

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

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| In the Matter of |) | Docket No. 63-001-HLW |
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| U.S. DEPARTMENT OF ENERGY |) | ASLBP No. 09-892-HLW-CAB04 |
| |) | |
| (License Application for Geologic |) | July 9, 2010 |
| Repository at Yucca Mountain) |) | |
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**NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS BRIEF
SUPPORTING THE JUNE 29, 2010 DECISION OF THE ATOMIC SAFETY AND
LICENSING BOARD AND RESPECTFULLY SUGGESTING ADDITIONAL REVIEW
IS BOTH UNNECESSARY AND A WASTE OF COMMISSION RESOURCES**

In response to the Nuclear Regulatory Commission’s (NRC) June 30, 2010 Order, the National Association of Regulatory Utility Commissioners (NARUC) respectfully suggests that no additional review of the June 29, 2010 Atomic Safety and Licensing Board’s LBP-10-11 Order (*Board Order* or *Order*) denying the Department of Energy’s (DOE’s) motion to withdraw in the above-referenced proceeding is necessary. Alternatively, if the full Commission chooses to review the Licensing Board Order, the Order should be upheld in all particulars.

While the Commission retains the inherent authority to take review of the Licensing *Board Order* as a matter of discretion, the Commission should decline review primarily because the Board has accurately pointed out the Department of Energy’s Withdrawal motion is fatally flawed and transparently at odds with the plain text of the controlling statute. It is rare for any agency to be presented with a motion that is flawed as the one filed by DOE in this proceeding. The *Board Order* presents a compelling, neutral, independent, and informed determination.

Additional review will be an incredible waste of NRC resources at a time when the federal government has very little resources to waste.

A licensing board's principal role in the NRC adjudicatory process “is carefully to review all of the evidence, including testimony and exhibits, and to resolve factual disputes.” *AmerGen Energy Co., LLC (License Renewal for Oyster Creek Nuclear Generating Station)*, CLI-09-7, 69 NRC 235, 259 (2009), citing *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-05-19, 62 NRC 403, 411 (2005). The Commission will not exercise its authority to make de novo findings of fact “where a Licensing Board has issued a plausible decision that rests on carefully rendered findings of fact.” *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-03-8, 58 NRC 11, 25-26 (2003); See also *General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit No. 1)* ALAB-881, 26 NRC 465, 473 (1987); *Louisiana Energy Services, L.P. (National Enrichment Facility)*, CLI-05-28, 62 NRC 721, 723 (2005).

However, this record presents no real factual disputes.¹ As the Board’s Order accurately points out:

- DOE has filed “its 17 volume 8,600-page construction authorization application” (page 1)
- DOE spent “decades” generating the report which is “undergirded by millions of pages of studies, reports, and related materials at a reported cost of over 10 billion dollars.” (page 2)
- DOE has conceded that in “the Secretary’s judgment” is “not that Yucca Mountain is unsafe or that there are flaws in the [Application],”(page 4)² and

¹ There are some facts presented as a basis for NARUC’s and others interventions, but the factual determinations about those interventions, along with the administrative record made by the Board to support its interpretation of the NWPA are entitled to deference under controlling cases cited, *supra*. The Board’s legal and factual analysis of NARUC’s intervention was also complete and accurate. NARUC will respond to any critiques of the Board’s analysis on reply.

- DOE acknowledges that it cannot withdraw the Application if that would be contrary to the statutes passed by Congress (page 4).

These facts are incontrovertible – the last conceded and thus effectively stipulated to by DOE during the course of this proceeding.

More critical to the Board’s final legal determinations, there are no facts in the record to support the withdrawal application. No judge can express a different view of any proposed rationale that is not backed by facts present in the record presented for decision.³ As the Board Order points out at page 4, after conceding the Secretary has not decided that Yucca is unsafe or that there are flaws in the application, the supposed “factual justification” for the motion is that the Secretary *believes* “it is not a workable option and alternatives will better serve the public interest.”

Is there any factual evidence included in the motion or in the subsequent pleadings provided by DOE that provides any *substantial* support for the notion that the Yucca Mountain application is “unworkable”?

No.

Is there any evidence in the record that clearly demonstrates that “alternatives will better serve the public interest?”

No. Indeed, the only facts in the record – the 8,600 page application backed by decades of work and hundreds of studies – strongly suggest that the repository is both workable and necessarily superior to any speculative uncited and thus necessarily unproven alternatives.

² The *Order* quotes directly from *DOE’s Reply* at 31 n.102.

³ The administrative hearing record itself must provide evidence that supports (1) any findings concerning a dismissal, (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.

Although the NRC does review legal determinations *de novo*,⁴ in this case there is simply no ambiguity in the law or the legislative history requiring any additional examination. Even if there *were* some facts in the record that justified the Secretary's policy call, the controlling statute makes clear the policy call is not his to make. It is the Legislative Branch's decision – and they have already specified that the Yucca Mountain application will be reviewed by the NRC on the merits. The DOE's frail and flawed legal theory fails to stand up under the most cursory examination. The Board Order provides a devastating, accurate, and comprehensive critique of DOE's distorted view of the statute⁵ concluding, at page 12, noting the "language, structure, and legislative history of the NWPA all contravene the notion that Congress intended to allow DOE to terminate the NRC's consideration of the Application."

⁴ The NRC has said "[a]s for conclusions of law, our standard of review is more searching. We review legal questions *de novo*. We will reverse a licensing board's legal rulings if they are 'a departure from or contrary to established law.'" *Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site)*, Nuc. Reg. Rptr. P 31608, 2009 WL 5246219 *5 (N.R.C.) CLI-10-05, (January 2, 2010), quoting *Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1; Sequoyah Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2 & 3)*, CLI-04-24, 60 NRC 160, 190 (2004).

