From: Joyce Strumpfi [mailto:joycestrumpfi@yahoo.com]
Sent: Thursday, February 04, 2010 1:08 AM
To: Moore, Thomas; Ryerson, Paul; Wardwell, Richard
Cc: Bupp, Margaret; Gendelman, Adam; Silvia, Andrea
Subject: Proposed DOE Request for Dismissal of Yucca Mountain Project License Application

Dear Judges Moore, Ryerson, and Wardwell:

I am writing to express my serious concern over recent actions taken by the U.S. Department of Energy (DOE) in the Yucca Mountain Project license application proceeding.

As you know, in its February 1 Motion to Stay the Proceeding, DOE has declared its intention to file a subsequent motion to withdraw the license application with prejudice, presumably in accordance with 10 CFR 2.107. Surely, such a request for dismissal with prejudice is remarkable and highly unusual (if not unprecedented) when made by the applicant itself rather than an opposing party. NRC's own license application guidelines (in NUREG-0386), and the case law cited therein, suggest as much.

The guidelines, for example, at Section 1.10.2, state that "dismissal with prejudice is a severe sanction which should be reserved for those unusual situations which involve substantial prejudice to the *opposing party or to the public interest in general*" (emphasis added). Elsewhere, the guidelines state that "A dismissal with prejudice requires some showing of harm to either a party or the public interest in general and requires careful consideration of the circumstances, giving due regard to the legitimate interests of all parties."

These and other provisions set forth in NRC's license application guidelines raise a number of questions that should, in my view, be addressed by the ASLB:

* First, has DOE, in seeking to carry out the current Administration's publicly declared policy, abdicated its responsibilities under the Nuclear Waste Policy Act (NWPA), effectively rendering DOE an opposing party in its own licensing proceeding?

* Second, if DOE has become, *de facto*, an opposing party in its own licensing proceeding, or even if DOE retains its nominal status as a proponent of its own license application, should the same standards reserved for opposing parties and the public be applied to DOE when deciding the question of whether or not to grant a dismissal with prejudice?

* Third, if the ASLB's authority in this matter includes consideration of "the public interest in general," or the "legitimate interests of all parties," then who in the proceeding can assume the role formerly held by DOE as advocate for its license application?

As a step toward addressing these questions, I would respectfully submit the following observations.

First of all, the NRC's license application guidelines, as well as relevant case law, require DOE to establish a credible basis for seeking a dismissal with prejudice. If media accounts and statements offered by certain politicians or government officials are to be believed, no such basis has yet been offered. In fact, the only rationale offered to this point seems to be preclusion of any subsequent submittal of the license application for further adjudication. As NRC's guidelines clearly state, citing relevant case law, "It is well settled that the prospect of a second lawsuit or another application does not provide the requisite quantum of legal harm to warrant dismissal with prejudice" (Section 1.10.2). Or, as amplified in Section 1.10.1, "The possibility of another hearing, standing alone, does not justify either a dismissal with prejudice or conditions on a withdrawal without prejudice. That kind of harm, the possibility of future litigation with its expenses and uncertainties, is the consequence of any dismissal without prejudice. *It does not provide a basis for departing from the usual rule that a dismissal should be without prejudice*" (emphasis added).

It cannot be the intent of the ASLB to impose this most "severe sanction" on DOE simply because DOE itself has requested it in accordance with current Administration policy. This cannot comport with the ASLB's responsibility to give "due regard to the legitimate interests of all parties" and to consider "the public interest in general," which by definition includes those interests that support a continuance of the licensing proceeding. Moreover, it cannot be the intent of the ASLB to allow DOE to dictate its own "punishment" in the proceeding. That would be tantamount to allowing a defendant in a civil trial to dictate the amount of damages granted to the plaintiff, an absurd and virtually unthinkable outcome. Clearly, and given the fact that the ASLB must consider the interests of all parties and the public in general, DOE cannot be granted such an outcome at the expense of those other interests.

Second, if the concept of "the public interest in general" does indeed encompass the advocacy and support of parties who would wish the licensing proceeding to continue, then the ASLB must recognize the fact that *those parties are no longer represented in the proceeding.* Chief among those parties, I would argue, is the Congress itself, which ratified the Nuclear Waste Policy Act and continues to support it, but there are many other parties as well whose interests should be considered: for example, the residents of dozens of states where nuclear waste is stored (many of whom have contributed to the Nuclear Waste Fund as ratepayers), the governments of those states with existing waste storage commitments from DOE (Idaho, South Carolina, Washington), or the taxpayers who will ultimately bear the cost of DOE's failure to live up to its contract with nuclear utilities under the NWPA (the Department of Justice has estimated this potential cost at $50 billion).

I say again: With the possible exception of the Nuclear Energy Institute, which strictly speaking represents the interests of the nuclear industry, *there is no party to the Yucca Mountain Project license application proceeding who could be said to represent the interests formerly advocated by DOE.* For this and other reasons mentioned above, I respectfully submit that the ASLB cannot grant DOE its request for a dismissal with prejudice.

Sincerely,

Joyce Strumpfi
Las Vegas, NV

Addenda:

[From NUREG-0386, Section 4.1:]

"A Licensing Board may refuse to dismiss a proceeding "with prejudice" even though all the participants jointly request that action, unless it is persuaded by legal and factual arguments in support of that request. General Public Utilities Nuclear Corp. et al. (Three Mile Island Nuclear Station, Unit 2), LBP-92-29, 36 NRC 225 (1992)."

[From NUREG-0386, Section 3.19.1:]

"Termination of a proceeding with prejudice is not warranted where there has been no demonstration that there has been substantial prejudice to an opposing party or to the public interest. That an opposing party may 'linger in uncertainty' about a future application does not constitute such a demonstration. In addition, termination with prejudice would be inappropriate in the absence of any information that would justify precluding the site from such future use. Northern States Power Company (Independent Spent Fuel Storage Installation), LBP-97-17, 46 NRC 227, 231-232 (1997)."