REQUEST FOR LEAVE TO FILE MOTION FOR RECONSIDERATION OF MEMORANDUM AND ORDER

In accordance with 10 C.F.R. Part 2 and the Commission’s inherent authorities, Nye County, Nevada, the State of South Carolina, the State of Washington, Aiken County, South Carolina, and the National Association of Regulatory Utility Commissioners (collectively the “Five Parties”) respectfully request leave to file a Motion for Reconsideration of the Commission’s November 18, 2013 Memorandum and Order (the “Order”). The Order fails to adequately address issues previously raised by the Five Parties or to demonstrate that the Commission’s chosen path forward fully complies with writ of mandamus issued by the U.S. Court of Appeals for the D.C. Circuit. In re Aiken County, 725 F.3d 255, 267 (D.C. Cir. 2013), request for rehearing en banc denied on Oct. 28, 2013. A copy of the Motion for Reconsideration is attached for the convenience of the Commission.¹

¹ Counsel has in good faith attempted to contact all of the parties to the Yucca Mountain proceeding. All of the other parties that timely responded reserved the right to respond to the Five Parties’ request and motion in the future.
Respectfully Submitted this 27th day of November, 2013

/Signed (electronically) by/

Robert M. Andersen  
Email: randersen@clarkhill.com  
Christopher B. Clare  
Email: cclare@clarkhill.com

Clark Hill PLC  
601 Pennsylvania Ave. N.W.  
North Building, Suite 1000  
Washington, D.C. 20004

Counsel for Nye County, Nevada

/Signed (electronically) by/

Kenneth P. Woodington  
Email: kwoodington@dml-law.com

Davidson & Lindemann, P.A.  
1611 Devonshire Drive  
P.O. Box 8568  
Columbia, SC 29202

Counsel for State of South Carolina

/Signed (electronically) by/

James Bradford Ramsay  
Email: jramsay@naruc.org  
1101 Vermont Ave. NW  
Suite 200  
Washington, D.C. 20005

Counsel for National Association of Regulatory Utility Commissioners

/Signed (electronically) by/

Todd R. Bowers  
Email: toddb@atg.wa.gov  
Andrew A. Fitz  
Email: andyl@atg.wa.gov

State of Washington  
Office of the Attorney General  
P.O. Box 40117  
Olympia, WA 98504-0117

Counsel for State of Washington

/Signed (electronically) by/

Thomas R. Gottshall  
Email: tgotshall@hsblawfirm.com  
S. Ross Shealy  
Email: rshealy@hsblawfirm.com

Haynsworth Sinkler Boyd, P.A.  
1201 Main Street, Suite 2200  
P.O. Box 11889  
Columbia, SC 29211-1189

Counsel for Aiken County, South Carolina
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY

(License Application for Geologic Repository at Yucca Mountain)

November 27, 2013

MOTION FOR RECONSIDERATION OF MEMORANDUM AND ORDER

In accordance with 10 C.F.R. Part 2 and the Commission’s inherent authorities, Nye County, Nevada, the State of South Carolina, the State of Washington, Aiken County, South Carolina, and the National Association of Regulatory Utility Commissioners (collectively the “Five Parties”) respectfully request that the Commission reconsider its November 18, 2013 Memorandum and Order (the “Order”) and issue a revised order. The Order fails to adequately address issues previously raised by the Five Parties and does not demonstrate that the Commission’s chosen path forward for the licensing of the nuclear waste repository at Yucca Mountain fully complies with writ of mandamus issued by the U.S. Court of Appeals for the D.C. Circuit. In re Aiken County, 725 F.3d 255, 267 (D.C. Cir. 2013), request for rehearing en banc denied on Oct. 28, 2013. The Order also fails to provide a sufficient legal and factual basis for the Commission’s decision. Without additional information and modification to the Order, the only potential recourse is to seek relief from the United States Court of Appeals for the D.C. Circuit.

That Court ordered the Commission to “promptly continue with the legally mandated licensing process.” In re Aiken County, 725 F.3d 255, 267 (D.C. Cir. 2013). Even though the
Court recognized that the Yucca Mountain licensing had never been fully funded, similar to other major federal projects requiring years to complete, the Court ordered the Commission to “effectuate the original statutory scheme as much as possible, within the limits of the added constraint.” Id. at 259 (citing City of Los Angeles v. Adams, 556 F.2d 40, 50 (D.C. Cir. 1977)). NRC’s Order falls short of this requirement.

