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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)
)
U.S. Department of Energy) Docket No. 63-001-HLW
(High Level Waste Repository))
)
)

INITIAL BRIEF OF NUCLEAR ENERGY INSTITUTE IN OPPOSITION TO
REVIEW OF ATOMIC SAFETY AND LICENSING BOARD ORDER (LBP-10-11)
DENYING MOTION TO WITHDRAW

I. INTRODUCTION

On June 29, 2010, the Atomic Safety and Licensing Board (“Board”) issued a Memorandum and Order (LBP-10-11)¹ which, among other things, denied the Department of Energy (“DOE”) motion to withdraw the license application at issue in this proceeding.² The Nuclear Energy Institute (“NEI”) had opposed the DOE Motion.³ On June 30, 2010, the Secretary issued an Order inviting all parties “to file briefs with the Commission as to whether the Commission should review, and reverse or uphold, the Board’s decision.” NEI herein files its initial brief in response to the Commission Order. While NEI recognizes the NRC’s inherent authority and discretion to take review of significant and novel issues, NEI does not believe that Commission review is warranted in this case. The Board has thoroughly and correctly addressed

¹ Memorandum and Order (Granting Intervention to Petitioners and Denying Withdrawal Motion), LBP-10-11, dated June 29, 2010 (“Board Order”).

² “U.S. Department of Energy’s Motion to Withdraw,” dated March 3, 2010 (“DOE Motion”).

³ “Opposition of the Nuclear Energy Institute to the Department of Energy’s Motion for Withdrawal,” dated May 17, 2010 (“NEI Opposition”).

the issues presented, providing a sound basis for agency action. Further, should the Commission take review on the merits, NEI fully supports the Board's decision on the motion to withdraw.⁴

II. BACKGROUND

In 1982, Congress enacted the Nuclear Waste Policy Act, 42 U.S.C. § 10101, *et seq.* ("NWPA"), establishing the federal policy and schedule for the siting, licensing, construction, funding and operation of one or more repositories for the geologic disposal of spent nuclear fuel. *See generally* 42 U.S.C. § 10131(b). In accordance with Section 112 of the NWPA, DOE was required to evaluate and nominate candidate sites for further characterization in accordance with Section 113 of the NWPA. However, in 1987, through the Nuclear Waste Policy Amendments Act, Congress directed DOE to focus its study exclusively on the Yucca Mountain site in Nevada. *See* Pub. L. No. 100-203, §§ 5001-5065, 101 Stat. 1330, 1330-227 to 1320-255 (1987) (codified throughout 42 U.S.C.); *see also* 42 U.S.C. § 10133(a).

In accordance with Section 113 of the NWPA, DOE completed extensive characterization of the Yucca Mountain site over a period of many years. In addition, DOE developed a final environmental impact statement for the high level waste repository at Yucca Mountain and the transportation of spent fuel to the repository site.⁵ Based on this substantial record, and in accordance with Section 114 of the NWPA, in February 2002 the Secretary of DOE made a recommendation to the President that the Yucca Mountain site be developed as the

⁴ NEI does not address here the issue of the five new petitions to intervene addressed in LBP-10-11, but does not oppose those petitions.

⁵ Department of Energy, *Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada*, (DOE/EIS-0250), February 28, 2002; Department of Energy, *Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada*, (DOE/EIS-0250F-S1), June 2008.

federal high level waste repository. As specified in Section 114(a)(2) of the NWPA, the President shortly thereafter submitted his recommendation of the site to Congress.

