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OFFICE OF SECRETARY
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Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

ATTENTION: Docketing and Service Branch

Re: Proposed Amendments To 10 CFR Part 2, Procedures Applicable To Proceedings For The Issuance Of Licenses For The Receipt Of High-Level Radioactive Waste At A Geologic Repository

Dear Sir:

We enclose comments on the above-referenced proposed rule submitted on behalf of the State of Nevada.

Yours very truly,

Malachy R. Murphy
Special Deputy Attorney General
State of Nevada

MRM:jfe
Enclosure

cc: Bob Loux
Harry Swainston
Jim Davenport

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STATE OF NEVADA'S COMMENTS ON
PROPOSED AMENDMENTS TO
10 CFR PART 2

These comments relate to the Commission's proposed amendments to its procedures applicable to proceedings for the issuance of licenses for the receipt of high-level radioactive waste at a geologic repository, published on September 26, 1989. 54 F.R. 39387.

The only site in the nation currently under investigation as a prospective geologic repository is at Yucca Mountain, Nevada. In the event that the Department of Energy is ever to apply for an authorization to construct a repository at that site, or to seek a license to receive and possess nuclear materials there, Nevada would be a party to those proceedings. 10 CFR 2.1001(12). Nevada does not believe that the Department of Energy will ever submit such a license application, for both legal and technical reasons. Nevertheless, these comments are submitted in keeping with the State's significant oversight responsibilities, and continuing interest in all matters related to the potential licensing of a geologic repository.

Nevada also wishes to preface its remarks at the outset with a reminder of the State's duel responsibility in this process. The State not only has a right and a responsibility to participate itself under the Nuclear Waste Policy Act, in order to protect its own interest and the interest of its citizens, it also has the correlative responsibility to help individuals or interested groups of its citizens to do so, and

to insure that procedures are available to facilitate that process. All of this, of course, is in keeping with the spirit of §111(a)(6) of the NWPA, 42 USC 10131(a)(6), which we remind the Commission at the outset states as follows:

> "State and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel . . . "

The Commission should adopt no procedural rules which hinder, rather than facilitate, the kind of public participation which the Congress has declared in clear and unequivocable terms to be essential to this entire process. If competition were to exist between completing an NRC review of a DOE construction authorization within three or four years, and effective and meaningful public participation, then Congress has, quite beyond any argument, declared that the winner must be public participation. The State's comments here are directed, for the most part, at that problem.

BACKGROUND

The proposed amendments would make changes in Subpart J of Part 2 of 10 CFR. Subpart J was drafted by a negotiated rulemaking committee in which Nevada participated in good faith. The final product of that negotiation was adopted as a final rule (the LSS Rule) and published at 54 F.R. 14944 on April 14, 1989. The stated need for that rule was to enable the Commission to expeditiously meet its three year time frame for initial licensing established by §114(d) of the NWPA. In those proceedings Nevada contended that the notice of

rulemaking which initiated the process included only the "licensing support system" itself, the computerized system for management, reproduction and distribution of the documents and data to be utilized in the licensing proceeding, and as well as computerized discovery from that system. The parties representing the nuclear utility industry, and the NRC staff, argued that amendments to procedures applicable to the balance of the geologic repository licensing process should also be negotiated. Reluctantly, and as part of a good faith compromise, Nevada did so. The utility industry, represented by EEI and UNWMG, made sweeping proposals, the adoption of which would have resulted in significant drawbacks from the adversarial process generally contained in Subpart G of Part 2, applicable to reactor licensing proceedings.

Some of the changes proposed by the utilities representatives, and the staff, were accepted by the parties to negotiated rulemaking proceeding. The object of those changes, as well as the licensing support system (LSS) itself, was to make it possible for the Commission to accomplish its congressionally mandated goal of completion of the construction authorization proceeding within a three to four year period, while maintaining intact the Commission's ultimate and overall responsibility under the Atomic Energy Act to protect the public against undue radiological risk. The NRC staff, the State of Nevada, Nevada local governments, represented environmental groups, Indian tribes, and the Department of Energy (the potential applicant) all agreed to the negotiated

package. Only the utilities withheld their endorsement of the rule, partly because their sweeping alterations to the procedural rules had not been adopted in total by the negotiating committee.

Now, it appears that most of the EEI/UNWMG proposal has found its way back into these proposed amendments. We recognize that they are probably offered, almost as a quid pro quo, principally by the NRC staff, in exchange for the Commission's not removing the so called "non-LSS provisions" of the negotiated LSS rule. That is not, however, by any means sufficient reason for their adoption.