The NRC Order properly finds “completion of the [Safety Evaluation Reports] SER volumes to be [an] appropriate next step in the licensing process.” Order at 9, 11–12. It then directs the Staff to complete the SERs. Id. at 12. However, in doing so, the Order only reiterates that the Staff informed the Commission that the remaining SERs could be “completed and issued concurrently in approximately twelve months after the Staff initiates work” and then directs that the Staff should “work on the completion of all remaining volumes concurrently but issue each SER volume upon completion.” Id. at 11–12. The Order does not provide an analysis of the stage of completion that each individual SER was in when the licensing was improperly halted; does not specify what additional work remains for completion of each SER; fails to provide an individual cost estimate for completing each SER; and fails to provide revised staff deadlines or a schedule for the release of each individual SER volume. Given that NRC staff directly involved in development of the SERs previously testified that the SERs were in advanced stages of completion,2 these Commission’s failures render the Order arbitrary, capricious, unreasonable, and violative of the Nuclear Waste Policy Act (“NWPA”) as well as the Court’s writ of mandamus.

2 See Nye County, Nevada, the States of South Carolina and Washington, Aiken County, South Carolina, and the National Association of Regulatory Utilities Commissioners Consolidated Response to NRC Order of August 30, 2013 and to Other Parties’ Submittals (Sept. 30, 2013), at 3–10 (Five Parties Response); see also Nye County’s Motion for Lifting of Suspension of Yucca Mountain Licensing Proceeding, Scheduling of Immediate Case Management Conference, and Issuance of Related Administrative Orders (Aug. 23, 2013) (Nye County Motion), and Points and Authorities in Support of Motion (August 23, 2013) (Nye County Points and Authorities).
A. The Commission Should Create a Schedule for Release of Each Individual SER.

Appendix D of the NRC’s Rules of Practice and Procedure\(^3\) provides a schedule for the licensing proceeding, and this schedule includes firm deadlines for different milestones in the licensing proceeding, including the issuance of the SERs. The Atomic Safety and Licensing Board (“ASLB”) assigned to adjudicate the license had to modify the schedule for SER issuance due to the improper delaying actions of the previous NRC Chairman. Full compliance with the D.C. Circuit’s writ of mandamus and with the NWPA, 42 U.S.C. § 10134(d), requires establishing actual deadlines for the issuance of the individual SERs. At the very least, such deadlines would help deter the types of delays that led to the D.C. Circuit’s writ of mandamus in the first place. Therefore, the Five Parties respectfully request that the Commission issue an order outlining a schedule of deadlines for the issuance of the remaining SERs.\(^4\)


Additionally, in light of the significant amount of evidence that the majority of the remaining SERs were nearly completed when the licensing was improperly halted,\(^5\) the Five Parties respectfully request that the Commission provide (or direct the Staff to provide) a detailed listing of what work remains on each individual SER, and an explanation for estimating that an additional twelve months is required. Given the Commission’s past conduct that led to the Court’s decision and writ of mandamus, it is incumbent on the Commission to demonstrate the factual basis for concluding that twelve months—one third of the three year period proscribed by statute for the adjudication of the entire license—are required to issue SERs that are known to have been almost complete two years ago.

\(^3\) 10 C.F.R. Part 2, Appendix D.
\(^4\) The Five Parties still maintain that a more appropriate and cost-effective step would have been issuing the unredacted and uncensored SER-3 immediately, and restoring the remaining SERs to their original state, reviewing where required, and issuing promptly. Five Parties Response at 8.
\(^5\) See Five Parties Response at 3–10.
The Five Parties are not suggesting that the Commission does not have some
discretion—indeed a range of discretion—to determine how to comply with the D.C. Circuit’s order. But the Commission has an obligation to explain, on the record, the rationale and factual basis for such an extraordinary amount of time. If the Commission has not solicited estimates from the staff who previously worked on the SERs, that failure should also be rectified.

C. The Commission Should Provide the Requested Details and Analysis So That Its Aggregated Estimate of the Time and Cost for All SERs Can Be Evaluated.