Sections 115 and 116 of the NWPA provided a process by which the host state and affected Indian tribes could disapprove the site recommendation. Nevada exercised its right to submit to Congress a “notice of disapproval,” which in the absence of further Congressional action would negate the Presidential recommendation. However, NWPA Sections 115(a), (d) and (e), further provided a mechanism whereby Congress could override the notice of disapproval. Following appropriate legislative hearings and pursuant to procedures specified in the NWPA, Congress enacted in the Yucca Mountain Development Act (“YMDA”) a Joint Resolution approving the Yucca Mountain site for a repository, notwithstanding the disapproval of Nevada. The legislation was signed by the President on July 23, 2002. *See* Pub. L. No. 107-200, 116 Stat. 735 (2002). As subsequently characterized by the United States Court of Appeals for the D.C. Circuit, “[t]he Resolution affirmatively and finally approved the Yucca site for a repository, thus bringing the site-selection process to a conclusion.” *Nuclear Energy Inst., Inc. v. Env’tl. Prot. Agency*, 373 F.3d 1251, 1309 (D.C. Cir. 2004). Approval of the repository remains subject only to the NRC licensing process.

On June 3, 2008, DOE filed the application with the NRC for a license authorizing construction of the Yucca Mountain high level waste repository. However, in the DOE Motion filed with the Licensing Board on March 3, 2010, DOE unilaterally sought to walk away from pursuing that license application for Yucca Mountain.⁶ Further, by seeking

⁶ The DOE Motion parallels the Administration’s decision to establish the Blue Ribbon Commission on America’s Nuclear Future (“Blue Ribbon Commission”), with a charter to review the federal policy on spent nuclear fuel management and to examine alternatives to Yucca Mountain. The charter does not mention, and does not foreclose,

withdrawal with prejudice, DOE sought to “provide finality” and to foreclose a renewed application in the future.⁷ DOE then expanded upon its arguments — but did not significantly alter the thrust or effect of those arguments — in a reply filing of May 27, 2010.⁸ DOE’s arguments were addressed by NEI and other parties in briefs and at an oral argument on June 3, 2010.⁹

The Board in its Order of June 29, 2010, fully evaluated and thoroughly rejected the DOE arguments — denying the motion to withdraw and holding that withdrawal of the license application under the present circumstances is contrary to the NWPA, as amended and amplified by the 2002 YMDA. The Board further concluded that, even if the DOE request to withdraw the application were granted, denial with prejudice would not be warranted and would not be in the public interest. DOE has argued for dismissal with prejudice simply because it “is the Secretary’s judgment that there cannot be a fresh start and new direction on these issues if the arguments about past policies can be rehashed over and over again, absent finality to the Yucca Mountain repository.” DOE Reply, at 34 (emphasis added). The Board, however, after finding that the Secretary lacks authority over the central policy consideration, observed that the current Secretary’s judgment “should not tie the hands of future Administrations for all time.” Board

Yucca Mountain as a possible option for geological disposal of spent nuclear fuel. *See* NEI Opposition, at 8, n. 12.

⁷ *See* DOE Motion at 3. In footnote 3, DOE stated that it “does not intend to refile an application to construct a permanent repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain.” This statement came after DOE has steadfastly pursued the project for 27 years since the enactment of the NWPA, through the Administrations of five different presidents, 15 terms of Congress, and under the leadership of nine different Secretaries.

⁸ “U.S. Department of Energy’s Reply to the Responses to the Motion to Withdraw,” dated May 27, 2010 (“DOE Reply”).

⁹ Oral Argument Transcript, Docket No. 63-001-HLW, June 3, 2010.

Order, slip. op. at 21. The Board further concluded that “if DOE were permitted to withdraw the Application, it should be required to preserve, in usable form, the millions of documents that DOE has placed in its [Licensing Support Network (“LSN”)] document collection” Board Order, slip op. at 22. Therefore, the Board recommended a series of conditions — based largely on an agreement of the parties — to be imposed if withdrawal (without prejudice) were permitted.

