UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	
U.S. Department of Energy	)	Docket No. 63-001-HLW
(High Level Waste Repository)	)	
	)	
	)	

OPPOSITION OF THE NUCLEAR ENERGY INSTITUTE TO NEVADA PETITION FOR RELIEF WITH RESPECT TO COMPLETION OF THE SAFETY EVALUATION REPORT

I. INTRODUCTION

On June 14, 2010, the State of Nevada filed, without any prior notice to the parties or any invitation from the Commission, an unusual, if not unprecedented, "Petition for Relief With Respect to Possible Issuance of a Partial Safety Evaluation Report for Yucca Mountain" ("Petition"). The Petition addresses the ongoing work of the Nuclear Regulatory Commission ("NRC") Staff to complete its Safety Evaluation Report ("SER") related to the proposed Yucca Mountain High Level Waste Repository that is the subject of a Department of Energy ("DOE") License Application now pending before the NRC. Nevada's Petition in particular addresses SER Volume 3, which evaluates the DOE Total System Performance Assessment ("TSPA") and presents the NRC Staff's analysis of post-closure repository performance and compliance. Fearing that the NRC Staff may reach conclusions different from those advocated in contentions filed by Nevada in the pending licensing hearing before the Atomic Safety and Licensing Board, Nevada in its Petition seeks Commission action to suspend the Staff's efforts to complete and issue Volume 3 pending a final Commission decision on the

DOE motion to withdraw the License Application.[1] Further, should the motion to withdraw be granted, Nevada seeks a Commission directive that the Staff "permanently cease all efforts to complete and issue all volumes of the SER." Petition, at 3.

The Nuclear Energy Institute ("NEI") herein opposes the Nevada Petition. The Petition does not conform to any established regulatory process and seeks relief that is unwarranted as a matter of law and inappropriate as a matter of policy. Contrary to Nevada's claims, completion of the SER, including Volume 3, will not in any way harm Nevada. In fact, completion of the SER would be entirely consistent with the Nuclear Waste Policy Act ("NWPA") and with the strong public interests in completion of the NRC Staff technical review and in NRC disclosure regarding the conclusions of the agency staff on the technical and compliance matters within the scope of the review.

II. DISCUSSION

A. The Petition Fails To Follow Any Established Process

Nevada filed its Petition without any reference to any NRC process – adjudicatory or otherwise. Nevada did not notify NEI prior to the filing nor indicate in its filing that it made any attempt to comply with 10 C.F.R. § 2.323(b), requiring a moving party to consult with other parties to attempt to resolve an issue prior to filing. Nevada also did not file any request for relief with the Construction Authorization Board, much less seek certification or referral of issues raised below to the Commission in accordance with Commission rules of practice.

[1] DOE filed a motion seeking consent to withdraw its License Application, with prejudice, on March 3, 2010. Numerous parties, including the Nuclear Energy Institute, have filed responses to the motion and participated in oral argument on the issue. The motion remains pending before the Atomic Safety and Licensing Board (Construction Authorization Board).

Accordingly, the extraordinary request for relief should be summarily dismissed on procedural grounds alone.

NEI recognizes that the Petition relates primarily to the Commission's oversight of the NRC Staff in connection with the Staff's non-adjudicatory duties. However, this does not excuse Nevada's clear circumvention of established processes. The fundamental argument of Nevada is that "in the unique circumstances of this case, the Staff's issuance of SER Volume 3 would signal grave disrespect for the adjudicatory hearing process mandated by Congress and result in serious prejudice to Nevada." Petition, at 2. While, as discussed below, the claim of prejudice is patently without basis, any request for relief related to the hearing process must conform to the Commission's rules of practice for that process.[2]

The agency's administrative boards, of course, do not have the authority under 10 C.F.R. § 2.319 to direct or regulate NRC Staff activities related to the Staff's independent review functions.[3] However, the burden is on Nevada to demonstrate a legitimate basis for the Commission to take immediate review of the issue. At bottom, "Petitioner" here should not be permitted to simply ignore established processes.

B. The Claims of Prejudice to Hearing Rights Are Without Basis

Nevada's Petition claims that it will be prejudiced if the NRC Staff review is continued and completed, particularly if the withdrawal of the License Application is ultimately

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[2] *See, e.g.,* 10 CFR § 2.319(l)(requests to certify an issue to the Commission must be made by motion); *Cf.* Order, Docket No. 63-001-HLW, December 22, 2009, issued by the Secretary (summarily rejecting pursuant to 10 C.F.R. § 2.323(b) a request from NEI to suspend the adjudicatory proceeding on the License Application).

