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August 9, 2004

Chairman Nils J Diaz, Ph.D.
U.S. Nuclear Regulatory Commission
Office of Public Affairs (OPA)
Washington, D.C. 20555

Dear Chairman Diaz:

The Department of Energy (DOE) announced to the Nuclear Regulatory Commission (NRC) staff on July 23, 2004, its unilateral decision to abandon, short of completion, its long-standing commitment to complete and close a group of Key Technical Issue (KTI) Agreements made with the Nuclear Regulatory Commission. (Letter: Ziegler to NRC Director, Division of High-Level Waste Repository Safety, July 23, 2004).

As you know, based on this commitment by DOE, former NRC Chairman Meserve, on behalf of the Commission signed a statutorily mandated letter (see attached) on November 13, 2001, attesting to the "sufficiency" of DOE's site characterization information for a License Application for a Yucca Mountain repository. That letter, in accordance with the Nuclear Waste Policy Act, was a prerequisite for Energy Secretary Abraham's recommendation to the President that Yucca Mountain be developed as a permanent repository for the nation's high-level radioactive waste and the President's subsequent acceptance of that recommendation.

While the Commission's letter concluded that sufficient information was "not available now," the goal was achievable upon completion of some 293 KTI Agreements requiring significant additional work by DOE. The letter stated, "DOE and NRC have reached numerous agreements, representing a broad scope of additional work DOE will complete before any license application." (emphasis added)

At the time of Mr. Ziegler's letter, only 105 of the 293 agreements had been satisfactorily completed. Many KTI responses had only recently been delivered to NRC for review, and a number of others have yet to be delivered. Typically, the majority of DOE's past KTI submissions have resulted in NRC requests for additional information as a prerequisite to

possible KTI “issue resolution”. Yet, DOE announced in its July 23rd correspondence that “DOE does not intend to provide direct responses to any additional KTI Agreement AINs [Additional Information Needs] received after the date of this letter.”

In view of DOE’s disingenuously walking away from its long-standing commitment, and assuming the role of the licensee dictating terms to its licensing authority, NRC’s silent acquiescence to DOE’s conduct would be in conflict with the intent of its sufficiency letter.

Key Technical Issue resolution is at the heart of the case that DOE must put forward for the safety of a Yucca Mountain Repository. The Commission’s statutory finding of “sufficiency,” based on DOE’s commitment to complete its agreements, was used by the Secretary of Energy to further the Yucca Mountain safety case to the President and Congress. DOE’s recent action, ending its commitment to the NRC, has reduced the Commission’s finding to one lacking both truth and substance.

The Commission should advise DOE without delay that the terms of its clearly conditional “sufficiency letter” have not been met and will not be met under DOE’s July 23rd announced course of action. Further, the NRC should inform DOE that, should it follow its announced course, the Commission will instruct its staff to return, without acceptance review, any Yucca Mountain License Application submitted.

Sincerely,

Robert R. Loux
Executive Director

RRL:njc

Attachment

cc: Nevada Congressional Delegation

November 13, 2001

Mr. Robert G. Card, Under Secretary
Energy, Science, and Environment
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585-0001

Dear Mr. Card :

As required by Section 114(a)(1)(E) of the Nuclear Waste Policy Act of 1982, as amended (42 U.S.C. 10134(a)(1)(E)), I am providing you with the preliminary comments of the U.S. Nuclear Regulatory Commission (NRC) regarding a possible geologic repository at Yucca Mountain, Nevada. These comments concern "...the extent to which the at-depth site characterization analysis and waste form proposal for such site seem to be sufficient for inclusion in any application to be submitted by the Secretary for licensing of such site as a repository." As described in more detail below and in the enclosures to this letter, the NRC believes that sufficient at-depth site characterization analysis and waste form proposal information, although not available now, will be available at the time of a potential license application such that development of an acceptable license application is achievable.

There are two important constraints related to NRC's preliminary comments. First, in making these comments, the NRC is making no conclusions concerning the actual site suitability of the Yucca Mountain site. Rather, the NRC comments address whether sufficient information will exist to begin a potential licensing review should DOE submit a license application. Second, NRC's licensing decisions, in terms of a potential repository at Yucca Mountain, will not occur until DOE submits a high-quality license application, the staff completes its independent safety review and issues a safety evaluation report, NRC provides an opportunity for a hearing, and NRC makes its final determination of whether the DOE license application meets NRC regulations. Any NRC licensing decision will be based on all the information available at the time of decision.

The NRC's preliminary comments reflect many years of extensive pre-licensing interaction among the NRC staff, DOE, and various stakeholders, including the State of Nevada, Indian Tribes, affected units of local government, representatives of the nuclear industry, and interested members of the public. NRC staff activities included: (1) engaging DOE in an issue resolution process on key technical issues including obtaining DOE's agreement to provide acceptable responses by the time of the submission of any license application; (2) issuing numerous publicly available technical and program status reports, over the last several years, that reviewed DOE's ongoing site characterization, waste package and waste form, and preliminary design work, and identified additional information that DOE would need to provide in any license application; and (3) interacting with representatives of the State

of Nevada and affected units of local government on technical information collected in their oversight role.

Based on its interactions with DOE and other stakeholders, the NRC provides the following preliminary comments:

1. DOE has or has agreed to obtain sufficient at-depth site characterization analysis and waste form proposal information required for a possible license application.

2. Although significant additional work is needed prior to the submission of a possible license application, we believe that agreements reached between DOE and NRC staff regarding the collection of additional information provide the basis for concluding that development of an acceptable license application is achievable.

3. DOE is exploring a flexible design concept to allow for the possibility of operating the repository over a range of thermal conditions. If DOE were to adopt a lower temperature operating mode or the approach used in the FY01 Supplemental Science and Performance Analyses, NRC believes that additional information would be needed for a potential license application.

The enclosures to this letter provide additional background information on the scope and conduct of NRC's review. In addition, we provide, for your information, the NRC staff's assessment of the quality of documentation supporting DOE's possible site recommendation.

If you have any questions or comments, please contact me.

Sincerely,

/RA/

Richard A. Meserve

Enclosures:

1. Background Information Supporting the NRC's Preliminary Comments on the Sufficiency of U.S. Department of Energy Information for Inclusion in a License Application for a possible Geologic Repository at Yucca Mountain, Nevada
2. NRC's Views on the U.S. Department of Energy Quality Assurance

cc: See enclosed distribution list.