III. DISCUSSION

A. *Commission Review Is Not Necessary*

Interlocutory review of orders in this high level waste repository proceeding are normally governed by 10 C.F.R. § 2.1015. That special regulation does not provide for an interlocutory appeal or review of a Board order, absent a referral by the Board to the Commission or a request by a party to the Board to certify the issue to the Commission — neither of which has occurred with respect to the present Board Order. *See* 10 C.F.R. § 2.1015(d). The NRC’s oft-cited interlocutory review provision of 10 C.F.R. § 2.341(f) does not apply to this proceeding. *See* 10 C.F.R. § 2.341(a)(1). Nonetheless, the Commission clearly has inherent supervisory authority over adjudications, which it has recently exercised in this proceeding. *See* Memorandum and Order, CLI-10-13, at n. 6, dated April 23, 2010.

The Commission has, in practice, been circumspect in applying its inherent authority to supervise proceedings. For example, the Commission typically declines to exercise that supervisory authority to address licensing board rulings on contention admissibility, thereby allowing litigation to continue notwithstanding that an applicant believes the process to be unnecessary.¹⁰ The Commission has also declined to exercise its inherent supervisory authority

¹⁰ *See, e.g., Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 138 (2009). Similarly, under the Commission’s interlocutory review standards

to review an interlocutory decision where the licensing board did not recommend prompt Commission review.¹¹

Discretionary Commission review is also addressed, in a different context, in 10 C.F.R. § 2.341(b)(4). While again this regulation is not applicable to this proceeding under the present circumstances, the regulation reflects the Commission's general reluctance to take review unless absolutely warranted. Using that regulation as a guide, discretionary review is not warranted here. In the present case there is no finding of material fact involved in ruling on the DOE Motion that could be erroneous. As discussed further below, the Board's legal conclusion is consistent with governing precedent and established law and the Board Order does not involve any prejudicial procedural error. And, while arguably important questions have been raised by the DOE Motion, the Board's disposition of those questions is careful and straightforward. The issues have been extensively briefed, by numerous parties, and oral argument has been thorough.¹² The Commission can choose to take discretionary review, but by no means needs to do so. The well-reasoned and carefully drafted Board Order should be allowed to become the NRC's final agency action on the DOE Motion.

The issues raised by the DOE Motion are also presently the subject of several consolidated appeals in the Court of Appeals for the District of Columbia Circuit. The NRC's

in 10 C.F.R. § 2.341(f) — which do not apply here — interlocutory review of rulings allowing hearings to continue have not been favored. *See, e.g., Pa. Power & Light Co. and Allegheny Elec. Coop., Inc.* (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 552 (1981) (rejecting NRC Staff's and applicants' argument that unnecessary expense and delay due to denial of motions for summary disposition amounts to immediate and irreparable harm necessitating interlocutory review).

¹¹ *Conn. Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374-75 (2001).

¹² The June 3, 2010 oral argument on the DOE Motion consumed over 300 pages of transcript.

Appeal Board has in the past recognized that “considerations of comity between court and agency” dictate agency restraint in addressing an issue pending at the same time in the federal courts, to “allow the court to act on the matter first.” *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), ALAB-350, 4 NRC 365, 366 (1976). In the present case the Licensing Board, at the direction of the Commission, has already addressed the issue. Nonetheless, the Commission should now exercise restraint — by allowing the impartial, thorough assessment of its independent administrative board to stand as the final agency decision on the issue. The Board Order will provide the Court of Appeals with ample agency guidance, based on expertise and a substantial record on the issues raised.

B. The Board Decision Should Be Upheld in All Respects

In the Board Order, the Board carefully and fully addressed the legal issues presented by the DOE Motion. The Board correctly observed that DOE’s Motion was not based on any determination that there are flaws in the license application or that a Yucca Mountain repository would be unsafe. Board Order, slip. op. at 4.¹³ Rather, as DOE itself has repeatedly emphasized, the motion was based on no more or less than a policy determination of the current Secretary that alternatives to Yucca Mountain will “better serve the public interest.” *Id.*, at 10; *see also* Tr. 33-34 (Lev). The Board concluded, however, that DOE lacks authority to override the policy established by Congress. The Board further concluded that, if DOE were permitted to withdraw the license application (a question it considered to be moot), withdrawal with prejudice