[3] *See*, *e.g.*, *Duke Energy Corporation* (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC 62, 74 (2004) ("NRC Staff reviews, which frequently proceed in parallel to adjudicatory proceedings, fall under the direction of Staff management and the Commission itself, not licensing boards.").

accepted by the Commission. Nevada argues that the "Commission would stand accused of publishing safety conclusions that ignored the highly relevant scientific and other professional contributions of other government bodies and the public" presented in the NRC adjudicatory process (*i.e.*, in Nevada's contentions). Petition, at 3. Moreover, Nevada fears that, if the NRC Staff were to reach positive conclusions for the High Level Waste Repository in SER Volume 3, "the public, the media, and Congress might be led to believe that the Commission was of the firm opinion that Yucca Mountain would have been a safe option for the disposal of spent reactor fuel and high level waste if only DOE had continued to prosecute its license application." Petition, at 5. In other words, Nevada fears that the NRC Staff may disagree with Nevada and its pending contentions. These fears, however, do not amount to any prejudice to hearing rights and do not justify curtailing the NRC Staff technical review.

First, contrary to Nevada's claims, there can be no prejudice to Nevada in continuing the NRC Staff review pending a resolution of the motion to withdraw the License Application. There should be no assumption that the motion will be decided in favor of DOE and that this proceeding will be terminated. Until the proceeding is terminated, the NRC Staff must continue to meet is statutory obligations under the NWPA and its duties under its regulations to review the License Application at hand.[4]

Second, specifically with regard to the claim of prejudice to its hearing rights, if the motion to withdraw is granted by the Commission, Nevada's statutory hearing rights would not be prejudiced in any way by completion of key aspects of the NRC Staff's review (including

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[4] Even if the *Commission* itself ultimately issues a decision terminating the proceeding, a directive now to curtail the NRC Staff review would be premature. Questions related to DOE's actions are already raised in the federal Court of Appeals, and final action by the Commission on the motion to withdraw the License Application may also be the subject of judicial review.

SER Volume 3). If the motion is granted with prejudice to future renewal or re-filing of an application for the Yucca Mountain site, Nevada need not be concerned about a hearing on the application. Nevada would have no hearing rights on a withdrawn application that could be prejudiced by issuance of the SER. And, if the motion is granted without prejudice, any future application for an NRC authorization for the site would be subject to the full NRC hearing process. Nevada's ability to pursue its contentions would not be harmed in any way.

Nevada's real concern, however, may have nothing to do with the ability to participate in the hearing process. Nevada's real concern is likely that the NRC Staff will make positive findings that do not fully accept Nevada's positions advanced in the pending Nevada contentions. Based on the Petition, this fear is implicitly premised on three assumptions: (1) that Nevada is correct in all of its technical and legal contentions; (2) the NRC Staff will not perform a valid and responsible review of the issues; and (3) the NRC Staff cannot address relevant information presented by stakeholders in the SER or acknowledge that the hearing process has not been completed. There is no valid basis for any of these assumptions. NEI believes that the NRC Staff review of the application will reflect an important assessment of the TSPA and the site — that can and will stand on its own merits, as *one* independent perspective on important technical issues related to geological disposal of high level waste.

Most fundamentally NEI disagrees with the basic concept of the Petition: that Nevada (and potentially other parties) are harmed by an SER that would address issues apart from a hearing process that may or may not occur. The fact is, an NRC Staff SER is always a review document separate from the NRC hearing process. The SER on its face represents no more and no less than the results of an *NRC Staff* review of a license application. The public, the media, and political leaders can make of it what they will. Nevada and all other stakeholders

will remain free to present their own views however they see fit and in whatever forum they choose.

C. Law and Policy Favor Completion of the NRC Staff's Review

Apart from purported harm to hearing rights, Nevada asserts other "policy" arguments that it believes support curtailment of the NRC Staff's technical review. Nevada suggests that the "SER for an abandoned project is obviously not necessary for safety, and it would be contrary to NRC's regulatory mission to issue an SER for the sole purpose of assisting those who lobby for or against any federal nuclear project." Petition, at 6. Similarly, Nevada argues that an SER Volume 3 "will benefit no one" and "will not settle anything." *Id*. These arguments, however, simultaneously exaggerate the significance of the SER and understate the value of an SER in this case. Sound legal and policy reasons exist for completing significant portions of the SER that reflect significant milestones in the NRC Staff review.

