

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD  
Before Administrative Judges:

09-892-HLW-CAB04  
Thomas S. Moore, Chairman  
Paul S. Ryerson  
Richard E. Wardwell

\_\_\_\_\_  
In the Matter of : ) May 17, 2010  
)  
U.S. Department of Energy ) Docket No. 63-001 )  
) Docket No. 63-001-HLW  
(High Level Waste Repository Construction )  
Authorization Application) )  
\_\_\_\_\_)

**NYE COUNTY RESPONSE IN OPPOSITION TO DEPARTMENT OF  
ENERGY'S MOTION TO WITHDRAW WITH PREJUDICE ITS  
LICENSE APPLICATION FOR YUCCA MOUNTAIN REPOSITORY**

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**NYE COUNTY RESPONSE IN OPPOSITION TO DEPARTMENT OF  
ENERGY'S MOTION TO WITHDRAW WITH PREJUDICE ITS  
LICENSE APPLICATION FOR YUCCA MOUNTAIN REPOSITORY**

Nye County, Nevada ("Nye County"), is the host County for the proposed geological repository for nuclear waste at Yucca Mountain, and hereby submits the following Response to the Department of Energy's ("DOE") Motion to Withdraw its License Application With Prejudice ("Motion to Withdraw"), which was filed on March 3, 2010. As more fully explained below, Nye County seeks a decision by the Construction Authorization Board 04 ("CAB04" or "Board") of the Nuclear Regulatory Commission ("NRC or "Commission") denying DOE's Motion to Withdraw.

**BACKGROUND**

**A. Overview of the Yucca Mountain NRC Licensing Proceeding**

On June 3, 2008, DOE submitted the "Yucca Mountain Repository License Application," ("LA") with NRC seeking authorization to begin construction of a permanent high-level waste

repository at Yucca Mountain pursuant to the Nuclear Waste Policy Act ("NWPA").<sup>1</sup> Prior to submitting the LA, DOE had spent decades locating the appropriate site for the repository, determining that it could be safely constructed and operated, obtaining approval for the site location from the President and Congress, and then preparing the LA.<sup>2</sup>

On October 17, 2008, the Commission issued a "Notice of Hearing and Opportunity to Petition for Leave to Intervene," which provided a 60-day window for intervention petitions to be filed.<sup>3</sup> Nye County and numerous other petitioners submitted timely petitions to intervene, as well as safety and environmental contentions and requests for a hearing; two petitioners filed requests to participate as interested government participants.<sup>4</sup> *U.S. Dept. of Energy* (High-Level Waste Repository), CLI-09-14, 2009 WL 1883741 \*1 (2009), *citing* Memorandum and Order, (Identifying Participants and Admitted Contentions), LBP-09-6 at pp. 3-8 (May 11, 2009) (unpublished).

The three Construction Authorization Boards ("CABs") designated to rule on the petitions granted the petitions to intervene; granted the interested governmental participant requests under 10 C.F.R. § 2.315(c); and admitted over 300 of the proposed contentions. 10 C.F.R. § 2.315(c) (2010). Memorandum and Order, (Identifying Participants and Admitted Contentions), LBP-09-6 at pp. 3-8 (May 11, 2009) (unpublished) at pp. 105-106.<sup>5</sup> Pursuant to CAB04's "CAB Case Management Order #2," dated September 30, 2009 (unpublished), formal

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<sup>1</sup> See Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008); corrected 73 Fed. Reg. 40,883 (July 16, 2008).

<sup>2</sup> See discussion, *infra*, at Section I, pp 6-11.

<sup>3</sup> *U.S. Dept. of Energy* (High-Level Waste Repository), CLI-08-25, 68 NRC 497 (2008); see also, *In the Matter of U.S. Dept. of Energy* (High Level Waste Repository); Notice of Hearing and Opportunity To Petition for Leave to Intervene on an Application for Authority To Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, 73 Fed. Reg. 63,029 (October 22, 2008).

<sup>4</sup> DOE filed answers to the intervention petitions on or before January 16, 2009. The NRC Staff responded to the intervention petitions on February 9, 2009. NRC Staff Answer to Intervention Petitions (February 9, 2009). On or before February 24, 2009, ten petitioners, including Nye County, filed timely replies to the DOE and Staff answers. Stay Motion at 1.

<sup>5</sup> Later, CAB04 also granted NCAC and the Joint Timbisha Tribal Group party status after both parties satisfied LSN certification requirements. Memorandum and Order (Granting Party Status to the Native Community Action Council) (August 27, 2009) (unpublished) at 2; Memorandum and Order (Granting Party Status to the Joint Timbisha Shoshone Tribal Group) (August 27, 2009) (unpublished) at 2.

discovery began in the proceeding with the submission of initial witness disclosures by the parties on or before October 10, 2009. Memorandum and Order, (CAB Case Management Order #2) (Sept. 30, 2009) (unpublished). Discovery was limited to "Phase I" issues: contentions that related to the subject-matter of Volumes 1 and 3 of the NRC Staff's Safety Evaluation Report scheduled for completion. Depositions were scheduled to begin on February 16, 2010. *Id.* at 7. In addition, CAB04 conducted hearings on legal contentions on January 26-27, 2010, but no decision has been rendered on those issues.

On February 1, 2010, just before the first scheduled depositions were to be conducted, DOE filed a "Motion to Stay the Proceeding" ("Stay Motion"). DOE's Stay Motion stated that the President, in the proposed budget for fiscal year 2011, "directed that the Department of Energy 'discontinue its application to the U.S. Nuclear Regulatory Commission for a license to construct a high-level waste geologic repository at Yucca Mountain in 2010 . . .'" Stay Motion at 1. DOE also stated that funding for Yucca Mountain would be eliminated in 2011.<sup>6</sup> *Id.*

Ultimately, DOE indicated its intent to withdraw the LA by March 3, 2010, and requested a stay of discovery pending consideration of the Motion to Withdraw in order to avoid unnecessary expenditure of resources by the Board and parties. Stay Motion at 2. The Stay Motion was unopposed by the parties, and CAB04 granted an interim stay of the discovery on February 2, 2010, and a stay of the proceeding on February 16, 2010. Memorandum and Order, (Granting Interim Suspension of Discovery) (February 2, 2010) (unpublished). Memorandum and Order, (Granting Stay of Proceeding) (February 12, 2010) (unpublished).