¹³ The Board aptly pointed out that the license application that DOE now seeks to withdraw comprised 17 volumes and 8,600 pages, was submitted just over 24 months ago, and was based upon “millions of pages of studies, reports, and related materials at a reported cost of over 10 billion dollars.” Board Order, slip. op. at 1-2. Under NRC regulations, 10 C.F.R. § 63.10, the license application was required to be complete and accurate in all material respects. DOE has not pointed out anything of a technical nature that would make the application incomplete or inaccurate.

as requested by DOE would not be appropriate. NEI fully agrees with the Board's analysis and conclusion with respect to these matters. Further, as previously set forth in the NEI Opposition to the DOE Motion, NEI believes that even dismissal without prejudice is not warranted. If necessary to address uncertainty in the status of the Yucca Mountain project, denial of the DOE Motion could be coupled with suspension of the proceeding pending further legislative developments. *See* NEI Opposition at 7-10.

1. DOE Lacks Authority to Withdraw the License Application for Policy Reasons

First and foremost, the Board correctly found that DOE lacks the authority to unilaterally set a new policy with respect to the disposal of spent nuclear fuel. As stated by the Board, the pertinent policy “is footed on the controlling provisions of the Nuclear Waste Policy Act” and “DOE lacks authority to override” that policy. Board Order, slip. op. at 10 (emphasis in original). More specifically, over Nevada's objections, the NWPA and the YMDA required DOE to move forward with the Yucca Mountain project based on the completed site characterization, and to pursue the necessary license through the NRC licensing process. It is simply illogical for DOE to conclude that the Department somehow has unbounded discretionary authority to ignore the completed site characterization and to subvert the NRC licensing process required by statute — based in this case on no more than the views of the current Secretary that the department needs a new strategy to meet its obligations to dispose of the nation's spent nuclear fuel.¹⁴

¹⁴ It bears repeating that before the present Secretary took office, eight different Secretaries maintained the program to carry out DOE's responsibilities under the NWPA — regardless of any views they may have held regarding Congress's high level waste disposal policy. There has been no change in the law prior to the present term to provide new, discretionary authority to the Secretary.

As recognized by the Board, the NWPA established a clear policy for disposal of spent nuclear fuel and a coherent framework for implementation of that policy. Board Order, slip op. at 5-8. Congress in the YMDA enacted a joint resolution approving the development of the Yucca Mountain repository (over the objection of Nevada). This resolution ended the site characterization process and triggered a DOE obligation under Section 114(b) of the NWPA for the Secretary to submit (and pursue) a license application through the NRC process. *Id.* at 7; *see also Nuclear Energy Institute*, 373 F.3d at 1302 (“Congress has settled the matter” of Yucca Mountain’s approval for development because “Congress’s enactment of the Resolution . . . was a final legislative action once it was signed into law by the President”).¹⁵ It is contrary to the entire thrust of the NWPA and the YMDA for DOE to now argue in effect that it could meet its obligation to submit an application one day, and then withdraw the application a day later — based not even on science, but on a belief that better alternatives may exist. The argument defies any reasonable reading of the statute and is contrary to basic tenets of statutory construction.¹⁶

Moreover, DOE’s argument completely ignores the NRC’s own role and responsibility to review and render an impartial decision on the application. The Board recognized that submission of the application “triggered a duty on the NRC’s part to consider and to render a decision on the Application pursuant to Section 114(d) of the NWPA.” Board Order, slip. op. at 7. The Board correctly identified the distinction that exists under the statutory

¹⁵ As discussed in the NEI Opposition, DOE has argued in federal court, that following the enactment of the YMDA and in accordance with Section 114(b) of the NWPA, “DOE is not only authorized but required to submit a license application for a repository at Yucca Mountain to the NRC.” Final Brief for the Respondents at 22, *State of Nevada v. U.S. Dept. of Energy*, Nos. 01-1516, 02-1036, 02-1077, 02-1179, and 02-1196 (D.C. Cir. May 28, 2003)(emphasis added).

