as a party under § 2.309, a reasonable opportunity to participate in a hearing. Each State, local governmental body, and affected Federally-recognized Indian Tribe shall, in its *request* to participate in a hearing, each designate a single representative for the hearing.... The representative shall identify those contentions on which it *will participate* in advance of any hearing held.

10 CFR § 2.315(c) (emphasis added). As section 2.315(c) plainly states, local governmental bodies such as the Counties, that are not admitted as full parties under § 2.309, are entitled to participate as IGPs. See also *Shieldalloy Metallurgical Corp.* (Licensing Amendment Request for Decommissioning of the Newfield, New Jersey Facility), LBP-07-05, 65 NRC 341, 359 (2007) (IGP participation is a “right” and an “entitlement”). They merely must “request” to participate, and also identify the contentions that they will participate on in advance of a hearing. The regulation does not state, however, how far in advance of “a hearing” an IGP must file its request to participate or identify the contentions on which it wishes to participate.

The Commission's hearing notice for the Yucca Mountain licensing proceeding addresses the issue of interested government participation only partially and indirectly. 73 Fed. Reg. 63,029 (Oct. 22, 2008). Section VI, entitled, "Revised Hearing Schedule Milestones," contains a "Partially Revised Appendix D Schedule," which establishes a deadline for "Answers to intervention and interested government participant Petitions," but does not establish a deadline for requests to participate as an IGP. In the accompanying text, the hearing notice states that an August 2008 NRC decision "granted the State of Nevada, as well as any other petitioner, an additional [30] days in which to file a petition to intervene, or a petition for status as an interested government participant . . . ." 73 Fed. Reg. at 63,032.<sup>2</sup> However, the hearing notice does not directly address the question of when interested governments must file requests to participate as IGPs or when they must identify the issues on which they wish to participate as required by 10 C.F.R. § 2.315(c).

### **Request for Clarification**

As discussed above, each of the Counties has filed a request to participate in this proceeding as an IGP. The Counties seek clarification of the hearing notice, however, with respect to the deadline for identifying issues on which IGPs wish to participate. They respectfully submit that it was impossible to meet that obligation by today's deadline for hearing requests (December 22, 2008) because the content of other parties' contentions was not available, let alone reviewed or analyzed, until the past two business

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<sup>2</sup> The Counties presume that in using the word "petition" in this sentence, the Commission did not intend to alter the meaning of Section 2.315(c), which allows interested governments to "request" leave to participate as IGPs.

days, and the admissibility of proffered contentions will not be known for approximately four or five months.

We are not aware of any previous instance in which the NRC has required a local government to petition for IGP status, or to request IGP status prior to the Commission's determination on the admissibility of contentions. In fact, numerous decisions by the Commission's Atomic Safety and Licensing Board ("ASLB") hold that requests to participate as an IGP may be made after contentions are admitted by the Commission. *See, e.g., Crow Butte Res., Inc.* (North Trend Expansion Project), LBP-08-06, 67 NRC 241, 345 (2008) (allowing the state, local government, or Indian tribe to file requests and notices of intent within 30 days of NRC's decision on contention admissibility); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 349 (2006) (ordering that state, local government, or Indian tribe may file a request and notice of intent within 20 days of NRC's decision on contention admissibility); *Entergy Nuclear Vt. Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 209 (2006) (noting that the "only timing requirement for giving notice of [IGP] participation" is that notice must be given prior to any hearing held and ordering that such notice be given within 20 days of ruling on contention admissibility).

The Counties respectfully request that the Commission exercise its discretion to establish a reasonable deadline for the identification of contentions by IGPs following the ASLB's ruling on the admissibility of contentions in the First Prehearing Conference Order. In light of the extremely large number of contentions that have been and are likely to be submitted in this proceeding (the State of Nevada alone has filed 229

contentions in a petition to intervene that exceeds 1500 pages), the Counties request a period of 45 days after rulings on contention admissibility to identify the contentions on which they wish to participate.

The requested relief will not delay these proceedings. Rulings on contention admissibility will be made on or about 140 days after the Commission's October 22<sup>nd</sup>, 2008 Notice of Hearing. 73 Fed. Reg. at 63,032. Discovery will not close until 468 days later, or 608 days after publication of the October 22<sup>nd</sup> Notice of Hearing. 10 C.F.R. Part 2, Appendix D. Consequently, it is virtually inconceivable that allowing the Counties 45 days after rulings on contention admissibility to identify the contentions on which they wish to participate could or would have any impact on the progress of these proceedings - with respect to the conduct (or completion) of discovery, the adjudicatory phase of the proceedings or final disposition.

### **Conclusion**

For the foregoing reasons, the Counties respectfully request the Commission to issue an Order providing that IGPs may identify the contentions in which they wish to participate pursuant to 10 C.F.R. § 2.315(c) by no later than 45 days after the ASLB rules on the admissibility of contentions.

Respectfully submitted,

*signed electronically*

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Counsel for Eureka County

Dated: December 22, 2008

**Counsel's Certification Pursuant to Section 2.323(b)**

Pursuant to 10 C.F.R. § 2.232(b), undersigned counsel hereby certifies that he has contacted counsel for other parties in this proceeding and made a sincere effort to resolve the issues raised in the motion. In response to those contacts, counsel for Clark County have informed the undersigned that Clark County supports the relief requested herein. The Department of Energy, the State of California, Inyo County and the Nuclear Energy Institute consent to the relief requested herein. The State of Nevada and the counties of Nye, Esmeralda, Lander, Churchill and Mineral do not oppose the filing of this motion but have not yet formulated a position with respect to the relief requested. Counsel for NRC staff has informed the undersigned that its client will oppose the granting of the relief requested herein. Undersigned counsel and counsel for NRC staff have had several discussions in an effort to resolve this matter, without success. Consequently, efforts to resolve the issues raised in the foregoing motion have been unsuccessful.

Respectfully submitted,

*signed electronically*

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Counsel for Lincoln County

Dated: December 22, 2008

**Certificate of Service**

I hereby certify that copies of the foregoing Joint Request By Lincoln and Eureka Counties for Clarification in the above-captioned proceeding have been served on all parties listed on the official service list for this proceeding as maintained by the Nuclear Regulatory Commission Electronic Information Exchange.

*Signed electronically*

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