UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

SECRETARY

December 20, 2007

# COMMISSION VOTING RECORD

DECISION ITEM: SECY-07-0159

TITLE: DENIAL OF PETITION FOR RULEMAKING (PRM-51-9) - THE STATE OF NEVADA

The Commission (with Chairman Klein and Commissioner Lyons agreeing and Commissioner Jaczko partially agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of December 20, 2007.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

Annette L. Vietti-Cook
Secretary of the Commission

Attachments:
1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Klein
Commissioner Jaczko
Commissioner Lyons
OGC
EDO

**THIS COMMISSION VOTING RECORD TO BE MADE PUBLICLY AVAILABLE 5 WORKING DAYS AFTER ISSUANCE OF THE LETTER TO THE PETITIONER**

# VOTING SUMMARY - SECY-07-0159

## RECORDED VOTES

| | APRVD | DISAPRVD | ABSTAIN | NOT PARTICIP | COMMENTS | DATE |
|---|---|---|---|---|---|---|
| CHRM. KLEIN | X | | | | | 10/04/07 |
| COMR. JACZKO | X | X | | | X | 10/24/07 |
| COMR. LYONS | X | | | | | 10/01/07 |

## COMMENT RESOLUTION

In their vote sheets, Chairman Klein and Commissioner Lyons approved the staff's recommendation without comments. Commissioner Jaczko approved in part and disapproved in part the staff's recommendation and provided comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on December 20, 2007.

**THIS COMMISSION VOTING RECORD TO BE MADE PUBLICLY AVAILABLE 5 WORKING DAYS AFTER ISSUANCE OF THE LETTER TO THE PETITIONER**

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# NOTATION VOTE

## RESPONSE SHEET

**TO:** Annette Vietti-Cook, Secretary

**FROM:** CHAIRMAN KLEIN

**SUBJECT:** SECY-07-0159 – DENIAL OF PETITION FOR RULEMAKING (PRM-51-9) – THE STATE OF NEVADA

**Approved** XX **Disapproved** _____ **Abstain** _____

**Not Participating** _____

**COMMENTS:** **Below** ___ **Attached** ___ **None** XX

**SIGNATURE**

10/4/07

**DATE**

**Entered on "STARS" Yes** ✓ **No** ___

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# NOTATION VOTE

## RESPONSE SHEET

**TO:** Annette Vietti-Cook, Secretary

**FROM:** COMMISSIONER JACZKO

**SUBJECT:** SECY-07-0159 – DENIAL OF PETITION FOR RULEMAKING (PRM-51-9) – THE STATE OF NEVADA

Approved __X__ Disapproved __X__ Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached __X__ None ___

_____
SIGNATURE

_____
DATE

Entered on "STARS" Yes __X__ No ___

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**Commissioner Jaczko's Comments on SECY-07-0159**
**Denial of a Petition for Rulemaking (PRM-51-9) - State of Nevada**

I approve in part and disapprove in part the recommendation to proceed with option 2 which would deny the rulemaking petition while offering the assurance that the NRC will interpret the existing regulations to allow substantive claims to the Department of Energy's (DOE) Final Environmental Impact Statement (FEIS). Instead, I approve a combination of options 1 and 2. The original regulations governing the agency's review of the FEIS were based upon an assumption of how the site selection process for a potential repository would unfold. But because the judicial review of environmental issues did not happen as we envisioned, I believe we should grant the petition and fix the corresponding regulations to appropriately reflect that the entire FEIS will be open for litigation in any NRC administrative proceeding regarding a repository application. At the same time, I believe the notice of the proposed rule should explain that the agency will interpret the regulations in a manner consistent with this approach should the rulemaking not be completed in time for a hearing on a potential Yucca Mountain license application.

Based upon the history of this issue, I think granting the petition and amending our regulations is the right answer in this case. First, it is important to remember that the NRC could have originally interpreted the Nuclear Waste Policy Act (NWPA) to allow the NRC to handle the adoption of DOE's FEIS in the same manner it currently handles the adoption of any other federal agency EIS in the NEPA review process. The NWPA's direction to avoid duplicative environmental analysis does not necessarily equate to a direction to eliminate most, if not all, of the FEIS from the NRC's hearing process. I believe we should treat DOE' FEIS in the same manner as we treat any other FEIS submitted by a similarly situated regulated entity. In this case, that would mean defending the agency's independent review of the entire FEIS – not just limited portions of it - in the NRC's administrative proceedings. Commenters, including the Council on Environmental Quality, said as much in comments to this rulemaking and I find their logic persuasive. Had the agency opted for that interpretation in the proposed rulemaking, perhaps we would not find ourselves facing this petition today.

NRC's rationale for not doing so, however, while not ideal, made sense in the context of what the agency thought would happen with the FEIS. According to the rulemaking history, section 51.109 of NRC's regulations was based, at least in large part, upon the theory that the administrative litigation of NEPA issues at the NRC should be limited because many of these issues should have already had the opportunity to be litigated in another forum. Thus, legal doctrines which prevent issues and claims from being re-litigated, such as res judicata and collateral estoppel, would prevent the re-litigation of these issues in NRC hearings. This was premised upon NRC's expectation that an interested person would have had an opportunity to legally challenge DOE's FEIS after it was used to support the recommendations of Yucca Mountain as a site for a repository by the Secretary of Energy and the President.