¹⁶ *See* NEI Opposition, at 5, n. 10. In particular, there is a strong presumption against a construction of a statute which virtually nullifies the statute and defeats its object. *U.S. v. Chavez*, 228 U.S. 525 (1913).

scheme between the site characterization phase and the application phase of the Yucca Mountain review process. Board Order, slip. op. at 8. As discussed in *Nuclear Energy Institute*, the Secretary of DOE completed the site characterization in 2002 and recommended the site based on a substantial record of decision. 373 F.3d at 1309. The President and ultimately Congress approved that recommendation as discussed above, leaving project approval subject now only to the review of the NRC. In accordance with Section 114(d) of the NWPA, the Commission “shall consider an application for a construction authorization for all or part of the repository in accordance with the laws applicable to such application” 42 U.S.C. § 10134(d). Congress did not give the Commission authority to simply terminate the review based on a policy decision of the Secretary, much less to terminate the licensing review with prejudice.

DOE has recognized that the NWPA requires the NRC to consider the license application, but has repeatedly asserted that the NRC obligation to conduct a review is subject to “the laws applicable to such applications” and that 10 C.F.R. § 2.107 is one of those laws. DOE Motion, at 5; DOE Reply, at 9-10. DOE argues that the NWPA obligations of DOE and the NRC are qualified by Section 2.107, such that DOE has authority to withdraw the application and NRC has authority to grant such a withdrawal. The Board correctly rejected this argument, observing that “[i]t would require a strained and tortured reading of the NWPA to conclude that Congress intended that its explicit mandate to the NRC — to consider and decide the merits of the Application — might be nullified by a nonspecific reference to an obscure NRC procedural regulation as being among the ‘laws’ to be applied.” Board Order, slip. op. at 14. Even more

pointedly, nothing in the plan language of Section 2.107 gives DOE (or any other applicant) permission to withdraw an application. *Id.* at 13.¹⁷

One recurring argument by DOE is that the Secretary’s discretionary authority over the Yucca Mountain policy flows from the Atomic Energy Act (“AEA”), which DOE argues is not repealed or constrained by the NWPA. DOE Reply, at 7. The Board considered this argument and correctly rejected it. As stated by the Board, the NWPA is the “subsequently-enacted, much more specific statute that directly addresses the matter at hand.” Board Order, slip op. at 11 (footnote omitted). The Board found that “it would be erroneous to interpret the AEA in a manner that would contravene the statutory scheme that Congress specifically adopted in the NWPA.” *Id.* at 12. The Board’s decision on this point is logical and well-supported by applicable case law. The decision is consistent with the policy objectives of Congress that are clearly established in the NWPA. The decision should be affirmed.

Another recurring theme in DOE’s arguments has been that the NWPA does not compel construction and operation of the facility, and that NRC licensing alone would not necessarily lead to a functioning repository. DOE Reply, at 2-3. The Board effectively dealt with this argument as well: “. . . the possibility that the Application might not be granted — or if

¹⁷ Contrary to DOE’s arguments, NEI also remains unconvinced that 10 C.F.R. § 2.107 even applies in this proceeding. *See* NEI Opposition, at 11. Section 2.107 is contained within subpart A of 10 C.F.R. Part 2. In accordance with 10 C.F.R. § 2.1000, the rules of subpart A do not apply to this case unless they explicitly state that they apply — which Section 2.107 does not. DOE suggests that this would result in other “fundamental and non-controversial commission rules, such as § 2.111’s prohibition on sex discrimination in licensing” not applying. DOE Reply, at 27. However, in connection with a high level waste repository, in which the government necessarily will be the applicant, there is no need for a regulation prohibiting sex discrimination to apply. Similar considerations apply to other subpart A regulations that do not apply in this case. Indeed, the Commission had no reason to believe that a regulation addressing how licensing boards would condition withdrawal of a license application would be needed in this case where the relevant statute requires an application and a review. *See* Tr. 259-60 (Bauser).

granted, that the repository might ultimately not be constructed and become operational for any number of reasons — does not entitle DOE to terminate a statutorily prescribed review process.” Board Order, slip. op. 18. This assessment is particularly true where, as here, the only reason given for not proceeding with the application is a policy decision of the Secretary. No concrete basis is offered as to why construction or operation could not be authorized. Accordingly, there is no need for the Commission to re-visit this argument.