Section 114(d) of the NWPA tasks the NRC with the responsibility to consider DOE's application for a high level waste repository. To date, the NRC has worked to carry out that responsibility — completing technical reviews of numerous portions of the License Application. In fact, the NRC stated in a conference call in February of this year (in which Nevada participated) that it had no further requests of DOE for additional information.[5] Even if, at some point in the future, Congress or the courts clearly establish that the Yucca Mountain High Level Waste Repository in its present form will not be pursued, policy makers, stakeholders (including the nuclear industry), and the public deserve a return on the investment

[5] Notably, an NRC list, even though not recently updated, of RAI's and response status (http://www.nrc.gov/waste/hlw-disposal/yucca-lic-app-rai.pdf) provides specific references to DOE responses for all but a very few of the hundreds of RAI's submitted to DOE by the NRC. Failure to pursue to completion the NRC's SER would result in the loss of valuable information as to the NRC's assimilation and review of the substantial information provided in the application and through its interaction with the DOE.

to date — a return in the form of results from the completed reviews (with whatever qualifiers are necessary). The NRC Staff's review, like the work completed by DOE to date, would represent a valuable public asset resulting from the Yucca Mountain project — one that can and should be used to inform future decisionmaking. Assuring the availability of this asset lies comfortably within the NRC's safety jurisdiction and mission.

Nevada asserts that if the Yucca Mountain project is abandoned, then any effort to bring NRC Staff reviews to logical completion points (and documentation thereof) will be "wasted" effort — and that its only purpose would be to somehow support future lobbying. The fact is, however, the issues of storage and disposal of used fuel in the United States would not go away with withdrawal of the License Application. The NRC Staff's efforts have been funded by consumers of nuclear generated electricity (not taxpayers as asserted by Nevada) in accordance with the NWPA and other statutory provisions. Those consumers deserve to know the results of that effort. Furthermore, many of the same technical issues will need to be addressed in any future repository effort. The record of the review of the Yucca Mountain application will be instructive to scientists and engineers involved in any such effort. Of course SER Volume 3 will not "settle" anything. But if any results documented in an SER help guide or inform future technical and policy decisions, then the effort will not have been "wasted."

Nevada cautions that "SER Volume 3 will be tentative and woefully incomplete at best." Petition, at 8. And Nevada makes bald assertions related to the Quality Assurance compliance of DOE during its work leading up to the License Application. *Id.*[6] However, these

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[6] Noteworthy for its evidence of desparation, to support its proposition that the DOE Quality Assurance compliance is suspect, Nevada references an internal NEI e-mail of *December 1998*. Petition, at 8. In fact, in October 2008 (nearly 10 years after the NEI e-mail that Nevada cites), NEI coordinated a Nuclear Industry Evaluation Team to conduct a Quality Assurance Evaluation at the Yucca Mountain project Quality Assurance office.

assertions are similar to Nevada's arguments that the SER will not reflect the Licensing Board's consideration of Nevada's hearing contentions. The NRC Staff is fully capable of framing its review results in a way that the NRC Staff determines to be technically valid. Fears that the review will be incomplete or untested are simply not valid reasons to curtail completing the review to the extent practicable. Nor are they valid reasons to forego documenting the extent of the review that has been completed. Curtailing the review and SER would lead to exactly the result Nevada decries — a "wasted" effort.

At bottom, Nevada suggests (Petition, at 2) that completion and issuance of SER Volume 3 "is a really bad idea." Nevada has completely failed to support that view. And, if the appropriate standard for assessing the Petition were to be whether or not completion and issuance of the SER is a good idea or a bad one, then the Petition should be denied. Given the current procedural context of this matter, given the likelihood of future Congressional and judicial action with respect to the Yucca Mountain project, given the resources that have been spent to date, and given the ability of the NRC Staff's review to contribute to the ongoing discussion of the important issue of geologic disposal of spent nuclear fuel, completion and issuance of the SER Volume 3 is clearly a good idea.

In a documented report transmitted by an October 21, 2008, letter from J. Fisicaro (NEI) to DOE, the team concluded, at page iii, that DOE "has a good program" and that "[p]rogress has been and is currently being made to improve overall QA performance." The transmittal letter and report were subsequently submitted to the LSN by DOE (LSN # DEN 001609072).

III. CONCLUSION

For the reasons discussed above, the Nevada Petition requesting that the Commission suspend and curtail NRC Staff efforts to complete the SER for the proposed High Level Waste Repository should be denied.

Respectfully submitted,

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Dated in Washington, D.C.
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NUCLEAR REGULATORY COMMISSION

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	)	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY	)	
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "OPPOSITION OF THE NUCLEAR ENERGY INSTITUTE TO NEVADA PETITION FOR RELIEF WITH RESPECT TO COMPLETION OF THE SAFETY EVALUATION REPORT" have been served upon the following persons on this 24th day of June 2010 by Electronic Information Exchange.

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