With that expectation in mind, the regulations were then designed to ensure that the environmental issues in any NRC proceeding on the proposed repository would appropriately focus on issues that were new – that were not able to be raised at the earlier opportunity to challenge the FEIS. So the regulations adopted in section 51.109 focused not on the entire FEIS, as would be the normal NRC practice, but on the NRC's decision to adopt the FEIS. The regulations limited challenges to NRC's adoption decision to those issues that had changed from the original application, or that were issues raising "significant and substantial new information" since that earlier opportunity to challenge the FEIS. This makes sense if any of the

other issues regarding the FEIS had already had the opportunity to be challenged. Given that presumption, it also explains why the regulations direct the Board to use the higher standards governing a motion to reopen when ruling upon the issues raised regarding adoption of the FEIS - because litigating the FEIS in NRC's administrative proceeding was seen as re-opening the record on an already litigated FEIS.

All that being said, as is often the case, actual events regarding judicial review of environmental issues transpired differently. Instead of the FEIS being used to support the recommendation of Yucca Mountain as a site for a repository, there was a Joint Resolution of Congress approving the Yucca Mountain site designation. This change of events, according to the Federal Court of Appeals decision in *Nuclear Energy Institute, Inc. v. Environmental Protection Agency,* 373 F.3d 1251 (D.C. Circuit 2004), rendered any such challenge to the FEIS' support for the Yucca Mountain site moot; and to the extent the NRC may rely upon the FEIS, rendered challenges unripe because the NRC had not reached a decision regarding adopting or relying upon the FEIS in a way that could have yet harmed the parties.

It was part of this discussion that led the NRC and DOE to assure the court that the parties would have an opportunity during NRC's administrative hearing to raise substantive challenges to the FEIS. And it is this assurance from NRC counsel that generated the petition for rulemaking. In essence, the petitioners do not understand how NRC's current regulations can be in accord with the assurance the court relied upon – that parties would have the opportunity at the NRC to substantively challenge the FEIS. Because current NRC regulations limit challenges to NRC's decision about adoption of the FEIS rather than the FEIS itself; and further limit those challenges to require they be based upon significant and substantial new information, it is easy to see how our stakeholders might be confused. Add to that the direction in the current regulations that the Boards are directed to review any challenge to the decision regarding adoption using the standards that govern re-opening a record - which is an intentionally higher bar for review – and there can be little question that the current regulations are confusing in light of the discussion in front of the court and the relied upon assurance that substantive issues regarding the FEIS could, in fact, be raised in NRC proceedings.

For all of these reasons, it appears to me that the best way to transparently resolve the real question presented – the question of what issues surrounding the FEIS can be challenged in a prospective hearing on an application for a construction authorization – is to grant this petition and ensure that the regulations transparently capture precisely how the environmental review will be conducted in NRC's administrative proceeding. The earlier rulemaking was based upon assumptions, but we can now answer the questions with the benefit of knowing now what we did not know then.

I recognize that the timing of the agency's decision on this petition is not ideal because an application for a repository may be submitted before this rulemaking would end. That is especially unfortunate in this particular situation where the petition was filed in 2005. Had we granted this petition at the close of the public comment period in October 2005, we likely would now be voting on the final rule instead of voting on this petition. I am hopeful that the staff's work to improve the rulemaking process will include ways to improve the timeliness of the petition process so we are not in this unfortunate position in the future.

But we are where we are, and with that in mind, I believe the notice that grants the petition for rulemaking should indicate that, if the rulemaking is not resolved prior to the receipt of an application for a repository, the agency intends to interpret the regulations in a manner consistent with the court's decision – as the staff has drafted in the notice accompanying option 2 - with some additional clarification. The notice should also explain that section 51.109(c), which indicates that challenges to the NRC's adoption decision are to be based upon "significant and substantial new information", will be interpreted in a manner that recognizes, as the court did, that claims regarding DOE's FEIS have not been adjudicated on the merits and thus, would certainly raise "new considerations" with regard to any decision to adopt the FEIS. The notice should also make it clear that the current direction in section 51.109(a) that the presiding officer should, to the extent possible, use the criteria for ruling on a motion to reopen in resolving disputes regarding the adoption of the FEIS, is rendered moot. The notice should clearly state that it is not possible to rely upon criteria used for a motion to reopen given the relevant history of this matter where there was no opportunity to originally open these issues. Instead, the contention admissibility should be determined by reliance upon section 2.309(f), the agency's current contention standard.

I appreciate that because these regulations have not yet been interpreted and applied in any proceeding, the agency has more flexibility to interpret them now without recreating them in a new rulemaking – and thus the recommendation for option 2. But this is not a situation where the regulations intent could have been clearer; this is a situation where the interpretation of the regulations will essentially require the agency to exercise great latitude in applying them in a manner consistent with the discussion in court. Transparency should dictate that we, at least, try to correct this situation through the appropriate rulemaking channels regardless of the impacts of the timing of this decision. We should not let the prospect of a potential application complicate what is clearly the right answer. We can and should deal with the possible complications of an intervening application by providing appropriate guidance should the rulemaking not resolve itself in time. But the two are not mutually exclusive and thus, I support a combination of options 1 and 2 - granting the petition and clarifying in the notice the agency's regulatory interpretation of the existing regulations should they be required to be used prior to completion of the rulemaking.

Also, this paper should be reviewed for a release determination and, at a minimum, the voting record and SRM from this paper should be made publicly available five business days after the letter is sent to the petitioner, as is current practice for release of information regarding decisions on rulemaking petitions.

10/24/07

Gregory B. Jaczko Date

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# NOTATION VOTE

## RESPONSE SHEET

**TO:** Annette Vietti-Cook, Secretary

**FROM:** COMMISSIONER LYONS

**SUBJECT:** SECY-07-0159 – DENIAL OF PETITION FOR RULEMAKING (PRM-51-9) – THE STATE OF NEVADA

**Approved** X **Disapproved** _____ **Abstain** _____

**Not Participating** _____

**COMMENTS:** **Below** ___ **Attached** ___ **None** ___

SIGNATURE

10/1/07

DATE

**Entered on "STARS" Yes** √ **No** ___

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