In summary, the Board has thoroughly addressed the DOE Motion and the supporting bases presented by DOE and other stakeholders. The motion to withdraw the application based on a policy determination by DOE cannot be granted as a matter of law. NEI fully concurs with the Board determination that “the NWPA does not give the Secretary the discretion to substitute his policy for the one established by Congress in the NWPA that, at this point, mandates progress toward a merits decision by the Nuclear Regulatory Commission on the construction permit.” Board Order, at 3. The NRC must therefore meet its separate obligation under the NWPA. Progress by the NRC in its review will, at a minimum, serve to inform the public, elected policy makers, and stakeholders with respect to the important technical issues presently before the NRC. Regardless of the fate of the Yucca Mountain project, those technical issues will remain germane to high level waste disposal in the United States.

2. Withdrawal With Prejudice is Not Appropriate

DOE seeks dismissal of the license application with prejudice, presumably to cement the policy determination of the current Secretary regarding Yucca Mountain. However, the Board concluded that, “[c]ontrary to DOE’s request, if dismissal were allowed at all it should be without prejudice.” Board Order, at 21. The Board’s decision denying dismissal with prejudice is clearly consistent with both the Commission’s precedent and the public interest.

The Board correctly found that “no aspect of the Application has been adjudicated on the merits.” *Id.* Under NRC precedent, “it is highly unusual to dispose of a proceeding on the merits; *i.e.*, with prejudice, when in fact the health, safety and environmental merits of the application have not been reached.” *Id.*, *citing P.R. Elec. Power Auth.* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133 (1981) (emphasis in original); *see also Phila. Elec. Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 973 (Nov. 17, 1981) (citations omitted) (dismissal without prejudice means that no merits decision has been made, while dismissal with prejudice suggests otherwise). It is also well-settled in the NRC licensing context that the prospect of a second lawsuit or another application does not provide the requisite quantum of legal harm to warrant dismissal of an application with prejudice. *North Coast*, 14 NRC at 1132, 1135; *see also Fulton*, 14 NRC at 979 (citation omitted) (the prospect of a subsequent application “does not provide the requisite quantum of legal harm to warrant dismissal with prejudice.”). Accordingly, the DOE request for withdrawal with prejudice is not in accordance with agency precedent. And even the harm asserted by Nevada and other project opponents (*i.e.*, the potential for renewed litigation) does not support the relief requested.¹⁸

The public interest also would not be served by dismissal of the application with prejudice. The issue of storage and permanent disposal of spent nuclear fuel in the United States would not vanish upon dismissal of the Yucca Mountain license application and termination of

¹⁸ Nevada has made additional arguments of prejudice based on the potential difficulties of discovery in a *future* proceeding due to loss of functionality of the LSN in the meantime. This claim, however, can be mitigated with appropriate conditions to preserve the LSN documentation as proposed by the Board. Based on DOE’s answers to Board questions, these concerns now appear to be “off the table.” Tr. 137 (Malsch). In any event, any issues of loss of documentation and limitations on discovery are best addressed in concrete terms in a future proceeding, rather than in the abstract in this proceeding. Moreover, if this proceeding is *suspended* rather than terminated, any concern regarding the adequacy of DOE’s commitment to the LSN following termination of the proceeding would be moot.

this proceeding. Congress, future Administrations, and DOE itself would be best served by preserving the option to file a renewed or revised application in the future, to meet the requirements established by Congress to address the ongoing issue of spent fuel disposal. DOE relies only on a desire for “finality” — that is, a desire to assure that the Yucca Mountain proposal will not “plague” efforts to move on with “alternative solutions to the disposal of nuclear waste.” DOE Reply, at 34. However, in this line of argument DOE makes an unfounded assumption that a denial with prejudice is somehow necessary to assure consideration (by the Blue Ribbon Commission or others) of alternative strategies. NEI is confident, for example, that denial with prejudice is not necessary to assure that the ongoing Blue Ribbon Commission review will be thorough.