The parties negotiated the "non-LSS provisions" in the context of the overall LSS negotiations in good faith. As is the case in any successful negotiation, compromises were made; by the State, environmental groups, Nevada local governments, the utilities, Indian tribes, DOE, and the NRC staff itself. Provisions were accepted by one or another party, including DOE and the staff, in order to avoid more undesirable provisions and to facilitate the adoption of a package acceptable to the major competing interests in any prospective licensing proceeding. They were also accepted because they would accomplish the major stated objectives of all parties; that is, to allow the NRC to meet the three or four year time table while at the same time facilitating a full exposure of all health, safety and environmental issues so as to completely inform the Licensing Board, and ultimately the Commission

itself, before any construction authorization decision was reached.

To retreat from that compromise now, and thus deny some of the parties the benefit of that bargain is wholly unwarranted, and would severely and unduly chill any willingness to engage in such future negotiated rulemakings, or similar mutual undertakings. This is particularly true when under the circumstances there is no compelling reason whatsoever to elevate the licensing time table over careful and informed decision making. We refer, of course, to the Commission's proposed revisions to its Waste Confidence Decision published on September 28, 1989. 54 F.R. 39767. It is also true where, as here, there is absolutely no reason to believe that the LSS rule, which after all was designed to expedite the licensing process in order to meet Congress's goal, cannot itself produce that result without further changes.

The Commission is certainly aware that no deadline established in the Nuclear Waste Policy Act, or in the Nuclear Waste Policy Amendments Act, has yet been met. The Commission has also clearly expressed its preference for greater attention to quality and safety then to schedule requirements.

> "It is in the same spirit of timely repository operation that the Commission is urging greater attention to quality then to meeting the schedule for submittal of the license application." 54 F.R. 39788.

Indeed, the Commission acknowledges the reality that the underlying reasons for a tight time frame for repository development have not materialized. No data, for example, has

been identified by which a repository must be available for health and safety reasons. 54 F.R. 39787. In light of these developments there is really no conceivable reason for the Commission to adopt procedures which impede in any way the ability of Nevada citizens, or interested groups, to participate in any licensing proceeding. The Commission's overall statutory duty to protect the public health and safety, and Congress's clear finding that public participation in the process is essential, dictate that most of the proposed changes to the procedural rules be abandoned.

With those introductory and background remarks in mind, we will now proceed to some specific comments on the proposed amendments themselves.

§2.1014 Intervention

While this proposed change does not impact the State itself, as Nevada will be a party from the outset, rather than an intervenor, it will potentially have a significant impact on the ability of individual members of the public, or interested groups, to participate in a meaningful way. The requirement that a proposed intervenor must show a genuine dispute on a material issue of law or fact with reference to specific documentary material that provides a basis for their contention is far too burdensome. While Nevada will know, probably years in advance of any licensing proceeding, what its contentions will be, and will have possession of or access to the critical documents, this is not the case at all with members of the public or interested groups of citizens. The

proposed rule regarding initial contentions of intervenors establishes a much more rigorous standard then that imposed upon even the applicant itself. That is unwarranted.

§2.1014(4)

The proposed amendment would require that any contentions proposed after the initial contentions have been filed must satisfy a higher standard. A proponent of late filed contentions would need to demonstrate that the contention address a significant new safety or environmental issue, or that the contention raises a new material issue related to the performance evaluation required by 10 CFR 60.112 and 60.113. The existing rule, which was adopted as part of the negotiated rulemaking, only applies the higher standard to contentions submitted more than forty days after the issuance by the NRC staff of its Safety Evaluation Report (SER). The parties negotiating the current rule, including the NRC staff, agreed that is was appropriate to permit any party participating in the proceeding to review the NRC staff's SER, including any new issues which that evaluation identified. For that reason the committee agreed that a forty day period during which parties could amend their contentions to incorporate issues raised by the staff was appropriate. The proposed rule in effect deletes this. The advantage of the existing rule over the proposed change is that it permits parties, and intervenors, to lend their support to NRC staff positions without the necessity of raising questions of "significance," "materiality" or "performance assessment." Those concepts would come

into play only when the forty day period immediately following the publication of the SER had expired. There is simply no reason for the proposed amendment, other then the protection of the applicant's posture in the proceeding against support being added to the criticism of NRC's own staff. Adopting the proposed change would deny the parties the benefit of their bargain in the LSS rule, and for that reason alone should be rejected.

§2.1014(c)(4)

Nevada supports this proposed amendment. Adding it merely reflects the original intent of the LSS negotiating committee, before its deletion prior to final adoption by the Commission.

§10 CFR 2.1024

This section would add a new requirement that parties present direct testimony on each of the contentions they have raised. The apparent intent is to prohibit any party from presenting its case on any individual contention exclusively by cross examination of other party's witnesses, or by arguing inferences or conclusions to be drawn from documents alone.