#### **B. DOE's Motion to Withdraw With Prejudice**

On March 3, 2010, DOE filed a Motion to Withdraw its license application for a permanent geological repository at Yucca Mountain, and asked that the withdrawal be granted

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<sup>6</sup> The Stay Motion referenced statements in the proposed budget prepared by the Office of Management and Budget for Fiscal Year 2011. Budget of the U.S. Government, Fiscal Year 2011, Appendix at 437 (available at <http://www.whitehouse.gov/omb/budget/fy2011/assets/doe.pdf>).

with prejudice, but with no other conditions. Motion to Withdraw at 1. DOE sought dismissal with prejudice "because it does not intend ever to re-file an application to construct a permanent repository for spent fuel and high-level radioactive waste at Yucca Mountain." Motion to Withdraw at 3, note 3. In its only other attempt to actually address the NRC requirements for a withdrawal with prejudice under NRC regulations, DOE further asserted that the NRC "should defer to the Secretary [of Energy's] judgment that dismissal of the pending application with prejudice is appropriate..." Motion to Withdraw at 4 & n. 4. DOE requested that no other conditions be placed on the dismissal, beyond those related to the LSN. Subsequent to DOE filing its Motion to Withdraw, Congress has not:

- amended the NWPA in response to the President's budget request;
- altered the statutory designation of Yucca Mountain as the sole site for the geological repository; or
- acted in any way upon the President's 2011 budget request as it pertains to the DOE in general or the Yucca Mountain repository in specific.

Nevertheless, DOE has moved forward with reprogramming its FY-2010 appropriation funding the licensing proceedings.<sup>7</sup>

The State of South Carolina, the State of Washington, Akin County, South Carolina, and a group of private individuals have filed federal lawsuits seeking to halt DOE's actions. Those suits have been consolidated in the United States Court of Appeals for the District of Columbia Circuit.<sup>8</sup> Five Petitions to Intervene in the NRC licensing proceedings were also filed by the State of South Carolina, the State of Washington, Aiken County, South Carolina, the National Association of Regulatory Utility Commissioners (NARUC), and the Prairie Island Indian

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<sup>7</sup> Letter from Steve Isakowitz, Chief Financial Officer, DOE, to Senator Peter J. Visclosky, Chairman, Subcommittee on Energy and Water Development, Committee on Appropriations, United States House of Representatives (Feb. 17, 2010)

<sup>8</sup> Currently pending before the U.S. Court of Appeals for the District of Columbia Circuit are four cases challenging the ability of DOE to withdraw its pending Yucca Mountain license application. All 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). A 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) and has now been consolidated.

Community (PIIC) [hereinafter the "Five Additional Petitioners"]<sup>9</sup> specifically to challenge DOE's right to withdraw the license application under the NWPA, the National Environmental Policy Act ("NEPA"), the Administrative Procedure Act ("APA"), and NRC regulations.

On March 5, 2010, CAB04 issued a scheduling order for briefing on the various petitions to intervene.<sup>10</sup> Memorandum and Order, (Scheduling Order) (March 5, 2010) (unpublished). The parties completed briefing on the first three petitions on April 5, 2010, and on the petitions by NARUC and PIIC on May 11, 2010. Nye County supported all the petitions to intervene. DOE did not oppose intervention by the Five Additional Petitioners, but sought certain conditions assuring the prompt briefing and resolution of the contentions related to its Motion to Withdraw.

On April 6, 2010, CAB04, acting on its own authority, issued an order suspending further briefing on the pending petitions to intervene and on DOE's Motions to Withdraw and stated that CAB04 would await review of similar statutory and regulatory claims filed with the United States Court of Appeals for the District of Columbia Circuit. Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) (April 6, 2010) (unpublished). DOE and Nye County filed petitions with the Commission for Interlocutory Review of the April 6, 2010 CAB04 Order on April 12 and April 15, respectively. On April 23, 2010, the Commission vacated the April 6, 2010 CAB04 Order suspending the Licensing case and directed that the CAB render a decision on DOE's Motion to Withdraw no later than June 1, 2010.<sup>11</sup>

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<sup>9</sup> Petition of the State of South Carolina to Intervene (February 26, 2010); State of Washington's Petition For Leave To Intervene and Request for Hearing (March 3, 2010); Petition of Aiken County, South Carolina (March 4, 2010); National Association of Regulatory Utility Commissioners Petition to Intervene (March 15, 2010), and the Petition to Intervene of the Prairie Island Indian Community (March 16, 2010).

<sup>10</sup> On March 16, 2010, the CAB issued a similar scheduling Order pertaining to the pending Petitions to Intervene filed by the National Association of Regulatory Commissioners and the Prairie Island Indian Community. Memorandum and Order (Filing Times for Answers and Replies) (March 16, 2010) (unpublished).

<sup>11</sup> *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-10-13, 71 NRC \_\_\_\_ (slip op. at 5.) (Apr.23, 2010).

CAB04 responded to the Commission's April 23, 2010 Order, by saying that the June 1, 2010, deadline was "infeasible" due to the complexity of the issues, the desirability of holding oral argument on DOE's Motion to Withdraw, and a previously established briefing schedule on the petitions to intervene. Memorandum and Order (Setting Briefing Schedule) (April 27, 2010) at 1-2 (unpublished). CAB04 stated that it would decide DOE's Motion "as soon as possible after June 1 and, in no event, later than June 30." *Id.* The instant Nye County Response is submitted in accordance with the CAB04 April 27, 2010 scheduling Order directing that party briefs concerning DOE's Motion to Withdraw be filed by May 17, 2010.

### ARGUMENT

**I. YUCCA MOUNTAIN IN NYE COUNTY, NEVADA, WAS DESIGNATED BY LAW AS THE SOLE SITE FOR THE REPOSITORY AND THEREFORE THE SITE MAY NOT BE PERMANENTLY ABANDONED WITHOUT CONGRESSIONAL ACTION**

Congress bemoaned the well-documented difficulties in siting a geologic repository as early as 1982. *See*, H.R. Rep. No. 97-491(I) at 26 (1982). Those difficulties led Congress to enact the NWPA, which prescribed a detailed process for identifying a permanent geological repository site for the safe containment of both civilian and defense nuclear waste and spent nuclear fuel. 42 U.S.C. § 10101 *et seq.* (1982).

