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September 20, 2002

Spencer Abraham, Secretary  
U.S. Department of Energy  
1000 Independence Avenue, S.W.  
Washington, D.C. 20585

Re: DOE/NRC Private Communications

Dear Mr. Abraham:

The State of Nevada takes strong exception to a growing and apparently unlawful trend on the part of the Department of Energy (DOE) to conduct private meetings with the Nuclear Regulatory Commission (NRC) regarding the federal government's activities at the proposed Yucca Mountain repository site, to the exclusion of the public in general and the State of Nevada in particular. Nevada's entitlement to information, and to participation in DOE meetings with NRC, and the obligations of your agency in that regard, are the subject of statute, regulation, and written Procedural Agreements with NRC mandating that you conduct your affairs in an open and inclusive manner, except in rare and carefully circumscribed circumstances.

As you are aware, Section 117 of the Nuclear Waste Policy Act of 1982 specifically requires that:

The Secretary, the Commission, and other agencies involved in the construction, operation, or regulation of any aspect of a repository in a State shall provide to the governor and legislature of such State, and to the governing body of any affected Indian tribe, timely and complete information regarding determinations or plans made with respect to the site characterization, siting, development, design, licensing, construction, operation, regulation, or decommissioning of such repository.

As would be expected in any situation involving the relationship between an applicant or prospective applicant for a license and the licensing authority, pre-licensing communications authorized between your agency and NRC are limited. *Ex parte* communications between a prospective applicant and the adjudicatory staff of the NRC are strictly prohibited. Pre-licensing communications between DOE and NRC's non-adjudicatory staff are permitted only under carefully circumscribed rules.<sup>1</sup> Under 10 C.F.R. 2.101, "A prospective applicant **may confer informally** with the NRC staff prior to the filing of an application." The parameters of such informal communication are prescribed at 10 C.F.R. 63.16 which concludes, in subparagraph (g): "The activities described in paragraphs (a) through (f) of this section constitute informal conference between a prospective applicant and the NRC staff, as described in Section 2.101(a)(1) of this chapter."

The provisions of paragraphs (a) through (f) speak to semi-annual written progress reports by DOE to NRC; the ability of the NRC staff to visit and inspect activities at the site; and the authority of the NRC to comment in writing to DOE expressing its views on any aspect of site characterization or performance assessment at the site. Paragraph (e) and (f) provide that such written comments as are made by NRC to DOE shall be transmitted to the Governor and legislature of the State of Nevada, and that **all** correspondence between DOE and NRC resulting from the requirements of this section should be placed in the Public Document Room.

Over the last two decades, beginning in 1983, a series of written Procedural Agreements have been executed between DOE and NRC, providing the guiding principles for your interface with NRC regarding the proposed Yucca Mountain repository site. The most recent iteration of those Agreements was published as NRC's SECY-99-031 (January 28, 1999). As you know, one of its principle changes from earlier Agreements was a mandate that "management commitments will be documented in correspondence subsequent to the interactions." The recited Statement of Purpose of the Agreement is to provide "guidelines for communications between the staffs and management organizations of the DOE/OCRWM and NRC/MMSS (including senior management and contractors designated by either agency) during the pre-licensing period with respect to all activities preparatory to DOE's submission" of a license application. Your Agreement with NRC describes three different types of interactions: Technical Exchanges, Management Meetings, and Site Visits, and it sets out the formalities to be observed by both agencies in connection with such interactions:

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<sup>1</sup> Under the terms of a recent guidance letter which your agency (in concert with NRC) persuaded the Office of Government Ethics (OGE) to issue, the communications between NRC and DOE which NRC regulations characterize as "pre-licensing" have now been deemed part and parcel of a single "particular matter" extending from 1987 through the end of the licensing proceeding (which will not even be initiated for several years from now). That OGE guidance, successfully lobbied for by NRC and DOE, would, if not altered, throw into question the whole NRC regulatory scheme for "informal pre-licensing communications," as well as place constraints on Nevada in fully airing issues important to the American people, in the anticipated licensing hearings.