The Order also provides that the estimated cost of completing the SERs is $8.3 million. Order at 11–12. However, despite an increase from the already-inflated prior staff estimate of $6.5 million,\(^6\) no attempt whatsoever is made to provide a basis for these estimated costs.\(^7\) As the Five Parties have previously detailed,\(^8\) the prior cost estimate of $6.5 million to release the nearly-completed remaining volumes was, and is, an unreasonable figure. Yet this figure has now risen to $8.3 million without Commission justification. That estimate reflects Congressional testimony presented by Chairman Macfarlane last month, but gives no further supporting information than provided to Congress. Full compliance with the writ of mandamus and the NWPA requires that the Commission ensure that the remaining funds are spent in the most efficient and justifiable manner possible. Without such information and analysis, it is impossible to determine why the Commission has estimated the cost of completion of all the SERs at such enormous and unsubstantiated levels, between $6.5 and $8.3 million.

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\(^6\) The Staff previously estimated that completing and issuing the SERs would cost $6.5 million. Order at 12, n. 39.

\(^7\) Footnote 39 of the Order does note that the estimated cost has been “affected by the length of time the licensing process was suspended.” Though it is unclear why this would be the case.

\(^8\) Five Parties Response at 10–12.
D. The Commission Failed to Adequately Assess Other NRC Costs and Sources of Revenue For Going Forward With the Licensing Proceeding.

Even taking the Commission’s highest estimate, the Order fails to address NRC’s costs, as opposed to those of the parties, in fully recognizing the Atomic Safety and Licensing Board’s (“ASLB”) authority to resume the illegally halted licensing proceeding. The Commission also does not provide an adequate explanation for why prompt issuance of the SERs, followed by staged discovery and adjudication of Phase I post-closure issues, is not achievable with available funds. The parties to the proceeding are unable to assess whether the Commission’s denial of the request for an ASLB case management conference and resumption of Phase I discovery is justified without the information and analysis requested by the Five Parties in Sections A though D, coupled with an estimate of the cost of ASLB and NRC staff costs in conducting Phase I discovery. Without additional analysis of ASLB costs, raised by the Five Parties and others, the participants in the licensing proceeding, Congress, and other interested parties will be unable to determine if serial discovery and adjudication of post-closure safety issues is achievable with existing NRC funds. The Five Parties also note that NRC also has not addressed past violations of the Purpose Act or instituted action to recoup or restore appropriations illegally used to terminate, rather than conduct the licensing proceeding, as requested by the Five Parties in its previous submittals.

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9 Even based on what appears to be the inflated total cost estimate for issuing the SERs, reviewing the EIS, and loading the DOE’s LSN document collection and other participants’ collections into non-public ADAMS, the Commission will still have approximately $1.4 million in unobligated funds to proceed with the adjudication. As explained previously, resuming Phase I discovery will be a cost primarily borne by the participants and would only require oversight by a single ASLB judge, whose salary is limited by statute. Five Parties Response at 21–22; Nye County Points and Authorities at 14–15. Further, the ASLB orders regarding the LSN provided for continuation of the proceeding without the LSN, as counsel for NRC has conceded In re Aiken County, et al., Case No. 11-1271 (D.C. Cir. Aug. 13, 2013), Oral Argument Transcript at 49:12–14. Thus, the remaining $1.4 million could be sufficient to cover NRC’s costs of resuming Phase I discovery and adjudicating post closure issues.

10 Five Parties Response at 3–16; Nye County Points and Authorities at 14–17.

11 See Five Parties Response at 17–18; Nye County Points and Authorities at 10–14.
CONCLUSION

The Commission’s Order of November 18, 2013, failed to address critical issues raised by the Five Parties and again suspended the licensing proceeding without providing adequate justification. For all of the above-stated reasons, the Five Parties respectfully request that the Commission reconsider its order in accordance with this Motion and revise it to immediately and fully address the issues previously raised and detailed in sections A through D above.

Respectfully Submitted this 27th day of November, 2013

/Signed (electronically) by/

Robert M. Andersen
Email: randersen@clarkhill.com
Christopher B. Clare
Email: cclare@clarkhill.com

Clark Hill PLC
601 Pennsylvania Ave. N.W.
North Building, Suite 1000
Washington, D.C. 20004
Counsel for Nye County, Nevada

/Signed (electronically) by/

Kenneth P. Woodington
Email: kwoodington@dml-law.com

Davidson & Lindemann, P.A.
1611 Devonshire Drive
P.O. Box 8568
Columbia, SC 29202
Counsel for State of South Carolina

/Signed (electronically) by/

James Bradford Ramsay
Email: jramsay@naruc.org
1101 Vermont Ave. NW
Suite 200
Washington, D.C. 20005
Counsel for National Association of Regulatory Utility Commissioners