Following the mandates of the NWPA, DOE began its search for multiple repository sites in 1983. In 1986, DOE ranked the appropriateness of the various sites it had investigated and assigned Yucca Mountain the highest ranking, using an "accepted, formal scientific method." DOE, *A Multiattribute Utility Analysis of Sites Nominated For Characterization For the First Radioactive Waste Repository — A Decision Aiding Methodology* 1-5-1-15 (1986). From 1987 to 2002, DOE continued its intensive and probing analysis of the Yucca Mountain site pursuant to the NWPA. 42 U.S.C. §§ 10132-10133 (2009); DOE, *Recommendation by the Secretary of*

*Energy Regarding the Suitability of the Yucca Mountain Site for a Repository Under the NWPA of 1982 (2002) ("Suitability Determination")*<sup>12</sup> at 7-8; 10 C.F.R. Part 963 (Yucca Mountain Site Suitability Guidelines). DOE investigated for the better part of two decades and invested "billions of dollars and millions of hours of research" on Yucca Mountain. Suitability Determination at 1. As a result of this investigation, DOE determined that the site was "far and away the most thoroughly researched site of its kind in the world." *Id.*

In 1987, Congress amended the NWPA to focus exclusively on the Yucca Mountain site, departing from the statute's original multiple site selection and designation scheme. Pub. L. No. 100-203, Title V, Subtitle A §§5001-5065, 101 Stat 1330, 13330-227 to 1330-255 (Dec. 22, 1987) *codified* throughout the NWPA, 42 U.S.C §10100 et seq. In January 2002, the Secretary of Energy formally advised the President that a geological repository could be safely located at Yucca Mountain:<sup>13</sup>

[T]he amount and quality of research the [DOE] has invested into [determining the safety and suitability of Yucca Mountain as the Site for a repository] – done by top flight people. . . – is nothing short of staggering. After careful evaluation, I am convinced that the product of over 20 years, millions of hours, and four billion dollars ... provides a sound scientific basis for concluding that the site can perform safely during both the pre- and post-closure periods, and that it is indeed scientifically and technically suitable for development as a repository.

Suitability Determination at 45.

Based upon the Secretary's findings and DOE's Suitability Determination, the President recommended Yucca Mountain to Congress in February 2002 as the nation's sole geological repository. 42 U.S.C. § 10134(a)(2)(A) (2009); H.R. Rep. No. 107-425 at 3. The Governor and legislature of the State of Nevada submitted a notice to Congress opposing DOE's and the President's recommendation. H.R. Rep. No. 107-425 at 3.

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<sup>12</sup> Available at: [http://www.ocrwm.doe.gov/uploads/1/Secretary\\_s\\_Recommendation\\_Report.pdf](http://www.ocrwm.doe.gov/uploads/1/Secretary_s_Recommendation_Report.pdf)

<sup>13</sup> H.R. Rep. No. 107-425, at 3 (2002); Suitability Determination at 1.

Following the requirements of the NWPA, 42 U.S.C. § 10135, the Secretary of Energy, the President, and Congress collectively overrode opposition from the State of Nevada and designated Yucca Mountain as the sole site for development of a deep geological repository for nuclear waste in the United States. *See* Pub. L. No. 107-200, 116 Stat. 735 (2002); 42 U.S.C. §§ 10172; 10132-10135 (1987). That concerted Executive and Legislative Branch action cannot legally be unilaterally undone by the current Administration's FY-2011 budget request. Well over ten billion dollars and more than twenty-years of time and effort have been expended in locating, analyzing, designating, and preparing both the site and the DOE's LA. *As a matter of law*, Yucca Mountain's designation as the sole site for the nuclear waste repository may *only* be modified by an affirmative legislative act that either directly amends the NWPA or manifests Congressional intention to permanently abandon the site. *See Nuclear Energy Inst., Inc. v. EPA*, 373 F. 3d 1251, 1310, 1302 (D.C. Cir. 2004). *As will be demonstrated*, a Presidential budget request asking Congress to zero-out the Yucca Mountain appropriations for FY 2011, transfer DOE's Yucca Mountain program offices to other elements within the DOE, and fund a blue ribbon panel to explore alternatives, standing alone, does not amount to the required Congressional action.

In reviewing the Congressional actions related to the designation of Yucca Mountain as the sole repository site, the United States Court of Appeals for the District of Columbia Circuit stated that "Congress had affirmatively approved the Yucca site for development of a repository" and because "Congress has settled the matter, ... we [the court], no less than the parties, are bound by its decision." *Id.* That designation as the sole repository site triggered an interrelated set of statutory requirements for DOE to prepare and file the LA and for the NRC to process and review the LA until a final decision is reached.



Because of the long-term nature of such a massive project in the national interest, and the recognized political sensitivity of the project, Congress mandated a detailed procedure designed to result in the licensing and construction of a scientifically acceptable repository. *See* Pub. L. No. 97-425; 97 Stat. 3792, 3794, 3797 (Jan. 7, 1983) (noting the change in course between Administrations and stating an essential feature of the statute is a "legislated schedule for Federal decisions and actions for repository development.") All the NWPA's provisions that govern the repository licensing process are written in terms of the *mandatory* duties of the President, the Secretary of DOE, and the NRC. *See Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1243 (D.C. Cir. 2009).

First, the Secretary of Energy was required to submit an application for construction authorization by section 114 (b) of the NWPA. 42 U.S.C. § 10134(b) ("the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site..."). All site-specific activities at possible repository locations other than Yucca Mountain were to be phased out by DOE in an orderly manner. 42 U.S.C. § 10172(a) (1). The Secretary of Energy was directed to update Congress annually on the status of the application, and to prepare and update a schedule for project decision-making that "portrays the optimum way to attain operation of the repository." 42 U.S.C. § 10134(c), 10134(e)(1), respectively. Thereafter, NRC "shall" consider DOE's application and "shall" reach a decision within three years of the date of submission, unless a statutorily authorized extension is granted. 42 U.S.C. § 10134(d) (NWPA section 114(d)). "'Shall' has long been understood as 'the language of command'" except for "rare exceptions ... that apply only where it would make little sense to interpret 'shall' as 'must.'" *Zivotofsky v. Sec'y of State*, 571 F.3d at 1243. The use of the word "shall" is "a command that admits of no discretion on the part of the person instructed to carry out the

directive.” *Ass’n of Civilian Technicians v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994).

Thus, the NWPA, on its face, as well as the relevant legislative history, clearly do not anticipate that the President and DOE could withdraw the application prior to NRC's decision on the merits of the LA. The plain language of the statute supports the argument that *affirmative* Congressional action is required to permanently halt the licensing proceeding. See *F.T.C. v. Tarriff*, 584 F.3d 1088, 1090 (D.C. Circuit 2009), *citing Williams v. Taylor*, 529 U.S. 420 (2000).

As recently as last year, the Administration requested, and Congress approved, funding for the current fiscal year in order to continue the Yucca Mountain license application process. DOE, *FY 2010 Congressional Budget Request, Vol. 5*, 504 (FY 2010 budget request "is dedicated solely to supporting ... the NRC LA process."), 505, 520, 540<sup>14</sup>; P.L. 111-85, 123 Stat. 2864, 2868. However, on February 17, 2010, DOE advised Congress that it intends to "reprogram" these funds and use them instead to immediately begin to shut down the entire Yucca Mountain project.