1. **Technical Exchanges:** must have concise bilateral minutes prepared, including summaries of the presentations made and discussions held, regulatory or technical interpretations or positions, and identification of points of agreement and disagreement; however, technical exchanges may **not** be used to officially establish or change positions or make commitments. Copies of the minutes will be provided to the State of Nevada, affected units of local government, affected Indian tribes, and the NRC and DOE Public Document Rooms. Representatives from the State of Nevada, affected units of local government, affected Indian tribes, the public, and any other interested parties may observe the proceedings of Technical Exchanges. Such representatives may provide comments at the opening and ending of the meeting.
2. **Management Meetings:** must have concise bilateral minutes prepared, including summaries of the presentations made and discussions held, regulatory or technical interpretations or positions, and identification of points of agreement; commitments may be made at Management Meetings by either organization, but must be documented in writing. Copies of the minutes will be provided to the State of Nevada, affected units of local government, affected Indian tribes, and the NRC and DOE Public Document Rooms. Representatives from the State of Nevada, affected units of local government, affected Indian tribes, the public, and any other interested parties may observe the proceedings of Management Meetings. Such representatives may provide comments at the opening and ending of the meeting.
3. **Site Visits:** a scheduled interaction held between DOE and NRC technical staff in order for both agencies to benefit from discussion of technical topics in the field. While Site Visits do not require the preparation of written reports, Site Visits may **not** be used as a forum to officially establish or change technical and/or regulatory positions, establish commitments, nor agree to courses of action. Representatives from the State of Nevada, affected units of local government, any affected Indian tribes, the public, and any other interested parties may observe the proceedings of Site Visits.

It is evident from the foregoing provisions regarding pre-licensing interactions:

1. That any commitments are to be documented and may only be made at Management Meetings;
2. That no commitments may be made at Technical Exchanges or Site Visits;
3. That the public in general and the State of Nevada in particular are free to attend those interactions between DOE and NRC; and

4. That, with the exception of Site Visits, the other type of interactions between DOE and NRC require the preparation of detailed, and publicized, bilateral minutes.

In accordance with Section 3.7 of your Procedural Agreement, DOE agreed that NRC would be responsible to assume the lead to keep all parties informed about schedules for **all** Technical Exchanges, Management Meetings, and Site Visits. The only exceptions are set out in the limited exemptions and circumstances described in the NRC Policy Statement: Staff Meetings Open to the Public. The NRC's policy in that regard was addressed most recently in SECY-02-0060, which recites that the NRC has had a formal policy regarding open meetings since 1978, and states that its most recent revision "continues NRC's longstanding practice of providing the public with substantial information on its activities and of conducting business an open manner."

In stark contradiction to the statutory, regulatory, and policy mandates described above, it has become obvious that DOE and NRC staffs are meeting, conferring, and making agreements or commitments with respect to their respective pre-licensing activities at the proposed Yucca Mountain site on a routine basis, with neither notice, nor the opportunity to attend being furnished, to the public in general or the State of Nevada in particular. Gordon Pedersen, addressing the Nuclear Waste Technical Review Board on behalf of DOE last Tuesday, September 10, 2002, and discussing the design of proposed multiple small surface facilities at Yucca Mountain (instead of the one large facility previously envisioned) stated that the design information has been **presented to the NRC** and that "we have **several meetings planned** with the NRC" to further discuss it. Dr. Margaret Chu, Director of the Office of Civilian Radioactive Waste Management -- your appointed head of the DOE Yucca Mountain effort -- reported verbally and distributed a handout at the same NWTRB meeting in which she stated that **DOE has made commitments to the NRC** in five specific areas:

1. Roles, responsibilities, authority, and accountability.
2. Quality assurance program.
3. Project procedures.
4. Corrective action program.
5. Safety-conscious work environment.

In view of the framework of requirements for DOE interactions with NRC mandating that (a) they be conducted openly and with notice to Nevada; (b) that detailed minutes be maintained; and (c) that any commitments be reduced to writing, we request the following information:

1. Was it Dr. Chu or someone else who made these commitments to NRC on behalf of DOE?
2. To whom at NRC were these commitments made?
3. When were the discussions or meetings (or where is the correspondence paper trail) that culminated in such commitments, and who participated?
4. Why was Nevada not given notice of such meetings or interactions?
5. Why were such commitments not reduced to writing and made available to the public or the State of Nevada?
6. What interchanges (when and where and concerning what issues) are scheduled in the upcoming months between DOE and NRC?