/Signed (electronically) by/

Todd R. Bowers
Email: toddb@atg.wa.gov
Andrew A. Fitz
Email: andyl@atg.wa.gov

State of Washington
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
Counsel for State of Washington

/Signed (electronically) by/

Thomas R. Gottshall
Email: tgottshall@hsblawfirm.com
S. Ross Shealy
Email: rshealy@hsblawfirm.com

Haynsworth Sinkler Boyd, P.A.
1201 Main Street, Suite 2200
P.O. Box 11889
Columbia, SC 29211-1189
Counsel for Aiken County, South Carolina
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

___________________________________

In the Matter of ) Docket No. 63-001-HLW

) U.S. DEPARTMENT OF ENERGY )
) (License Application for Geologic )
Repository at Yucca Mountain) )

___________________________________

CERTIFICATE OF SERVICE

I hereby certify that copies of the Five Parties’ “Request for Leave to File Motion for Reconsideration” in the above-captioned proceeding have been served on the following persons this 27th day of November, 2013, by Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board (ASLBP)
Mail Stop T-3F23
Washington, DC 20555-0001

Construction Authorization Board 04

Thomas S. Moore, Chair
Administrative Judge
thomas.moore@nrc.gov

Paul S. Ryerson Administrative Judge
paul.ryerson@nrc.gov

Richard E. Wardwell Administrative Judge
richard.wardwell@nrc.gov

Anthony C. Eitreim, Esq., Chief Counsel
anthony.eitreim@nrc.gov

Carter Thurman, Law Clerk
carter.thurman@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001
Hearing Docket
hearingdocket@nrc.gov

Jessica Bielecki, Esq.
jessica.bielecki@nrc.gov

Joseph S. Gilman, Esq.
joseph.gilman@nrc.gov

Daniel W. Lenehan, Esq.
daniel.lenehan@nrc.gov

Megan A. Wright, Esq.
megan.wright@nrc.gov

Mitzi A. Young, Esq.
mitzi.young@nrc.gov

Shelbie Lewman, Esq.
shelbie.lewman@nrc.gov

OGC Mail Center
OGCMailCenter@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop O-7H4M
Washington, DC 20555-0001
OCAA Mail Center
ocaamail@nrc.gov
Nevada Agency for Nuclear Projects  
Nuclear Waste Project Office  
1761 East College Parkway, Suite 118  
Carson City, NV 89706  
Steve Frishman, Tech. Policy Coordinator  
steve.frishman@gmail.com  
Susan Lynch, Administrator of Tech. Prgms  
szeeee@nuc.state.nv.us  

Nye County Regulatory/Licensing Advisor  
18160 Cottonwood Rd. #265  
Sunriver, OR 97707  
Malachy Murphy, Esq.  
mrmurphy@chamberscable.com  

Nye County Nuclear Waste Repository  
Project Office  
2101 E. Calvada Boulevard, Suite 100  
Pahrump, NV 89048  
Celeste Sandoval, Q.A. Records  
Spec. csandoval@co.nye.nv.us  

Counsel for Lincoln County, Nevada  
Whipple Law Firm  
1100 S. Tenth Street  
Las Vegas, NV 89017  
Annie Bailey, Legal Assistant  
baileys@lcturbonet.com  
Adam L. Gill, Esq.  
adam.whipplelaw@yahoo.com  
Eric Hinckley, Law Clerk  
erichinckley@yahoo.com  
Bret Whipple, Esq.  
bretwhipple@nomademail.com  

Lincoln County District Attorney  
P. O. Box 60  
Pioche, NV 89403  
Gregory Barlow, Esq.  
lcda@lcturbonet.com  

Lincoln County Nuclear Oversight Program  
P.O. Box 1068  
Caliente, NV 89008  
Connie Simkins, Coordinator  
jcciac@co.lincoln.nv.us  

For Lincoln County, Nevada  
Intertech Services Corporation  
PO Box 2008  
Carson City, NV 89702  
Mike Baughman, Consultant  
mikebaughman@charter.net  

Counsel for Nye, County, Nevada  
601 Pennsylvania Avenue NW  
North Building, Suite 1000  
Washington, DC 20004  
Robert Andersen, Esq.  
randersen@clarkhill.com  
Christopher Clare, Esq.  
cclare@clarkhill.com  

