

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of	)	Docket No. 63-001
	)	
U.S. DEPARTMENT OF ENERGY	)	ASLBP No. 09-892-HLW-CAB04
	)	
(High Level Waste Repository)	)	April 14, 2010

**STATE OF NEVADA ANSWER IN SUPPORT OF
THE DEPARTMENT OF ENERGY'S
PETITION FOR INTERLOCUTORY REVIEW**

On April 12, 2010, the Department of Energy (DOE) petitioned the Commission to take interlocutory review of the Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) issued by Construction Authorization Board-04 (CAB) on April 6, 2010. For the reasons given below, the State of Nevada (Nevada) supports DOE's petition.

First, because the Memorandum and Order suspends the entire proceeding on DOE's withdrawal motion, it clearly affects the basic structure of the proceeding on DOE's motion in a pervasive and unusual manner. Therefore, the Memorandum and Order satisfies the Commission's criteria for interlocutory review. *See, e.g., Private Fuel Storage (Independent Spent Fuel Storage Installation)*, CLI-00-2, 51 NRC 77 (2000).

Second, while it is apparent that the CAB gave thoughtful consideration of how best to conserve its and the parties' resources under the circumstances of this case, its decision ultimately failed to give adequate consideration of the relative roles of the U.S. Court of Appeals

for the D.C. Circuit (Court)¹ and the Commission on matters of statutory and regulatory interpretation. DOE's motion to withdraw raises questions regarding how the Nuclear Waste Policy Act, as amended (NWPAct), 42 U.S.C. §§ 10101 *et seq.*, Public Law No. 107-200, 42 U.S.C. §§ 10135 *note*, and the Commission's regulations should be interpreted. Among other things, DOE's petition raises questions regarding whether various provisions in the NWPAct and Public Law No. 107-200 somehow operate to supersede the full application of section 114(d) of the NWPAct, 42 U.S.C. § 10134(d), which provides (with exceptions not here relevant) that the Commission shall consider DOE's pending Yucca Mountain license application "in accordance with the laws applicable to such applications." 10 C.F.R. § 2.107, which allows any applicant to move to withdraw its license application, appears quite clearly to be one example of a law – an NRC licensing regulation - made applicable by section 114(d). The existence or absence of a fully developed factual record is irrelevant. The Commission has expertise in how the NWPAct should be construed, has exercised this expertise in the past, and should do so again so that the Court has the benefit of NRC's thinking and may properly defer to its reasonable interpretation. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Moreover, the Court will generally defer to NRC's interpretations of its own regulations. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Yet, under the CAB's Memorandum and Order, these settled and normal principles of Administrative Law defining the relative roles of reviewing courts and administrative agencies would be effectively nullified, as *Chevron* and *Auer* cannot

¹ Currently pending before the U.S. Court of Appeals for the District of Columbia Circuit are four cases challenging the ability of DOE to file its motion to withdraw its pending Yucca Mountain license application and, necessarily, the ability of the Commission to consider that motion. Three of those cases have been consolidated: *In re Aiken County*, No. 10-1050 (D.C. Cir. filed Feb. 19, 2010); *State of South Carolina v. U.S. Dept. of Energy, et al.* (D.C. Cir., docketed Mar. 26, 2010) (filed in the 4th Cir. on Feb. 26, 2010 and transferred to the D.C. Cir. on Mar. 25, 2010); and *Ferguson, et al., v. U.S. Dept. of Energy, et al.* (D.C. Cir. filed Feb. 25, 2010). The fourth case was filed after DOE petitioned the Commission for interlocutory review: *State of Washington v. U.S. Dept. of Energy, et al.* (D.C. Cir. filed April 13, 2010).

apply in the absence of Commission statutory and regulatory interpretations of the relevant statutes and regulations.

Third, the Board's Memorandum and Order is contrary to settled Commission precedent. *Pacific Gas & Electric Company (Diablo Canyon, Units 1 and 2)*, CLI-02-16, 55 NRC 317, 334 (2002) (and cases cited therein) indicate that it is the "usual practice" of the Commission to complete its reviews and proceedings notwithstanding the pendency of proceedings elsewhere. For example, in *Diablo Canyon* the Commission denied a motion to hold a license transfer proceeding in abeyance pending the conclusion of a parallel proceeding before a federal bankruptcy court even though the bankruptcy court might reject the reorganization plan which called for the license to be transferred. There is no reason why this settled practice should not apply here.

Respectfully submitted,

(signed electronically)

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Atomic Safety and Licensing Board

In the Matter of U.S. DEPARTMENT OF ENERGY (High Level Waste Repository)	)))))	Docket No. 63-001-HLW
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing State of Nevada Answer in Support of the Department of Energy's Petition for Interlocutory Review has been served upon the following persons by the Electronic Information Exchange:

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