Nevada's concerns are far more broad and far more serious than having been systematically excluded from meetings and discussions involving NRC and DOE in which Mr. Pedersen and Dr. Chu presented information to the NRC on behalf of DOE and apparently made commitments. Those serious concerns are rooted in DOE's publicly stated position that site characterization with respect to the Yucca Mountain site legally **ended**<sup>2</sup> on or before February 14, 2002, when Secretary Abraham recommended the site to President Bush. DOE itself has frequently articulated the change of its focus from site characterization to license application. Dr. Chu herself characterized that changeover in her September 10 presentation as a "cultural sea-change from scientific investigation to an NRC-regulated license culture." Accordingly, even assuming the guidance you extracted from OGE (that all effort since 1987 has been licensing, **not** pre-licensing) is incorrect, there can be no question that the focus of NRC and DOE is now represented by both agencies to be fully upon the licensing effort.

Whether an easy familiarity and interchange of ideas was **ever** appropriate between this license applicant (DOE) and this licensing agency (NRC) is open to contention. However, now that site characterization is complete, and DOE is apparently proceeding full bore toward Dr. Chu's next announced milestone -- the License Application -- any further communications between the two agencies must be carefully scrutinized. Legally (and hopefully in practice), the NRC staff is permitted to make **no commitment** on behalf of the NRC with respect to the

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<sup>2</sup> Section 114(a)(1) of the Nuclear Waste Policy Act of 1982 provides that the Secretary of Energy may only recommend approval of a repository site to the President "upon . . . completion of site characterization activities at the Yucca Mountain site."

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licensability of the Yucca Mountain site or the adequacy of DOE's preparation for a license application until a complete and acceptable License Application has been filed by DOE and docketed by NRC.

It is clear from DOE's hundreds of self-serving comments filed in response to NRC's recently published NUREG 1804 (its draft Yucca Mountain License Application Review Plan) that DOE wishes to "shape" the licensing proceeding to mask the inadequacies of the proposed repository site. DOE's proposals for NUREG 1804 include the suggestion that NRC rely on documents not docketed in the licensing proceeding (but available to NRC during pre-licensing) (DOE Detailed Comment No. 3 on NUREG 1804). NRC's draft NUREG 1804 itself proposes (Section 1.4, p. 20) that the NRC staff may rely on evaluations done during the pre-licensing consultation phase of the program, stating "The staff should be able to use the technical understanding and basis for issue resolution developed during pre-licensing." Such procedures would be wholly inappropriate, but even NRC's and DOE's respective proposals highlight how critical it is that pre-licensing interactions between NRC and DOE be open, accessible, memorialized by minutes, and with any commitments reduced to writing.

In addition to wanting prompt responses to our six specific questions (above), Nevada insists upon its entitlement to be kept apprised, on an ongoing basis, with "timely and complete information" regarding every aspect of the proposed repository, in accordance with Section 117(a) of the Nuclear Waste Policy Act. Nevada demands that DOE and NRC observe the mandates of 10 C.F.R. 63 and their own formal Procedural Agreement regarding pre-licensing interactions.

Attached as Exhibit A to this letter is correspondence addressed to Dr. Chu, sent August 12, 2002, asking, among other things, that Nevada be given access to a then-scheduled NRC/DOE meeting regarding the proposed Yucca Mountain repository. A month has gone by without the courtesy of a reply to our letter. This is merely indicative of a continuing disregard for the rights of the State of Nevada.

Dr. Chu announced at the NWTRB's May 7, 2002 meeting in Washington, D.C., a renewed DOE commitment to open communications with stakeholders and the public. To date, Nevada has observed the opposite.

Cordially,

Frankie Sue Del Papa

c: Lee Liberman Otis, Esq., Office of General Counsel  
Dr. Margaret Chu