Clark County, Nevada  
500 S. Grand Central Parkway  
Las Vegas, NV 98155  
Phil Klevorick, Sr. Mgmt Analyst  
klevorick@clarkcountynv.gov  
Elizabeth A. Vibert, Deputy District Attorney  
Elizabeth.Vibert@ccdanv.com  

Counsel for Eureka County, Nevada  
Harmon, Curran, Spielberg & Eisenberg, LLP  
1726 M. Street N.W., Suite 600  
Washington, DC 20036  
Diane Curran, Esq.  
dcurran@harmoncurran.com  

Eureka County, Nevada  
Office of the District Attorney  
701 S. Main Street, Box 190  
Eureka, NV 89316-0190  
Theodore Beutel, District Attorney  
tbeutel.ecda@eurekanv.org  

Nuclear Waste Advisory for Eureka  
County, Nevada  
1983 Maison Way  
Carson City, NV 89703  
Abigail Johnson, Consultant  
eurekanrc@gmail.com
For White Pine County, Nevada
Intertech Services Corporation
PO Box 2008
Carson City, NV 89702
Mike Baughman, Consultant
mikebaughman@charter.net

For Eureka County, Nevada
NWOP Consulting, Inc.
1705 Wildcat Lane
Ogden, UT 84403
Loreen Pitchford, Consultant
lpitchford@comcast.net

Eureka County Public Works
PO Box 714
Eureka, NV 89316
Ronald Damele, Director
damele@eurekanv.org

Counsel for Churchill, Esmeralda, Lander,
and Mineral Counties, Nevada
Armstrong Teasdale, LLP
1975 Village Center Circle, Suite 140
Las Vegas, NV 89134-6237
Tara Baugh
tbaugh@armstrongteasdale.com

Kolesar & Leatham
1975 Village Center Circle, Suite 140
Las Vegas, NV 89134
Robert F. List, Esq.
rlist@klnevada.com

Esmeralda County Repository Oversight
Program-Yucca Mountain Project
PO Box 490
Goldfield, NV 89013
Edwin Mueller, Director
muellerered/msn.com

Mineral County Nuclear Projects Office
P.O. Box 1600
Hawthorne, NV 89415
Linda Mathias, Director
yuccainfo@mineralcountynv.org

For Lincoln and White Pine County, Nevada
Jason Pitts, LSN Administrator
P.O. Box 126
Caliente, NV 89008
jayson@idtservices.com

For White Pine County, Nevada
Kelly Brown, District Attorney
801 Clark Street, Suite 3 Ely, NV 89301
kbrown@mwpower.net

White Pine Co. Nuclear Waste Project Ofc
959 Campton Street Ely, NV 89301
Mike Simon, Director
wpnucwst1@mwpower.net

Counsel for Inyo County, California
Gregory L. James, Attorney at Law
712 Owens Gorge Road
HC 79, Box
Mammoth Lakes, CA 93546
E-Mail: gljames@earthlink.net

Counsel for Inyo County, California
Law Office of Michael Berger
479 El Sueno Road
Santa Barbara, CA 93110
Michael Berger, Esq.
michael@lawofficeofmichaelberger.com
Robert Hanna, Esq.
robert@lawofficeofmichaelberger.com

Inyo County Yucca Mountain Repository
Assessment Office
P. O. Box 367
Independence, CA 93526-0367
Cathreen Richards, Associate Planner
crichards@inyocounty.us

Counsel for State of Washington
Office of the Attorney General
P. O. Box 40117
Olympia, WA 98504-0117
Todd R. Bowers, Esq.
toddb@atg.wa.gov
Andrew A. Fitz, Esq.
andyf@atg.wa.gov
Michael L. Dunning, Esq.
michaeld@atg.wa.gov
H. Lee Overton, Esq.
leeo1@atg.wa.gov
Danielle French, Esq.
daniellef@atg.wa.gov
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Kevin, W. Bell, Senior Staff Counsel
kwbell@energy.state.ca.us

California Department of Justice
Office of the Attorney General
1300 I Street, PO Box 944255
Sacramento, CA 94244-2550

Michele Mercado, Analyst
michele.Mercado@doj.ca.gov

California Department of Justice
Office of the Attorney General
1515 Clay Street, 20th Fl, PO Box 70550
Oakland, CA 94612-0550

Timothy E. Sullivan, Deputy Atty. Gen.
timothy.Sullivan@doj.ca.gov

California Department of Justice
Office of the Attorney General
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013