The President and the Secretary of Energy have recently stated that the site is "unworkable" as the geological repository for nuclear waste, without providing any scientific evidence to support that conclusion. This premature and unsupportable decision was made despite DOE's own extensive scientific record to the contrary, well in advance of NRC's decision on the merits of the LA, before the development of recommendations for alternatives from the President's own Blue Ribbon Panel, and prior to any action by Congress in accepting the Administration's budget proposal relative to DOE's FY-2011 appropriation.

There are two possibilities for Congressional action that would render the President's plan for permanent abandonment of Yucca Mountain legally enforceable. First, Congress could

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<sup>14</sup> Available at <http://www.cfo.doe.gov/budget/10budget/Content/Volumes/Volume5.pdf>

directly amend the NWPA to eliminate both the designation of Yucca Mountain as the sole repository site and the statutory timetables for decision-making by NRC on the LA. In the alternative, if Congress enacts the President's Yucca Mountain appropriations exactly as the Administration has requested it, and includes unambiguous report language supporting the withdrawal of further consideration of the Yucca Site, it could conceivably be argued that Congress has passed legislation that effectively eliminates Yucca from further consideration without directly amending the NWPA.<sup>15</sup>

In the absence of such legislation, DOE, however, *must* also comply with NRC regulatory requirements governing the proposed withdrawal of the Yucca license application. As will be demonstrated below, the relevant NRC rule, 10 C.F.R § 2.107, and the decisions interpreting that rule would, at most, allow NRC to stay the processing of the LA without prejudice pending Congressional action. 10 C.F.R § 2.107 (2010). The rule and decisions certainly do not authorize the requested dismissal with prejudice.

## **II. DOE'S PROPOSED WITHDRAWAL OF THE LICENSE APPLICATION WITH PREJUDICE IS NOT AUTHORIZED UNDER NRC REGULATIONS AND DECISIONS**

### **A. Overview of the Content and Requirements of NRC's Regulations Governing License Application Withdrawals "With and Without Prejudice"**

The NWPA directed the NRC to develop regulations governing the licensing of the repository and to review the LA "in accordance with the laws applicable to such applications."

42 U.S.C. § 10134(d). DOE's request for construction authorization is subject to specified NRC

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<sup>15</sup> Where an appropriations act amends substantive law, the change is only intended for one fiscal year, unless there is clear language that a permanent amendment to substantive law is intended. *See Whatley v. District of Columbia*, 447 F.3d 814, 819 (D.C. Cir. 2006). In the FY 2010 House Committee Report, the Committee actually stated its support for the position that the Yucca Mountain application review should continue in order to answer all relevant technical questions. The Committee made \$5,000,000 available for the Blue Ribbon Commission "*provided that Yucca Mountain is considered in the review.*" H.R. Report No 111-203 at 82 (emphasis added). The Conference Report states that the Blue Ribbon Commission shall "*consider all alternatives for nuclear waste disposal.*" Energy and Water Development and Related Agencies Appropriations Act, 2010 Conference Report, H.R. Report No. 111-278 at 21 (2009) (emphasis added).

regulatory requirements contained in its general licensing rules at 10 C.F.R. Part 2, supplemented by the specific repository regulations in Part 63. 10 C.F.R. Parts 2 and 63 (2010). Part 63 contains no specific provisions for DOE to withdraw the repository application. Part 2 provides the following regarding the withdrawal of NRC license applications in general:

10 C.F.R Sec. 2.107 Withdrawal of Application.

- (a) The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. If the application is withdrawn prior to issuance of a notice of hearing, the Commission shall dismiss the proceeding. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.
- (b) The withdrawal of an application does not authorize the removal of any document from the files of the Commission.
- (c) The Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, will cause to be published in the Federal Register a notice of the withdrawal of an application if notice of receipt of the application has been previously published. 10 C.F.R § 2.107 (2010).<sup>16</sup>

When an applicant requests a withdrawal after a notice for hearing is issued, as in this case, the presiding officer (CAB or Licensing Board) will determine, in the first instance, whether it is appropriate to deny the application, or dismiss with or without prejudice. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 50-51, 1999 WL 595216, \*3 (NRC July 28, 1999).

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<sup>16</sup> This NRC rule is modeled after Federal Rule of Civil Procedure 41(a)(2). For purposes of this discussion, we assume the 10 C.F.R § 2.107 (2010) applies, or in the alternative, that the federal principles of withdrawal with prejudice apply in the absence of the rule. Under either analysis, the result is the same. Case law under the Federal Rule makes it clear that DOE has a very difficult burden to demonstrate that withdrawal should be with prejudice. This is a significant burden for any applicant, let alone DOE, which has spent billions of dollars in support of a project, and developed a substantial record in support of its safety. DOE's request that its own LA be dismissed with prejudice, requires an explanation for the 180 degree shift in its policy and legal position on the repository. In making that demonstration DOE is faced with and must overcome its own record that was intended to demonstrate that the site is safe and in the public interest. The administrative hearing record itself must provide evidence that supports any findings concerning a dismissal with prejudice, any conditions imposed, and any harm alleged. *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1134, 1982 WL 31593, \*2+ (NRC Sep 20, 1982), citing *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976); 5 Moore's Federal Practice §41.05(1) at 41-58.

Two aspects of DOE's Motion to Withdraw are of paramount importance to NRC's decision in this case: whether DOE may obtain a dismissal with prejudice based on the record of this proceeding, and whether it may do so without conditions of any kind, save those relating to the LSN.

In determining whether to permit DOE to withdraw its application, with prejudice, the CAB must apply the above-referenced withdrawal rule to the facts already developed in the record. *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1134, 1982 WL 31593, \*2+ (NRC Sep 20, 1982), *citing LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976); 5 Moore's Federal Practice §41.05(1) at 41-58. NRC is uniquely qualified to undertake such a determination because it has been consistently interpreting the rule on license withdrawal for nearly thirty years. Notwithstanding DOE's assertions to the contrary, NRC owes no deference to DOE in interpreting the NWPAs' licensing requirements for the repository or in construing NRC's own regulations, such as 10 CFR § 2.107. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984); *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *U.S. Dept. of Energy (High-Level Waste Repository)*, 67 N.R.C. 205, 216, 2008 WL 6600193 (2008). NRC is the sole licensing authority for Yucca Mountain under the NWPA, and it alone is authorized to impose conditions on a withdrawal, such as withdrawal with prejudice, based upon the facts in the record.

The ordinary meaning of "dismissal with prejudice" is "an adjudication on the merits, and a final disposition, barring the right to bring or maintain an action on the same claim or cause." It is well-settled law that a dismissal with prejudice under section 10 CFR § 2.107 is treated as a decision on the merits. *Philadelphia Electric Co.*, (Fulton Generating Units 1 and 2), ALAB-657, 14 NRC 967, 973, 1981 WL 27754 (1981), *citing Jamison v. Miracle Mile Rambler, Inc.*, 536 F.2d 560, 564 (3rd Cir. 1976); 5 Moore's Federal Practice 41.05[2] at 41-75 (2d ed. 1981).

