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June 4, 2004

Honorable Nils J. Diaz, Chairman  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Dear Chairman Diaz:

I have written to you a number of times to express Nevada's concern that the Nuclear Regulatory Commission (NRC) is not treating us fairly in the Yucca Mountain proceeding. Your May 27, 2004 letter notwithstanding, calling the NRC's review of early versions of the Energy Department's (DOE) Yucca Mountain license application a *pre-review* does not make it any less of a license review. The Commission may or may not prevail in postponing the application of adjudicatory rules in this case on the narrow legal grounds that DOE has not yet submitted a *formal* application. But I can tell you that the Commission's minimal interpretation of its responsibilities to conduct a fair proceeding is counter to the public interest. I am referring specifically to the commissioners participating in the staff review and receiving private communications in a way that would be clearly illegal if the Commission acknowledged the obvious—that the NRC was already conducting a license review.

Our concern is very much heightened by your testimony at the March 25, 2004 hearing of the Subcommittee on Energy and Air Quality of the House Committee on Energy and Commerce. Your March 25 remarks indicate that you have formed an opinion on a key issue in the licensing proceeding that you will ultimately have to judge, and that you have done so on the basis of private communications.

At the March 25 hearing Professor David J. Duquette, an expert on metals and alloys, and a member of the Nuclear Waste Technical Review Board (NWTRB), had testified on the Board's view that "that there is an almost 100 percent probability of the breaching of the containers because of corrosion processes that can occur in the repository." In context that means breaching of the containers in the 10,000 year period during which specific regulatory restrictions on human exposure apply under 10 CFR Part 63.

Congressman C. L. “Butch” Otter asked you whether the NRC will “fully and openly explore the concerns expressed by the NWTRB when it reviews the Department’s license application for Yucca Mountain.” You said that the NRC would do so. But you then volunteered that the NRC had “disagreements in the corrosion area” with the Board view. As you said “*we*” when referring to the NRC, I take you to mean staff and commissioners.

When Mr. Otter asked what the nature of the disagreement was, you said, “there are disagreements in the corrosion rate.” You went on to suggest the waste packages might corrode in a hundred thousand years. That is indeed quite different from the Board view that corrosion might come early in the regulatory period.

I am very much surprised that you would allow yourself to form an opinion at this early stage on an issue you will have to judge. You have left the impression that you have adopted the DOE position on waste package corrosion and rejected the Nevada position before hearing testimony has even been presented.

Nevada has the right to have the issues in this case—of which waste package corrosion is a chief one—decided by impartial judges. I would say to you that if you have indeed formed an opinion on a central issue in this case you should not participate in the adjudication. It is a determination that you have to make—whether you can still judge the Yucca Mountain case fairly. I can tell you that in view of your March 25 testimony your participation in an eventual decision will undermine the credibility of that decision.

I would add one other comment. In speaking at the March 25 hearing of the Department of Energy and Nevada you referred to them as “parties.” It is to my mind a backhanded acknowledgement on your part of what you deny in your June 1 letter—that the Yucca Mountain adjudication is underway. The NRC should face up to the implications of that.

Sincerely,

Robert R. Loux  
Executive Director