More importantly, in its desire for “finality” DOE again arrogates to itself far too much discretion to set policy affecting the nuclear industry, electric ratepayers, and all other stakeholders that seek a timely and effective resolution to the nuclear waste issue, consistent with the current law of the land (*i.e.*, the NWPA). DOE, in urging prejudice to achieve “finality,” is quite clearly attempting to usurp Congressional authority and bias any further consideration of the policy issue. This exceeds the Secretary’s authority and is not a basis for the Commission to order withdrawal with prejudice.¹⁹ DOE and others have also agreed that a dismissal with

¹⁹ In a filing with the Board, DOE made the following bold assertion: “In particular, dismissal with prejudice is appropriate in light of the Secretary’s conclusion that Yucca is not a workable option, and such dismissal would not legally prejudice any party. The opponents may disagree with the Secretary’s judgment about the workability of Yucca and the need to have finality as to the Yucca approach, but that is a policy dispute that the opponents must press elsewhere.” DOE Reply, at 4. DOE has it exactly backwards. If the Secretary disagrees with the policy established by law, and seeks to finally terminate the project in order to pursue alternative approaches, that is a disagreement that the Secretary must press elsewhere.

prejudice may be overcome in the future by an act of Congress.²⁰ This factor serves only to undermine the assertion of a need for a dismissal with prejudice in the first place.

Notwithstanding whether future policy changes dictate that radioactive waste generated by nuclear plants will be disposed of directly, reprocessed, or otherwise recycled, ultimate disposal depends on the availability of a geologic repository. Abandonment of the Yucca Mountain project — and a bar to a future application — will significantly delay the availability of a repository, likely for decades. This delay will necessarily lead to extended onsite storage and will complicate spent fuel management by nuclear plant operators. This will lead to increased costs to electric ratepayers as well as to taxpayers, as damages continue to accrue based on DOE's failure to meet its obligation to accept spent fuel from the power reactor licensees.²¹ DOE's thin argument to support dismissal with prejudice is far outweighed by the public interest in continuing the NRC review and, alternatively, preserving the Yucca Mountain option.

At bottom, DOE has cited no NRC case in which an applicant has requested and been granted withdrawal of its own application with prejudice. Where intervenors have

²⁰ See, e.g., Tr. 85 (Lev); 138 (Malsch).

²¹ In 1996 the Court of Appeals held that DOE had an unconditional obligation to commence disposing of spent nuclear fuel not later than January 31, 1998. *Ind. Mich. Power Co. v. U.S. Dep't of Energy*, 88 F.3d 1272 (D.C. Cir. 1996). See also *N. States Power Co. v. U.S. Dep't of Energy*, 128 F.3d 754 (D.C. Cir. 1997) (finding that companies should pursue claims for damages resulting from DOE's failure to meet its obligation under the terms of contracts with the Department). According to the Congressional Budget Office, companies have been awarded \$1.3 billion in compensation, and DOE estimates liabilities to utilities will total more than \$12 billion assuming that the Department begins to accept spent nuclear fuel by 2020. See *Statement of Kim Cawley, Chief, Natural and Physical Resources Cost Estimates Unit before the Committee on the Budget, U.S. House of Representatives* 6-7 (July 16, 2009), available at http://cbo.gov/ftpdocs/104xx/doc10456/07-16-NuclearWaste_Testimony.pdf. These totals have since been increased by the most recent decisions awarding damages to nuclear licensees.

requested that withdrawal be granted with prejudice, the request for prejudice has been routinely denied by the NRC. A similar result is warranted here. Moreover, the public interest would not be served by a dismissal at the request of DOE that would bar a future application for the Yucca Mountain site. The Board's decision on this issue is patently the correct decision.