In this licensing proceeding, the Board has considered intervention petitions, admitted over three hundred contentions, started formal discovery, and noticed and conducted hearings on Phase 1 legal contentions. There has been, however, no CAB or NRC ruling on the merits of any admitted contention. Nevertheless, DOE has inexplicably requested that NRC grant its Motion to Withdraw and dismiss the LA with prejudice in direct contravention of the relevant precedent discussed in detail below. Motion to Withdraw at 1.

In determining whether withdrawal should be granted and under what condition, Boards and licensing officers apply the guidance provided in three seminal cases in which requests for dismissals with prejudice were denied because the merits of contentions had not been finally adjudicated and the moving parties failed to prove the requisite extraordinary harm. *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967 (1981) (“*Philadelphia Electric Co.*”); *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1981 WL 27768, \*1+ (NRC Dec. 07, 1981) (“*Puerto Rico Electric Power Authority*”); *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-668, 15 NRC 450, 451, 1982 WL 31593, \*2 (NRC Sep 20, 1982) (“*Duke Power Co.*”). In this case, DOE clearly has not met its burden to demonstrate that withdrawal with prejudice is justified under the principles of those cases. See *Sequoyah Fuels Corp. (Gore, Oklahoma site)*, CLI-95-2, 41 NRC 179, 191-93, 1995 WL 135720, \*4 (NRC Mar. 09, 1995). Because DOE has not met its burden, its Motion to Withdraw the LA with prejudice must fail.

**B. There is No Legal Basis for Granting DOE's Extraordinary Request for a Withdrawal With Prejudice, Since NRC Has Not Finally Adjudicated Any Admitted Contention**

Dismissal in this case would contravene a uniform line of NRC decisions since at least 1981 that conform to the standard federal view that a dismissal with prejudice should only be granted after the merits of the case have been evaluated and finally adjudicated. See, e.g., *Duke*

*Power Co.* (Perkins Nuclear Station, Units 1, 2 and 3), LBP-8281, 16 NRC 1128, 1135, 1982 WL 31593, \*4+ (NRC Sept 20, 1982); *Yankee Atomic Electric Company* (Yankee Nuclear Power Station), 50 NRC 45, 51, 1999 WL 595216 (July 28, 1999) (requests for dismissal with prejudice denied where final adjudication not reached). Dismissals with prejudice are not favored. *Sequoyah Fuels Corporation*, 38 N.R.C. 304, 304, 1993 WL 534753, \*1 (Dec 15, 1993).

NRC has also uniformly held that dismissal with prejudice is a severe sanction that should be reserved for those unusual situations that involve substantial prejudice to the proposing party or to the public interest in general. See, e.g., *Energy Fuels Nuclear, Inc.*, 42 N.R.C. 197, 198, 1995 WL 808338, \*1 (Nov. 3, 1995); *Puerto Rico Electric Power Authority*, 14 NRC at 1132-1133; *Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1)*, LBP-84-33, 20 NRC 765, 767-768 (1984); *Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, 50 NRC at 51. Such prejudice can only flow from (1) a dismissal without prejudice of contentions already finally adjudicated in favor of a party to the licensing proceeding and from (2) a demonstration of harm that is established in the record of the licensing proceeding itself. Neither test for dismissal with prejudice has been met in this case.

DOE, the license applicant in this case, has asked for a dismissal of its own license application with prejudice - an extraordinary, landmark request. Without exception, the relevant reported cases all involve intervenors opposing a project, and not the license applicant, requesting dismissal with prejudice and seeking to preclude the applicant from re-filing. In *U.S. Dept. of Energy Project Management Corporation Tennessee Valley Authority* (Clinch River Breeder Reactor Plant), 21 NRC 507, 509, 1985 WL 56925, \*2 (Mar 11, 1985), NRC granted DOE's and the other applicants' request that the Clinch River Breeder Reactor licensing proceeding be dismissed *without* prejudice where there had been no final adjudication of the contentions filed.

Even though there has been no adjudication on the merits of any contention in the Yucca Mountain license proceeding, DOE, the States of Nevada and California, and other intervenors have stated their support for DOE's Motion to withdraw with prejudice.<sup>17</sup> DOE's Motion to Withdraw does not adequately explain why it seeks a dismissal with prejudice.<sup>18</sup> DOE's request is without a rational explanation or record-based finding to support it. Therefore, should NRC honor DOE's request, that action would not only contravene the NWSA and NRC's regulations, but would also violate the Administrative Procedure Act as a final agency action that is unreasonable, arbitrary, capricious, and otherwise contrary to law. 5 U.S.C. § 706 (2010). As noted below, the NRC has uniformly rejected dismissal with prejudice requests where no contention has been adjudicated in the petitioner's favor.

In a waste storage facility case, the Board refused an intervenor's request for a dismissal with prejudice in a decision that is directly applicable to this proceeding, *Northern States Power Company* (Independent Spent Fuel Storage Installation), 46 NRC. 227, 231, 1997 WL 687861, \*3 (NRC Oct 15, 1997) ("*Northern States Power*"). In *Northern States Power*, NRC noted that the merits of the intervenor's contentions had not been reached, and further held that the existence of other, more suitable nuclear storage sites did not constitute grounds for dismissal with prejudice. *Id.*

The President and DOE have similarly stated that Yucca Mountain is "not workable" and that DOE will seek more suitable alternatives to nuclear disposal at Yucca Mountain in the Administration's budget proposal. Motion to Stay at 1 and n.6, *supra*. Pursuant to *Northern States Power*, seeking alternatives to disposal at Yucca Mountain does not justify dismissal of the LA with prejudice. Moreover, the NWSA clearly states that nuclear disposal alternatives to

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<sup>17</sup> While Section 2.107 is phrased in terms of requests for withdrawal of an application by an applicant, the Commission has entertained such requests initiated by other parties to a construction permit proceeding, *Consumers Power Company* (Quinacasse Plant, Units 1 & 2), CLI-74-29, 8 AEC 10, 1974 WL 2275 (AECBCA), \*1, 8 AEC 627, 627, AECBCA No. 50-475, 50-475, AECBCA No. 50-476, 628 (AECBCA Oct 01, 1974).

<sup>18</sup> See discussion, *supra*, at pp. 3-4.



Yucca need not be considered in this licensing proceeding. 42 U.S.C. § 10134 (f)(6). Therefore, seeking alternatives to storage at Yucca Mountain should not be grounds for dismissal with prejudice of the instant action.

