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February 23, 2004

Margaret Chu, Director
Office of Civilian Radioactive Waste Management
Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

Dear Dr. Chu:

The Department of Energy's (DOE) effort to establish a nuclear waste repository at Yucca Mountain is moving forward to licensing proceedings before the Nuclear Regulatory Commission (NRC). Indeed, you have recently confirmed that DOE remains committed to submitting its license application to NRC late this year. Those proceedings will be NRC's most extensive ever, addressing a variety of complicated scientific and technical issues over the span of several years. Nevada, of course, will be an active statutory participant; both in addressing matters raised by DOE's application and in sponsoring its own affirmative scientific analyses of key areas important to evaluating repository safety. Nevada's role in the repository's licensing is thus as important to the public interest generally as it is to the citizens of Nevada specifically, since Nevada may well be the only party-opponent of DOE with the resources to conduct meaningful studies to aid NRC in its examination.

Essential to Nevada's meaningful participation is the financial assistance that the Secretary of Energy must provide Nevada from the Nuclear Waste Fund under Section 116 of the Nuclear Waste Policy Act. DOE has recently again recognized that Section 116 imposes on DOE an obligation to assist Nevada financially, and that this obligation extends to funding Nevada's participation in and administrative litigation before the NRC.¹ In view of this obligation, and Nevada's critical and time-sensitive need for

¹ See Letter from W. John Arthur, III, Deputy Director, DOE Office of Civilian Radioactive Waste Management, to Robert R. Loux, Executive Director, Agency for Nuclear Projects (Dec. 22, 2003) ("[W]e have concluded that the above [§ 116] funds

funds to continue with development of its important scientific and technical studies that will be presented to NRC beginning early next year, we intend to pursue a new process to ensure that Nevada's participation in licensing is not effectively undermined by lack of essential funds.

This process is intended to (1) guarantee the availability and ensure a certain transparency in our use of financial assistance; (2) create a regular method, agreed upon before NRC proceedings begin, by which such assistance is provided unencumbered by *ad hoc* judgments that may otherwise be expected given the adversarial relationship between DOE and Nevada; and (3) ensure appropriate auditing of Nevada's expenditures. Since Nevada's use of financial assistance has been routinely audited in the past, I am writing today specifically to address my first two points.

Essential to Congress' mandate in Section 116 is the fact that the Nuclear Waste Fund constitutes a "special fund" out of which the Secretary is commanded to make grants to Nevada without any need for specific additional appropriations legislation from Congress. As the General Accounting Office has explained, "[S]tatutes which authorize the collection of fees and their deposit into a particular fund, and which make the fund available for expenditure for a specified purpose, constitute continuing or permanent appropriations, that is, the money is available for obligation or expenditure without further action by the Congress." 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (the "GAO REDBOOK") (1991), 1991 WL 645708 (G.A.O.), at *2.

Not only do the provisions of Section 116 and those establishing the Nuclear Waste Fund obviously create such a special fund, but also the key institutional players in the federal budget process have long recognized this fact. Thus, the 11-digit account identification code assigned to the Nuclear Waste Fund by the Office of Management and Budget clearly identifies the Fund as a "special fund." *See, e.g.*, THE BUDGET FOR THE FISCAL YEAR 2005, at 404-405. GAO has also referred to the Nuclear Waste Fund as a classic example of a special fund. *See, e.g.*, U.S. General Accounting Office, BUDGET ISSUES: EARMARKING IN THE FEDERAL GOVERNMENT, at 6 (1995); GAO REDBOOK, 2001 WL 34038519 (G.A.O.), at *1. Moreover, after studied deliberation by its General Counsel's office, DOE itself has acknowledged that the Secretary's obligation to make payments to Nevada under Section 116 is not dependent on subsequent appropriations legislation. As DOE's Chief Financial Officer put it during consideration of the FY 1996 Energy and Water Appropriations Act, "the Appropriations Act and legislative history do not negate the Department's obligation to make payments to the State and affected units of local government under the NWPA." Letter from Joseph F. Vivona, Chief Financial Officer, DOE, to John J. Myers, Chairman, House Subcommittee on Energy and Water Development (Dec. 31, 1995) (attaching analysis by DOE's Office of General Counsel).

may be used by the State in preparing to conduct, and in conducting, its presentations to the NRC as 'participat[ion] in licensing activities,' including those that comprise administrative litigation before the NRC.").