There is no clear or apparent reason for any requirement that direct testimony be presented in every case. A clear effect of such a rule would be to impose upon intervenors expenses which they might not otherwise have to bear, when all that might be necessary to the presentation of their case is cross examination of the applicant's or the NRC staff's witnesses, or argument from documents already in the record.

Indeed, the proposed rule would be counterproductive, and would have the effect of potentially increasing the length of an evidenciary hearing beyond that necessary, rather than reducing it.

§2.1026 Schedule

This proposed section would make mandatory the hearing schedule adopted by the LSS negotiating committee as a workable target for conducting the proceeding. The Commission should not be locked into compliance with the three year statutory time frame. Unreasonable commitment to that schedule, which the Commission itself in the context of its proposed Waste Confidence revisions now finds to be unnecessary, might compromise the overall statutory obligation to protect the public health and safety against undue radiological risk. It would also tend to preclude effective participation by the public. It will certainly not "promote the public confidence in the safety of disposal of such wasted spent fuel." (NWPA §111(a)(6), 42 USC 10131(a)(6).)

§2.1027 Sua sponte

The proposed rule takes away from the ASLB, or the ASLAB, a basic and essential attribute of judicial or quasi judicial activity: the ability of a judge or panel to recognize issues in a proceeding effecting the public's health and safety which the contesting parties themselves do not raise. The amendment, deleting the licensing board's or appeal board's sua sponte authority might suggest to some that the Commission is prepared to compromise its primary statutory responsibility to

protect the public's health and safety in favor of an essentially artificial and mechanically applied deadline. We do not believe that the Commission is really prepared to do that and thus suggest that it is in the Commission's own interest to drop this proposed amendment.

GENERAL COMMENTS

Even though they go somewhat beyond the package accepted by the LSS negotiating committee some of the proposed changes appear beneficial, and in keeping with the spirit of the compromise reached by the committee, and thus Nevada supports those changes. The proposed amendment, for example, to 10 CFR 2.1003(h) would require that the LSS Administrator's evaluation of DOE's compliance at six month intervals be submitted to all potential parties for comment in order to identify disputes concerning the Administrator's findings. The proposal is a good one and Nevada supports it.

The proposed amendment to substitute a prelicense application presiding officer for a prelicense application licensing board is also good, and Nevada supports it as well.

Nevada supports the Commission's concept of selecting technical members of the hearing licensing board from a wide pool of external and internal candidates, including members of the Commission's Atomic Safety and Licensing Board Panel. Nevada agrees that engineering, geoscience and performance assessment expertise are important basic qualifiers for service on such a licensing board.

Nevada opposes the idea of setting time limits on cross examination in order to meet the hearing schedule. This concept ignores entirely the fact that sufficient authority already exists in licensing boards, and their presiding officers, to limit or otherwise control cross examination. Such cross examination should only be limited by relevance to the facts or issues in material dispute in the proceeding, and the parties contentions. Within those parameters the Board's current authority, which has been responsibly and judicially exercised in the past, should be retained.

Nevada strongly opposes the institution of the so called "lead intervenor" concept for the proceeding, and urges the Commission not to include that in its Notice of Hearing. Nevada's rights to participate in the licensing proceeding are clearly recognized. The State cannot and will not agree to permit its participation to be subordinated in any way to a "lead intervenor." At the same time, Nevada is sensitive to the rights of all other parties to the proceedings, and does not wish to be placed in the position of compromising in any way those rights by having other party's participation subordinated to the State's.

Nevada does not object to the limitation of the scope of redirect and recross examination to the issues raised on cross examination and redirect examination, respectively, except that redirect and recross examination should be permitted freely to the extent that they are not repetitive and raise material issues related to the performance evaluation

anticipated by §60.112 and 113. Licensing boards currently have ample authority to accomplish this.

Nevada has no objection to, and finds merit in the board and parties agreeing on the order of hearing issues so that related issues can be addressed at the same time and, to the extent practical, in a logical sequence.

Nevada has no objection to the NRC staff refraining from becoming involved in procedural disputes between other parties in which the staff does not have an interest. Likewise, Nevada has no objection to the Commission defining, in advance, the general scope of the hearing, outlining appropriate general issue areas to be considered in the proceeding, and defining the boundaries of the licensing board's jurisdiction in the notice of hearing, so long as sufficient flexibility is retained. As with the proposed deletion of sua sponte authority in the licensing board, this proposal, if rigidly or inflexibly applied, could significantly undercut the value of a quasi judicial proceeding. It could potentially remove the party's ability to raise legitimate issues which come to light only during the course of the hearing, and could thus significantly undermine the public's confidence in the objectivity of the entire proceeding. While we do not suggest that this idea should be abandoned completely, we urge that it be evaluated with caution, and sensitivity to the flexibility which this wholly unique and first of its kind proceeding demands.