Even Board adjudication of a contention is insufficient, standing alone, to impose dismissal with prejudice. Appeal Boards have held that if an applicant requests termination of a construction permit proceeding prior to Commission resolution of issues raised by an intervenor on appeal from the initial Board decision authorizing construction, fundamental fairness dictates that termination of the proceedings be accompanied by a vacation of the initial decision on the ground of mootness. *Rochester Gas & Electric Corporation* (Sterling Power Project, Nuclear Unit 1), ALAB-596, 11 NRC 867, 869 (1980); *U.S. Dept. of Energy* (Clinch River Breeder Reactor Plant), ALAB-755, 18 NRC 1337, 1338-1339 (1983), *vacating* LBP-83-8, 17 NRC 158 (1983). In addition, a withdrawal of a license transfer application also moots an adjudicatory proceeding on the proposed transfer if final judgment has not been reached. *Niagara Mohawk Power Corp., et. al.* (Nine Mile Point Nuclear Station, Units 1 & 2), CLI-00-9, 51 NRC 293, 294 (2000). At most, dismissal with prejudice on a single contention, let alone 300 of them, is justified, if at all, only where a party has finally prevailed on that contention before the Commission. *See Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3)*, 16 NRC at 1135. In such cases, the NRC determines whether a *partial* dismissal with prejudice is justified by examining the status of the adjudication or appeal and determining whether it should impose a condition on the withdrawal—such as finding that an applicant is precluded from litigating certain issues in the event of a re-filing. Such action is regarded as partial dismissal with prejudice. *Id.*

In the seminal *Philadelphia Electric Company* case, referenced above, the ALAB noted that a dismissal with prejudice in that case could have resulted in several possible limitations on

applicant's future activities. *Philadelphia Electric Co.*, 14 NRC at 967. The Philadelphia Electric Company could have been barred from: (1) re-filing an identical application to construct an HTGR reactor at the Fulton site; (2) filing a new application to construct any type of reactor at any site; or (3) filing a new application to construct any type of nuclear reactor at Fulton. *Id.* In over-ruling a Licensing Board's decision to grant the dismissal with prejudice, the ALAB in *Philadelphia Electric Company* emphasized that a dismissal with prejudice **requires** a showing of harm to either a party or the public interest in general. *Id.* at 973-74, *citing* Fed. R. Civ. Pro. 41(2)(2); *LeCompte v. Mr. Chip, Inc.*, 528 F.2d at 604; 5 Moore's Federal Practice 41.05[1] at 41-73 (2d ed. 1981); *Boston Edison Co.*, (Pilgrim Station Units 2 and 3), LBP-74-62, 8 AEC 324, 327 (1975). The ALAB stated that the dismissal with prejudice, and the effective prohibition against Philadelphia Electric Company's future use of the Fulton site for any nuclear reactor, was "particularly harsh and punitive," and required a strong demonstration of harm that the dismissal with prejudice served to remedy. *Philadelphia Electric Co.*, 14 NRC at 974. It found no such harm and, instead, directed dismissal without prejudice. *Id.* See also *U.S. Army* (Jefferson Proving Ground Site), 62 NRC 546, 2005 WL 4131573 (NRC Oct. 26, 2005).

Similar reasoning applies to DOE's withdrawal of the license application for Yucca Mountain. No safety contentions have been adjudicated yet. A dismissal with prejudice that is deemed an adjudication on the merits of over 300 safety and environmental contentions could make any future activity at Yucca Mountain, or the Nevada Test Site for that matter, problematic -- a result that perhaps even the Secretary of Energy has not fully considered. A stay adequately prevents future harm to the public should the DOE or another Administration later decides that it must re-file the Yucca Mountain application for any reason.

**C. The Record Contains No Evidence of Harm Of the Type That Justifies Withdrawal With Prejudice.**

The administrative hearing record itself must provide evidence that supports (1) any findings concerning a dismissal with prejudice, (2) any conditions imposed, and (3) any harm alleged. *Duke Power Co.*, 16 NRC at 1134, citing *LeCompte v. Mr. Chip, Inc.*, 528 F.2d at 604; 5 Moore's Federal Practice §41.05(1) at 41-58. In this case, DOE has built a massive record which supports a determination that the repository can be safely constructed and operated at the Yucca Mountain site.<sup>19</sup> After decades of preparing its safety case and priming its witnesses to support its LA, DOE now wants to ignore its own factual record and withdraw the LA with prejudice. DOE should be estopped from asserting the record is anything other than it is: supportive of a determination that the repository can be safely constructed and operated at the Yucca Mountain site.

Neither DOE, Nevada, nor any other party can point to the requisite harm, demonstrated on the record, justifying a dismissal with prejudice in this case. This issue was discussed in depth in the *Northern States Power Company* case, in which intervenor Florence Township requested dismissal with prejudice. The Township detailed in its petition to intervene and contentions the damage its population would allegedly suffer if the applicant's site for an ISFSI were approved. *Northern States Power Company* 46 NRC 227, 1997 687861 \*3. The NRC noted that these *allegations of injury* had not been adjudicated before the request for withdrawal was submitted, and could therefore be re-raised if a new storage facility was sought later. The only discrete factor that Florence Township asserted to support a with-prejudice termination was the availability of other sites for applicant to use as an ISFSI, if necessary. The NRC noted, however, that such factors could be considered in the context of a new application, when and if Northern States resubmitted its application. NRC considered it premature to consider the

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<sup>19</sup> See discussion and authorities cited , *supra*, at pp. 6-7.

argument during the motion to withdraw proceedings. *Id.* Thus, mere allegations of injury, standing alone, do not justify dismissal with prejudice. *Northern States Power Company* 46 NRC 227, 1997 687861 \*3.

The mere possibility of the application being re-filed, or of another hearing, standing alone, certainly does not justify a dismissal with 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 traditional rule that a dismissal should be without prejudice. *Duke Power Co.*, 16 NRC at 1135, citing *Jones v. SEC*, 298 U.S. 1, 19 (1936); 5 Moore's Federal Practice 41.05(1) at 41-72 to 41-73 (2nd ed. 1981); *Pacific Gas & Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 50, 1983 WL 31390, \*3 (Jan. 19, 1983). *Puerto Rico Electric Power Authority* 14 NRC at 1132, 1135; *Philadelphia Electric Co.* 14 NRC at 978-979; *LeCompte v. Mr. Chip Inc.*, 528 F.2d at 603.