To be sure, Congress has regularly enacted annual appropriations legislation addressing assistance to Nevada from the Nuclear Waste Fund. Yet, none of these appropriations purported to be the only assistance that might be provided to Nevada from that Fund, nor did they seek in any way to amend the provisions of the NWPAs, or in any other way change the obligations of the Secretary under Section 116. Certainly, if Congress has made such an appropriation, the Secretary should not ignore those funds in ensuring that Nevada has the appropriate amount of assistance under the NWPAs. (That is, the Secretary would make grants above such an appropriation only to the extent reasonably needed by Nevada.) The law is clear, however, as DOE has recognized, that the Secretary has a legal duty to make grants from the Nuclear Waste Fund to Nevada that are needed for Nevada's participation in the NRC licensing proceedings even if Congress has enacted no appropriation for such funding or Nevada's needs exceed the appropriation.

That clearly is the case for FY 2004, as Congress sharply lowered its historical \$5 million annual appropriation to approximately \$1 million at the very time that Nevada's needs for financial assistance for the impending NRC proceeding are at their most critical juncture. Thus, Nevada will clearly need funds from the Nuclear Waste Fund that exceed this year's appropriation.

Operating within the confines of the financial assistance mandate of the NWPAs, as DOE, Nevada, and the GAO apparently all understand it, the practical task before us, then, is to establish a transparent, settled regimen that will allow for prudent planning and a predictable, timely, and smooth flow of appropriate assistance to Nevada. Planning with respect to this financial assistance obviously entails a budget, and we hereby provide you with our budget, attached to this letter, for these funds for fiscal year '04. We intend to furnish you an annual budget for each fiscal year in which licensing remains underway. With such a budget in hand, the Secretary will know the size of the grant he must make from the Waste Fund, taking into account any other funds that might have been appropriated for that fiscal year. As you can see, with a total budget of \$5 million needed for FY '04, we do not seek a level of funding that exceeds the recently historical amounts we have been provided with from the Nuclear Waste Fund (though clearly we will need more than this sum annually as licensing proceedings actually commence). Such annual budgets will additionally inform you of the uses to which we plan to put this money, helping to confirm that we do not use this assistance for purposes not authorized by the NWPAs.

Second, we propose that within a reasonable time after receiving our budget, the Secretary establish a letter of credit in the amount of the grant for that fiscal year, from which Nevada can draw funds as needed during the year. In light of our budget and Congress' FY 2004 appropriation of approximately \$1 million for such assistance, the amount of this letter of credit for FY 2004 should be \$4 million.

As I am sure you appreciate, we have much work to do this year, with an array of highly qualified experts preparing for the NRC proceeding. Accordingly, coming to an agreement with you about the regimen to ensure the appropriate, impartial disbursement

of financial assistance as we go forward is genuinely urgent. I therefore request that you respond to Nevada's proposed administrative approach as soon as possible, but in no event later than March 15. I would of course be happy to discuss this proposal and other, perhaps equally workable options with you at any time.

We are disappointed that the Secretary has not responded to letters from Nevada's Governor last summer and Nevada's Attorney General this past fall concerning the funding issue – a rather extraordinary silence given the numerous state comity and state participation provisions in the NWPA and the stature of the requesters, which generally entitles them to a modicum of official respect. If DOE does not respond to this letter in the time requested, therefore, especially given the urgency of Nevada's needs, we will assume that DOE takes the official position that it will not assist Nevada over and above the Congressional appropriation level for FY '04, and, as the Attorney General indicated in his letter, we will promptly seek a judicial remedy.

Sincerely,

Robert R. Loux
Executive Director

enclosure

cc: Governor Guinn
Attorney General Sandoval
Nevada Congressional Delegation
Commission on Nuclear Projects