

**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))	November 27, 2013

**STATE OF NEVADA PETITION FOR CLARIFICATION
OF NOVEMBER 18, 2013 RESTART ORDER
AND RELATED STAFF REQUIREMENTS MEMORANDUM**

On November 18, 2013, the Commission issued a Memorandum and Order (CLI-13-08) and a Staff Requirements Memorandum (associated with SECY-13-0113) (“SRM”) detailing how the Commission would respond to the Court’s decision in *In re Aiken County*, 725 F.3d 225 (D.C. Cir. 2013), which ordered the Commission to promptly continue with the Yucca Mountain licensing process. For the reasons set forth below, the State of Nevada requests the Commission to clarify one aspect of the Memorandum and Order and one sentence in the SRM. The clarification to the Memorandum and Order would confirm that the parties’ procedural rights will not be severely compromised if the formal adjudicatory proceeding is ever restarted.¹ The clarification to the SRM would protect the public health and safety and preserve the questioning

¹ The Rules of Practice in 10 C.F.R. Part 2, Subpart C, do not apply to this request because the adjudication remains in abeyance. *See* 10 C.F.R. § 2.300 (“The provisions of this subpart apply to all adjudications”) and Memorandum and Order at 6 (“[T]oday’s decision ... is not strictly adjudicatory in nature” and “otherwise does not fit cleanly within the procedures described in our rules of practice”). Nevertheless the Commission has the inherent authority to clarify its decisions either *sua sponte* or on request. *See, e.g.*, 5 U.S.C. § 555 (b). Moreover even if the Rules of Practice did apply, the Commission has distinguished requests for clarification from requests for reconsideration and has granted requests for clarification even when no grounds for reconsideration were present. *See, e.g., Duke Energy Corporation (Catawba Nuclear Station, Units 1 and 2)*, CLI-04-37, 60 NRC 646 (2004); *Entergy Nuclear Vermont Yankee, et al. (Vermont Yankee Atomic Power Station) and Entergy Nuclear Generation Company, et al. (Pilgrim Nuclear Power Station)*, CLI-07-13, 65 NRC 211 (2007). In this petition Nevada seeks clarification not reconsideration.

attitude that must be a part of the Commission's safety culture in relation to the completion, review and issuance of the NRC Staff's Safety Evaluation Report ("SER").

First, as explained below, the Memorandum and Order addressed several aspects of the schedule in Appendix D to 10 C.F.R. Part 2 but neglected to address one other significant aspect that has dramatic implications for the parties' procedural rights.

In directing the completion of the SER the Commission relied, in part, on the fact that the issuance of the SER was the "next significant milestone" in the Appendix D schedule.

Memorandum and Order at 12. The Commission also noted that its Memorandum and Order deviated from the Appendix D schedule in that discovery would not occur in parallel with completion of the SER. *Id.* at 17. While Nevada believes it is extremely unlikely (if not impossible) that discovery will ever resume given the funds currently available to NRC, contingency planning in light of the Court's mandamus decision and the Commission's Memorandum and Order requires Nevada (and other parties) to assume that discovery might occur and plan ahead accordingly.

In this light, Nevada requests the Commission to clarify that another deviation from the Appendix D discovery schedule will also be needed to safeguard the parties' procedural rights if discovery should ever resume, specifically a deviation from that part of the Appendix D schedule requiring all discovery to be completed sixty days after the SER is issued (*i.e.*, day 608 "Discovery complete" minus day 548 "NRC Staff issues SER"). It will not be possible to complete discovery within sixty days for the simple reason that the depositions of fifty to one hundred expert witnesses (including NRC Staff, DOE, Nevada and other parties' witnesses) cannot possibly be scheduled and completed within this brief period even if discovery resumes immediately upon completion of the SER. The immediate resumption of discovery upon

issuance of the SER is unlikely given the need for the Commission to assess where things stand after SER completion and issue the appropriate orders lifting the abeyance. The Commission should clarify that this sixty-day limit in Appendix D will not apply if discovery resumes.

Ordinarily it could be assumed that this is the type of issue that would be taken up by the Commission if and when the adjudicatory abeyance is lifted and discovery is about to resume. However, in light of the nature of this highly contested and unique proceeding, Commission action now will remove uncertainty and avoid later unnecessary delay in establishing a discovery schedule.

Second, the SRM includes a direction to NRC Staff that should be clarified to protect the public health and safety and to preserve the questioning attitude that must be a part of the Commission's safety culture. Specifically, the NRC Staff is told that in completing the SER it should "adopt work previously completed as a first principle, to the maximum extent possible, and should undertake original investigation or inquiry only as necessary to account or adjust for new information." SRM at 1-2. This direction implies, or could be read to imply, a Commission judgment that all of the work relevant to Yucca Mountain safety completed by any technical staff personnel to date is adequate based on the information already available, and is therefore suitable for adoption without further "investigation or inquiry" absent new information.

Nevada is not aware of any Commission review of the adequacy of Staff's SER efforts to date that could justify such a conclusion. In fact, 10 C.F.R. § 2.1023 (c)(2) contemplates that the Commission would review the SER (uncontested issues) only after the issuance of an initial decision granting a construction authorization and any Commission review before this time would be premature and inappropriate because, among other reasons, the full scope of uncontested issues may not be defined until late in the adjudicatory proceeding. Moreover,

insofar as Nevada is aware, NRC Staff management and Office of General Counsel (“OGC”) review of any drafts of the SER was not completed when work on the SER was suspended in the fall of 2011.

Also, the SRM reference to “work previously completed” can be fairly read to include the Staff’s “Technical Evaluation Reports,” NUREG-2107, 2108, and 2109, or similar completed reports. Nevada is not aware that any Commission review of the merits of these reports has occurred and questions whether the Staff management and OGC review of those reports proceeded as if they would become a foundation for an SER without further Staff or OGC review.

The Commission should clarify that the SRM reference to “work previously completed” (which Staff is to adopt as a first principle) only includes work done specifically to complete the SER (or in contemplation that it would be incorporated into the SER without further review) and that such work is not considered “completed” unless the Staff management and OGC review required by internal Staff practice and procedure was completed. In addition, management review must include appropriate disposition of any Staff dissenting views or opinions or non-concurrences on any SER topics and new Staff (or contractor) technical reviewers should not be prevented from raising significant questions about work previously completed. Otherwise the SRM could lead inadvertently to an SER that Staff itself could not fully support.

Respectfully submitted,

(signed electronically)

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *State of Nevada Petition For Clarification of November 18, 2013 Restart Order and Related Staff Requirements Memorandum* has been served upon the following persons by the Electronic Information Exchange:

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