Similarly, an intervenor's allegations of psychological harm from the pendency of the application, even if supported by the facts on the record, do not warrant the dismissal of an application with prejudice. *Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2)*, LBP-84-43, 20 NRC 1333, 1337-1338 (1984), citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

The state of Nevada and some of the other intervenors have also alleged that water or other natural resources will be negatively impacted, and that land values will suffer if Yucca Mountain is licensed. These unproven allegations, standing alone, are insufficient to grant dismissal with prejudice. Where an intervenor opposes a project and raises allegations of harm to natural resources or property values that have not been adjudicated in favor of the intervenor, such allegations do not provide a basis for dismissal of an application with prejudice. See *Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2)*, 20 NRC at 1337, citing

*Puerto Rico Electric Power Authority* 14 NRC at 1133-34; *Philadelphia Electric Co.* , 14 NRC at 979.

Even if no party to the proceeding had opposed DOE's Motion, the NRC, acting as protector of the public interest, should, on its own authority, *sua sponte*, raise the issue and decide that a withdrawal with prejudice is not in the public interest, and then stay the proceeding pending Congressional action. *See Florida Power and Light Company (Turkey Point Plant Unit Nos. 3 and 4)*, 32 N.R.C. 181, 185-86, 1990 WL 324437, \*3 (Sept. 25, 1990) (Board's *sua sponte* authority to be used to protect the public interest).

### **III. PERMANENT ABANDONMENT OF THE YUCCA MOUNTAIN SITE IS A "MAJOR FEDERAL ACTION" UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT REQUIRING AN ENVIRONMENTAL IMPACT STATEMENT**

The National Environmental Policy Act ("NEPA") requires federal agencies to prepare an environmental impact statement (EIS) with alternatives for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The Council on Environmental Quality regulations implementing NEPA define a "major federal action," to include "concerted actions to implement a specific policy or plan" and "systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive." 40 C.F.R. § 1508.18(b)(3).

DOE's decision to terminate the licensing proceeding and abandon the Yucca Mountain site certainly constitutes a major federal action under NEPA, *Andrus v. Sierra Club*, 442 U.S. 347, 363 (1979), as does any revision or expansion of an ongoing federal program that substantially alters its operational status. *Id.*; *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 234-35 (9th Cir. 1990). Therefore, DOE's proposal to forever terminate the

Yucca Mountain project requires the preparation of an EIS that assesses the potential harm from yet another delay in implementing the Congressional approved solution to the nation's nuclear waste problems. Indeed, DOE's own NEPA regulations require an EIS for actions affecting high level waste facilities, including geological repositories. 10 CFR § 1021, Appendix D to Subpart D. Over 100 nuclear power plants and numerous defense nuclear waste facilities throughout the nation would be required to modify temporary and permanent waste disposal plans tied to the eventual operation of Yucca Mountain, the centerpiece for such programs.

In spite of these unequivocal NEPA mandates, DOE asks NRC to permit permanent dismantlement of the project without first preparing the required EIS. DOE's Motion, if granted, would alter the direction of long-standing national program aimed at resolving an entrenched environmental nuclear waste problem. DOE's unsupported about-face on Yucca would alter not just the operational status quo of the Yucca Mountain repository itself, but an entire national nuclear waste program tied to Yucca Mountain. Such action definitely requires an EIS.

**IV. AN INDEFINITE STAY PENDING FURTHER CONGRESSIONAL ACTION IS THE ONLY VIABLE NRC ACTION SINCE THE CURRENT ADMINISTRATION IS RELUCTANT TO SUPPORT AND PROSECUTE THE LICENSE APPLICATION**

The President's own blue ribbon panel has only recently initiated consideration of waste disposal options in lieu of Yucca Mountain. In a case analogous to the Yucca Mountain proceeding, *Washington Public Power Supply System (Nuclear Project No. 1)*, 52 NRC 9, 11-12; 2000 WL 1099897, \*2 (NRC 2000), an operating license proceeding was deferred for seventeen years while the applicant considered alternative facilities, budgetary issues, and other considerations. *Id.* A lengthy delay in this case is both unjustified and contrary to the public interest. Nevertheless, if NRC rules on DOE's Motion to Withdraw before Congress acts on the President's budget request, or before Congress amends the NWPA, it should dismiss the Motion

to Withdraw on the merits, based upon existing case law, and simply stay the proceeding pending further Congressional action. The only alternative, a clearly untenable one, would be to try to order DOE to provide a good faith defense for an LA that the highest levels of the Executive Branch seek to abandon. Even the best efforts of DOE would not be able to overcome the inherent conflict of interest of defending an LA that its own Administration seeks to bury.

Although this Administration may indeed have no intention of ever re-filing an application for a repository at Yucca Mountain, there is no basis for binding future Administrations from doing so without Congressional approval. It is impossible to determine what future exigencies may occur that will require the geological repository, which was intended for both civilian and defense high-level nuclear waste forms. Therefore, until Congress acts, it is in the best interest of the public and the Nation that any action taken by the NRC in this case be without prejudice to re-filing of the LA.

Even though the first clause of section 2.107 indicates that the Commission “may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe,” NRC decisions have made it clear that the applicant is only free to unilaterally withdraw an application prior to issuance of a notice of hearing. In *Fansteel, Inc.* (Muskogee, Oklahoma Facility), ASLBP No. 03-813-04-MLA; 2003 WL 22170174, \*1 (NRC Aug. 20, 2003) ("*Fansteel Inc.*"), the Board held that, absent a hearing notice, a license applicant is generally free to withdraw a request for a licensing action without the presiding officer's approval or conditions, and that such action effectively moots the proceedings. *Fansteel, Inc.*, 2003 WL 22170174 at \*5. See also, *Niagara Mohawk Power Corps Corp.* (Nine Mile Nuclear Power Station, Units 1 and 2), CLI-00-9, 51 NRC 293, 294 (2000). All of these cases, along with the others analyzed previously, uniformly hold that requests for withdrawals before a hearing notice is issued should be granted without prejudice to the applicant's re-filing.

It has been sometimes said that the filing of an application to construct a nuclear power plant is a wholly voluntary business decision. Therefore, the decision to withdraw such an application is a business judgment, and the law on withdrawal *without prejudice* does not require a determination of whether the business decision is sound. *Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1)*, LBP-83-2, 17 NRC 45, 51, 1983 WL 31390, \*2 (NRC 1983) (“Pacific Gas & Electric Co.”). However, the reasoning in *Pacific Gas & Electric Co.* does not apply to the Yucca Mountain repository. Unlike power reactor license applications, the decision to submit the Yucca Mountain license application was not voluntary, but was filed by DOE in accordance with Presidential directives and the statutory mandates of the NWRPA. Yucca Mountain, unlike a nuclear power plant, was selected, and the license application developed, in the public interest by DOE, a Department in the Executive Branch, with federal dollars appropriated by Congress. Therefore, the decision to withdraw in this case, even without prejudice, requires Congressional action and heightened scrutiny by the NRC.