⁵ For example, the Order holds, at 7, the NWPA requires the Secretary of Energy to submit to NRC a license application for construction authorization once Congress approves the geologic repository site. Congresses' approval of Yucca Mountain in 2002 required DOE's to submit the application. Once submitted, NWPA Section 114(d) specifies the NRC "shall consider" the Application and "issue a final decision approving or disapproving the issuance of a construction authorization." 42 U.S.C. § 10134(d); Order at 7. The Licensing Board Order reveals how the text, structure, and legislative history of the NWPA demonstrate DOE lacks authority to withdraw the application. Order at 4-9. The Board Order also eviscerates the remaining DOE arguments finding: (i) DOE has no authority provided by the Atomic Energy Act which can trump the more recent and specific NWPA mandates, Order at 11-13; (ii) NRC regulations do not allow a withdrawal "as of right" for an application filed in response to a statutory mandate and subject to a separate NWPA directive that the applicable regulations do not apply to the extent that they jeopardize NRC's duty to render a final decision on the merits of the license application, Order at 13-16; (iii) DOE is not entitled to deference where Congress has clearly spoken, Order at 16-17; (iv) DOE is not a "voluntary" applicant, and Congress did not intend for DOE to be treated as such, Order at 17; and (v) that the establishment of a Blue Ribbon Commission does not alter DOE's or NRC's duties under the NWPA, Order at 18-19.

It is extremely unlikely DOE or any proponent of the motion can present any credible critique of the Board decision on the merits.

It is also unlikely any opponent of the motion, including NARUC, can significantly improve on the Board's articulate explanation of the gaping flaws in the DOE motion. As the NRC Commissioners will undoubtedly read the Board decision, NARUC will not waste the NRC's time by regurgitating those arguments here. We will, however, respond to any new arguments presented by others on reply.

There are also prudential considerations auguring against additional NRC investments of staff and resources in this proceeding. As noted, *supra*, the DOE's proffered rationale is so weak that additional NRC review is superfluous. The Board has done an excellent job and in any case, there is no question that the United States Courts of Appeal will be the final arbiter of the legal issues presented. The Board explicitly recognized the Court's role in its initial decision to hold the case in abeyance⁶ as did the full Commission when asked the Board to conduct its review based on an incredibly compressed timeline to assure the Board's analysis could provide some input in the pending Court appeals, where the final legal issues will ultimately be resolved.⁷

The United States Court of Appeals is already poised to address the crucial issues raised by the DOE's motion. Initial briefs have already been filed.

⁶ See *Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion)* (Apr. 6, 2010), at 9 (unpublished), where "the Board concludes that the pending actions in the Court of Appeals will likely yield quicker and more authoritative resolution of most if not all relevant legal issues."

⁷ See *U.S. Dep't of Energy (High Level Waste Repository)*, CLI-10-13, 71 NRC ___, ___ (slip op. at 4- 5) (Apr. 23, 2010), noting "[t]he Board understandably has sought to manage this case with an eye toward the efficient use of NRC resources and in anticipation of an authoritative legal ruling from the D.C. Circuit on DOE's effort to withdraw its Yucca Mountain application ...[however] judicial review may well benefit from NRC's consideration of the issues surrounding DOE's motion."

To assure the Court gets the full benefit of the Board's careful analysis, the NRC should immediately certify the Board Order as a final agency decision ripe for judicial review.

Moreover, the consolidated appeals that are at the heart of the pending court action were filed before DOE filed the motion to withdraw in this NRC docket. DOE's March 2010 filing of the motion to withdraw before the Board did not divest the Court of its original and exclusive jurisdiction granted by statute over the direct actions alleging violations of the NWPA. Even if the NRC was not obviously anxious to assure (i) efficient use of taxpayer funded resources and (ii) that the Board's Decision informed the Court's decision, where a federal court suit addressing identical legal issues is well underway, abstention by the NRC "would appear to be called for by considerations of comity between court and agency." *In the Matter of Pub. Serv. Co. of N.H., et al.*, 4 N.R.C. 365 (1976). In such circumstances, the Commission "should allow the court to act on the matter first." *Id.* These considerations carry even more force where, as here, Congress has selected the Court of Appeals as the *original and exclusive* forum for challenges to actions and decisions alleged to be in violation of the NWPA.

CONCLUSION

The issues presented for review are currently being considered by the Court of Appeals. The Board’s decision incinerates DOE’s legal rationale beyond rehabilitation. Moreover, both efficiency and principles of comity compel the Commission to forego any additional review of the Licensing Board Order and certify it as a final agency decision ripe for judicial review. If review is undertaken, the Licensing Board’s correct interpretation of the NWPA should be upheld *in toto*.

DATED this 9th day of July, 2010

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[Signed Electronically by James Bradford Ramsay]

Dated at Washington, DC
this 9th day of July 2010

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ADDITIONAL CERTIFICATION

Availability of Material

As required by 10 C.F.R. § 2.1012(b) and 10 C.F.R. §2.1003, the undersigned also has made a good faith effort to substantially comply with the “Availability of Material” requirements, 10 C.F.R. § 2.1003. NARUC has been in communication with Daniel J. Graser, the NRC’s Licensing and Support Network Administrator to obtain technical guidance to comply with this provision.

[Signed Electronically by James Bradford Ramsay]

Dated at Washington, DC
this 9th day of July 2010

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