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November 16, 2009

Via Electronic Mail Only

The Honorable Gregory B. Jaczko
Chairman, U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Dear Chairman Jaczko:

Late Friday afternoon, November 13, 2009, the Nuclear Energy Institute (NEI), one of the intervening parties to the highly contested adjudicatory proceeding on the U.S. Department of Energy's (DOE's) license application for a construction authorization for the proposed Yucca Mountain high-level waste repository, wrote to you and the other Commissioners requesting that the adjudicatory proceeding required for DOE's application be suspended. NEI's request, which would deny other intervening parties to this first-of-a-kind proceeding their right under Section 114(d) of the Nuclear Waste Policy Act, Section 189 of the Atomic Energy Act, and 10 C.F.R. § 2.310(f) to a full, fair, and timely on-the-record hearing, is a thinly disguised motion since it seeks to abrogate the entire regulatory scheme for the licensing proceeding. As such, it suffers from numerous defects that should preclude the Commission from giving it any consideration. Among other things, NEI's request:

- was filed before the wrong tribunal, which is the presiding Construction Authorization Board (CAB);
- was filed without certification of prior consultation with the other parties, as required by 10 C.F.R. § 2.323(b) (and in fact, no consultation was conducted);
- relies on gross supposition about DOE's plans (*i.e.*, a partial leak of an alleged DOE draft document), without any supporting affidavit or authoritative information from DOE;
- mischaracterizes NRC Staff resources and includes no supporting affidavit or authoritative information about alleged Staff resources constraints;

- ignores a prior DOE formal representation filed before the CAB, several public statements by DOE Secretary Chu, and recent Congressional funding appropriations language regarding the conduct of the Yucca Mountain licensing proceeding in FY 2010;

- usurps CAB's authority to manage and control the Yucca Mountain licensing proceeding, including its published schedule for activities during FY 2010; and

- pretends to offer an approach to define issues for a future adjudicatory proceeding, again ignoring the regulatory scheme under which the CAB and the Commission have already defined the issues for this hearing after reviewing well over 12,000 pages of filings by the parties.

Indeed, if acted upon, NEI's proposal would be an appalling denial of due process of law and would permit DOE and NRC Staff to proceed to resolve technical issues related to Yucca Mountain without any meaningful participation by any adverse party on any of their admitted safety and environmental contentions (which number in excess of 300). NEI is represented in the proceeding by experienced legal counsel, and therefore, it should know better.

It would be unimaginable that the Commission would decide to ignore its CAB and its rules and give NEI favored treatment by proceeding to consider the merits of NEI's request. Due process and the Commission's rules require that the State of Nevada and the other parties to the Yucca Mountain proceeding be advised whenever a motion has been filed, so that they may prepare and file formal answers in accordance with 10 C.F.R. § 2.323(c).

Sincerely,

Martin G. Malsch, Esq.
Attorney for the State of Nevada
Egan, Fitzpatrick, Malsch & Lawrence, PLLC

cc Commissioner Dale E. Klein
Commissioner Kristine L. Svinicki
Mr. R. William Borchardt
Yucca Mountain Licensing Proceeding Service List

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Board

In the Matter of	)	
	)	
U.S. DEPARTMENT OF ENERGY	)	**Docket No. 63-001-HLW**
	)	
(High Level Waste Repository)	)	**November 16, 2009**

CERTIFICATE OF SERVICE

I hereby certify that the foregoing State of Nevada's Correspondence to the Honorable Gregory B. Jaczko, Chairman, U.S. Nuclear Regulatory Commission, has been served upon the following persons by the Electronic Information Exchange:

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PRESIDENT AND CHIEF EXECUTIVE OFFICER

November 13, 2009

BY ELECTRONIC MAIL

The Honorable Gregory B. Jaczko
Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Re: Yucca Mountain Licensing Application Review

Dear Chairman Jaczko:

On behalf of the commercial nuclear industry, I am writing to request that the Nuclear Regulatory Commission limit the expenditure of resources on the Department of Energy's ("DOE") application seeking construction authorization for a high-level radioactive waste disposal repository at Yucca Mountain. While we support continuation of the licensing process, as discussed herein we believe there is a compelling basis for the Commission to focus agency resources solely on the technical review of DOE's applications rather than conducting adjudicatory proceedings in parallel.

As you know, the Department of Energy filed the Yucca Mountain license application in June 2008, and it is now undergoing review by the NRC Staff. Licensing proceedings are also underway. In this regard, legal issues raised by contentions are being briefed, and discovery has begun. Briefing should be complete next year; discovery – including the taking of numerous depositions – is scheduled to continue throughout most of 2010. If the adjudicatory proceedings continue as currently planned, hearings would likely begin sometime during the first part of 2011. However, because circumstances related to DOE's pursuit of the Yucca Mountain application are expected to change significantly in the very near term, the Commission should take immediate action to conserve and more immediately target its and stakeholders' resources now being expended on the licensing proceeding.

Specifically, on October 28, 2009, President Obama signed into law H.R. 3183, the "Energy and Water Development and Related Agencies Appropriations Act, 2010." That Act, which provides FY 2010 appropriations for the Department of Energy and other agencies, established the total

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funding for NRC review of DOE's repository application at $29 million. This amount is significantly below the $56 million NRC requested for this purpose.

As reported in Energy Daily on November 9, 2009, DOE's FY 2011 budget request apparently states "All license defense activities will be terminated in December 2009." In view of the foregoing, the Nuclear Energy Institute respectfully requests that the Commission constrain the NRC's Yucca Mountain licensing efforts to performing technical reviews (i.e., necessary to support issuance of the Safety Evaluation Report and environmental analyses) for the remainder of this fiscal year. As such, the Commission should direct that activities related to the adjudicatory proceeding (at least temporarily) be suspended. This will avoid unnecessarily consuming stakeholder resources in the face of DOE's potential withdrawal of its license application. Further, by focusing resources exclusively on its technical review, the Commission will most efficiently serve the goal of learning as much as possible regarding radioactive waste disposal from the Yucca Mountain review process while it is ongoing. Finally, this approach may help to better define the issues to be considered in any future adjudicatory proceedings.

I would be happy to discuss this matter at your earliest convenience.

Sincerely,

Marvin S. Fertel

cc: Commissioner Dale E. Klein
Commissioner Kristine L. Svinicki
Mr. R. William Borchardt
Yucca Mountain Licensing Proceeding Service List

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY	)	
(High-Level Waste Repository)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Letter to Gregory B. Jaczko from Marvin S. Fertel, dated November 13, 2009, have been served upon the following persons on this 13th day of November, 2009 by Electronic Information Exchange.

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