3. Uncertainty in the Yucca Mountain Project Can Be Addressed by Affirming the Board Order and Suspending the Proceeding if Necessary

NEI recognizes that there is currently uncertainty surrounding the future of the Yucca Mountain project, including both the uncertainty in the funding for the program and the Blue Ribbon Commission's ongoing evaluation of alternatives to Yucca Mountain. NEI understands that the NRC cannot ignore these developments and their implications for the conduct of the required licensing review. Nonetheless, the Board's analysis and its conclusion that the DOE Motion should be denied are sound and should be affirmed. Uncertainties surrounding the project can be addressed by *suspending* the hearing process if necessary.

The NRC has previously suspended its licensing hearing process for substantial periods of time while construction of proposed nuclear projects has been suspended, pending further review by the applicants of the future of the projects. For example, in *Wash. Pub. Power Supply Co.* (WPPSS Nuclear Project No. 1), LBP-83-66, 18 NRC 780 (1983), the Licensing Board ordered that a contested proceeding be held in abeyance because of a hiatus in construction, anticipated to last for up to five years, and because the NRC Staff's allocation of resources to the license application would be on only a "manpower available" basis.²² Unlike that situation, DOE is not a private applicant with unfettered discretion to make a business decision on whether or not to proceed with a project. But, as in that case, where there was

²² The licensing proceeding was ultimately terminated by the Licensing Board in 2000. *Wash. Pub. Power Supply Sys.* (Nuclear Project 1), LBP-00-18, 52 NRC 9 (2000).

uncertainty surrounding a project, suspension of the licensing proceeding may be an appropriate interim remedy.

Also in contrast to the current DOE request for “finality,” on April 22, 1977, the Energy Research and Development Administration (“ERDA”), one of the predecessor agencies to DOE, moved that all hearing procedures be suspended with respect to the NRC licensing of the Clinch River Breeder Reactor Plant. The ERDA action was initiated because the Carter Administration had determined that construction of the plant would be contrary to its policy objectives and would be indefinitely deferred. As a result, on April 25, 1977, the Licensing Board ordered that the hearing procedures and schedules be suspended. In 1981 President Reagan signed a budget which expressed the intention that the project be expeditiously completed. The applicants then filed a motion to lift the suspension of the hearing (which was granted). *See U.S. Dept. of Energy Project Mgmt. Corp. Tenn. Valley Auth. (Clinch River Breeder Reactor Plant), LBP-83-8, 17 NRC 158, 163-64 (1983)*. This case history illustrates that policies and funding priorities may change over time and that, when necessitated by project uncertainty, suspending an NRC proceeding pending further developments may be an appropriate approach. Withdrawal, with or without prejudice, is not warranted based only on a policy decision by the current Secretary of DOE.²³

²³ In the event withdrawal *without prejudice* is granted, NEI fully supports the license conditions proposed by the Board to protect and preserve the LSN documentation. This documentation, and other records of the Yucca Mountain site characterization process, represents an important legacy of the substantial investment that has been made in the project by electricity ratepayers.

IV. CONCLUSION

For the reasons stated above, the Board decision denying DOE's motion to withdraw the license application for the Yucca Mountain high level waste repository should be allowed to stand as the final agency determination. In the alternative, the Commission should uphold the Board decision on the merits.

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Dated in Washington, D.C.
this 9th day of July 2010

July 9, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “Initial Brief Of Nuclear Energy Institute In Opposition To Review Of Atomic Safety And Licensing Board Order (LBP-10-11) Denying Motion to Withdraw” have been served upon the following persons on this 9th day of July 2010 by Electronic Information Exchange.

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