**V. REGARDLESS OF THE BOARD'S DECISION ON THE MERITS OF THE MOTION TO WITHDRAW, DOE'S REQUEST FOR DISMISSAL WITHOUT CONDITIONS MUST NOT BE GRANTED**

As demonstrated previously, dismissal with prejudice is an extreme condition that is not supported by the record in this case. The Commission always has the authority to condition the withdrawal of a license application on such terms as it thinks just. 10 C.F.R. 2.107(a) (2010). DOE has requested that no other conditions, except those related to the LSN, be imposed by the NRC. Nye County retains the right to further address the question of appropriate conditions in accordance with the Board's Scheduling Order of April 27, 2010, after DOE files its May 24, 2010, response to the CAB04 questions on related issues. Nevertheless, Nye County believes



that three conditions are of such importance that they warrant being addressed, at least preliminarily, as a part of this response to DOE's Motion to Withdraw.

The conditions and terms prescribed at the time of any withdrawal or stay must bear a rational relationship to the conduct and legal harm at which they are aimed. A Licensing Board has substantial leeway in defining the circumstances in which an application may be stayed or withdrawn, so long as the conditions and terms set by the Board bear a rational relationship to the conduct and legal harm at which they are aimed. *See Philadelphia Electric Co.* 14 NRC at 974; *Pacific Gas and Electric Co.*, 17 NRC at 49.

Despite the fact that DOE's Motion to Withdraw asked that the case be dismissed without imposition of any further conditions,<sup>20</sup> in responding to CAB04 questions at the hearing held on January 27, 2010, the parties to the Yucca Mountain proceedings appear to agree that appropriate terms and conditions for preservation of documents, the administrative record, and data are necessary. Such terms and conditions are also supported by relevant NRC decisions. *See, e.g., Pacific Gas & Electric Co.*, 17 NRC at 51 (dismissal without prejudice granted with the condition that millions of discovery documents be preserved). DOE has yet to respond fully to the CAB's questions regarding these issues. Nye County noted in its February 16, 2010 preliminary filing, that it believes that all Yucca Mountain technical information, records, documents, physical samples and scientific data, as well as the materials in the LSN collection, constitute a critical national resource and source of information.<sup>21</sup> Nye County reiterates that all of the above-listed Yucca Mountain information, paid for by citizen taxpayers, should be protected and preserved for future scientific and policy purposes. Additionally, DOE should be required to put its LSN information in a format that will permit the other participants and future interested parties to readily search that information and retrieve the documents and information.

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<sup>20</sup> Beyond those related to the LSN.

<sup>21</sup> Nye County Preliminary Response to DOE's February 4, 2010, Answers to CAB04's LSN Questions (February 16, 2010) at 2.

Nye County is not in a position to more fully respond to DOE's proposed plan for all of the Yucca Mountain information, as the final plan has not yet been released by DOE. Nor can Nye County respond to DOE's proposed plans for preserving and protecting the data and core samples that are in DOE's custody, some of which are the property of Nye County, as those plans have also not been released to date. When DOE releases this information, Nye County welcomes the opportunity to respond to the details of those plans.

All of the parties to the proceedings also recognize that if the site is not to be used for the Yucca Mountain project, some site restoration will be required. Even the Administration has acknowledged in its budget request for FY-2011 that site restoration activities are required as a part of any withdrawal.<sup>22</sup> NRC has previously dismissed cases without prejudice and still imposed site restoration conditions when an applicant abandons a license application after site activities or construction have taken place. *Gulf States Utility Company*, (River Bend Station, Units 1 and 2), 20 N.R.C. 1478, 1483, 1984 WL 49886, \*4 (Nov 20, 1984); *Public Service Company of Oklahoma Associated Electric Cooperative, Inc.* (Black Fox Station, Units 1 and 2), 17 NRC 410, 410, 1983 WL 31420, \*1 (Mar 07, 1983). Regardless of NRC's position on the merits of the Motion to Withdraw, custodial and/or remedial terms and conditions must become an integral part of NRC's ruling on the Motion to Withdraw. If DOE is allowed to abandon the site, either temporarily or permanently, continued oversight will be required by DOE, the State of Nevada, and Nye County in order to protect the public and residents of Nye County. Consistent with the grant and oversight provisions of 42 U.S.C. § 10136, NRC should impose appropriate custodial and oversight conditions on any suspension or withdrawal it determines is appropriate in this case. 42 U.S.C. § 10136 (2010).

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<sup>22</sup> See authorities cited at n. 6, *supra*.

Finally, NRC should prohibit DOE from taking any irreversible action related to land use, water rights, contracts, or permits necessary for construction and operation of Yucca Mountain, pending further action by Congress. DOE should not be allowed to indirectly disable the project without Congressional approval any more than it should be allowed to directly abandon the project in contravention of the NWPA, the APA, and NEPA.<sup>23</sup>

### **CONCLUSION**

The NWPA has not been amended to allow permanent abandonment of the Yucca Mountain license. Nor has Congress yet acted upon the Administration's budget request for FY-2011, which proposes actions in furtherance of DOE's stated goal of permanently closing the Yucca Mountain project. The NRC precedent governing Motions to Withdraw NRC license applications is well-settled and does not permit withdrawal with prejudice in this case. Even where intervenors and opponents of a license request a dismissal with prejudice, NRC has refused to grant the request, or to impose conditions that preclude re-filing of the application, where there has been no final adjudication on the merits of the contentions and where there has been failure to demonstrate harm to the parties or the public. Granting such a Motion by DOE, the applicant itself, rather than an opposing party, would be unprecedented, and, at best, is premature if it is based on the Administration's budget request and not the record in the licensing proceeding. Moreover, abandonment of Yucca Mountain clearly violates statutory requirements of the NWPA, the APA, and NEPA. In short, DOE's request lacks any legally cognizable basis. Therefore, Nye County asks that the NRC determine that the NWPA, NEPA, and APA preclude permanent abandonment of the Yucca Mountain project without amendment to the NWPA or

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<sup>23</sup> See discussion, supra, at Section I.

other Congressional action which unambiguously signals that the Legislative Branch agrees with DOE's plans.

Given that DOE would now be a reluctant advocate for the Yucca Mountain license, it would be both impractical and unwise for NRC to direct DOE to move forward with defending the license application. Therefore, Nye County requests that NRC couple its denial of the Motion to Withdraw with a stay of the licensing proceeding pending further Congressional action on the NWPA, as it pertains to the Yucca Mountain repository.

Respectfully Submitted,

*Signed electronically*

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May 17, 2010

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC AND SAFETY LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the Nye County Response to DOE Motion to Withdraw, dated May 17, 2010, in the above-captioned proceeding have been served on the following persons by Electronic Information Exchange.

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