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June 14, 2004

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

Dear Chairman Diaz:

We are fast approaching the June 23 date on which the Department of Energy (DOE) must make *all* its Yucca Mountain documentary material available in electronic form to the Licensing Support Network (LSN) if it is to make its December target for submitting its license application. The Nuclear Regulatory Commission (NRC) requirement (10 CFR 2.1003(a)) that the full DOE document submission come at least six months before license submittal is critical to Nevada's ability to present its case. Recent DOE statements however indicate that DOE does not intend to comply—it has reinterpreted NRC's requirement for submitting "all" documentary material to mean submitting whatever is expedient for DOE to submit.

In an April 30 letter to the DOE Inspector General, W. John Arthur, III, Deputy Director of the Office of Civilian Radioactive Waste Management, cited DOE's estimate of 3 to 4 million documents that the Department had to submit to the LSN to comply with the NRC rule. Then on May 4 DOE cut the number to 1 million documents. The DOE

spokesman said, “We just overestimated the number, it’s that simple,” not a very plausible explanation considering that DOE arrived at the 3 to 4 million number after giving close attention to its document obligations for a couple of years. And that larger number still doesn’t count several million emails that DOE has not yet reviewed. Much more likely explanation—supported by the information in a May 2004 DOE Inspector General audit—is that DOE reinterpreted the LSN rule out of fear that a full submission on its part would delay the hearing because of the physical limitations on NRC document indexing. But DOE does not have leeway in deciding what it has to submit; that is specified by the NRC rule.

The objective of the electronic LSN was to speed up the hearing by obviating the usual document discovery process. But that only works if the parties, in particular DOE, make full disclosure of all the documents they intend to rely on and all the documents other parties had a right to obtain under otherwise lengthy discovery procedures. If DOE does not wholeheartedly meet the intent of NRC’s LSN rule then the new process breaks down.

There has been a long-standing problem, of which I know you are well aware, with DOE failing to understand that NRC rules apply to it just as they do to any license applicant. As Commissioner Merrifield said recently, “there remains within DOE a strong reluctance to be subject to external regulation.” He went on to say that the sooner DOE’s managers and staff come to terms with their role as applicants for an NRC license, the smoother this application process will be. I recall statements from you and Commissioner McGaffigan that were in the same vein. The trouble is DOE still doesn’t get it.

It is essential for the integrity of the Yucca Mountain hearing that NRC makes clear from the outset that it will enforce its rules, and that it will do so even if that means delaying the licensing process. If, out of fear of being blamed for delay, the Commission eases the DOE document requirements at this first formal stage of the Yucca Mountain proceeding on June 23, you will encourage DOE in its view that it can bully its way through the licensing proceeding. DOE already assumes that NRC doesn’t really mean it

when it says the license application expected in December has to be complete and of high quality. DOE still thinks it can get away with a piecemeal effort. That's evident from the game-playing that is going on about the 293 Key Technical Issues that were supposed to be resolved completely before license submittal but it now appears will not be.

The NRC faces one of the greatest challenges in its history. Can it stand up to a much larger and politically powerful agency, a "Goliath," as Commissioner Merrifield so aptly characterized it? Your upcoming decision on the adequacy of DOE's June 23 document submission will be a commanding indicator—to DOE, to other hearing participants, and to outside observers—on whether this is to be a fair hearing.

Sincerely,

Robert R. Loux  
Executive Director