Brian Hembacher, Deputy Attorney General
brian.hembacher@doj.ca.gov

Counsel for State of South Carolina
Davidson & Lindemann, P.A.
1611 Devonshire Drive
P.O. Box 8568
Columbia, SC 29202

Kenneth P. Woodington, Esq.
kwoodington@dml-law.com

Counsel for Aiken County, SC
Haynsworth Sinkler Boyd, PA
1201 Main Street, Suite 2200
P.O. Box 11889
Columbia, SC 29211-1889

Thomas R. Gottshall, Esq.
tgottshall@hsblawfirm.com
Ross Shealy, Esq.
rshealy@hsblawfirm.com

Florida Public Service Commission
Office of the General Counsel
2540 Shumard Oak Boulevard
Tallahassee, FL 32303

Cynthia Miller, Esq.
cmiller@psc.state.fl.us

Counsel for Native Community Action Council
Alexander, Berkey, Williams & Weathers LLP
2030 Addison Street, Suite 410
Berkeley, CA 94704

Curtis G. Berkey, Esq.
cberkey@abwwlaw.com
Rovianne A. Leigh, Esq.
releigh@abwwlaw.com
Scott W. Williams, Esq.
swilliams@abwwlaw.com

Native Community Action Council
P.O. Box 140
Baker, NV 89311

Ian Zabarte, Member of Board of Directors
mrizabarte@gmail.com

Counsel for Prairie Island Indian Community
Public Law Resource Center PLLC
505 N. Capitol Avenue
Lansing, MI 48933

Don L. Keskey, Esq.
donkeskey@publiclawresourcecenter.com

Prairie Island Indian Community Legal Department
5636 Sturgeon Lake Road
Welch, MN 55089
Philip R. Mahowald, Esq.

Nuclear Energy Institute
Office of the General Counsel
1776 I Street, NW Suite 400
Washington, DC 20006-3708

Jerry Bonanno, Esq.
ixb@nei.org
Anne W. Cottingham, Esq.
avc@nei.org
Ellen C. Ginsberg, Esq.
ecg@nei.org
Counsel for Nuclear Energy Institute
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, N.W.
Washington, DC 20037-1122

Jay E. Silberg, Esq.
jay.silberg@pillsburylaw.com
Timothy J.V. Walsh, Esq.
timothy.walsh@pillsburylaw.com

Counsel for Nuclear Energy Institute
Winston & Strawn LLP 1700 K Street, N.W.
Washington, DC 20006-3817

William A. Horin, Esq.
whorin@winston.com
Rachel Miras-Wilson, Esq.
rwilson@winston.com
David A. Repka, Esq.
drepka@winston.com
Carlos L. Sisco, Senior Paralegal
csisco@winston.com

Counsel for National Association of Regulatory Utility Commissioners (NARUC)
1101 Vermont Avenue, Suite 200
Washington, DC 20005

James Ramsay, Esq.
jramsay@naruc.org
Robin Lunt, Esq.
rlunt@naruc.org

For Joint Timbisha Shoshone Tribal Group
Indian Village Road, P.O. Box 206
Death Valley, CA 92328-0206

Joe Kennedy, Executive Director
joekennedy08@live.com
Tameka Vazquez, Bookkeeper
purpose driven12@yahoo.com

Counsel for Joint Timbisha Shoshone Tribal Group
Fredericks, Peebles, & Morgan LLP
1001 Second St.
Sacramento, CA 95814

Felicia M. Brooks, Data Administrator
fbrooks@ndnlaw.com
Ross D. Colburn, Law Clerk
rcolburn@ndnlaw.com
Sally Eredia, Legal Secretary
seredia@ndnlaw.com
Darcie L. Houck, Esq.
dhouck@ndnlaw.com
Brian Niegemann, Office Manager
bniegemann@ndnlaw.com
John M. Peebles, Esq.
jpeebles@ndnlaw.com
Robert Rhoan, Esq.
rrhoan@ndnlaw.com

Fredericks, Peebles, & Morgan LLP
3610 North 163rd Plaza
Omaha, NE 68116

Shane Thin Elk, Esq.
sthinelk@ndnlaw.com

Signed (electronically) by/

Robert M. Andersen
Counsel for Nye County, Nevada
Clark Hill PLC
601 Pennsylvania Ave. N.W.
North Building, Suite 1000
Washington, DC 20004
(202) 772-0924
E-mail: randersen@clarkhill.com

November 27, 2013