July 19, 2010

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)	)	
	)	
	)	

RESPONSIVE BRIEF OF THE NUCLEAR ENERGY INSTITUTE ADDRESSING REVIEW OF ATOMIC SAFETY AND LICENSING BOARD ORDER DENYING MOTION TO WITHDRAW

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this 19th day of July 2010

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I. INTRODUCTION

The Nuclear Energy Institute ("NEI") opposes review and reversal of the decision issued by the Atomic Safety and Licensing Board ("Board") on June 29, 2010.[1] In its decision the Board denied the Department of Energy ("DOE") motion to withdraw[2] the license application at issue in this proceeding. In accordance with the June 30, 2010 Order issued by the Secretary, on July 9, 2010, NEI and numerous other parties in this proceeding simultaneously filed initial briefs on the issue of whether the Board Order should be reviewed and reversed.[3] In accordance with the schedule in the Secretary's Order, as amended, NEI herein responds to the initial briefs of the other parties. NEI's position remains that the Board Order is a correct

[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] *See* "Initial Brief of Nuclear Energy Institute in Opposition to Review of Atomic Safety and Licensing Board Order (LBP-10-11) Denying Motion to Withdraw," dated July 9, 2010 ("NEI Initial Brief").

decision as a matter of law and should be allowed to stand as a final agency determination on the DOE Motion.

II. BACKGROUND

NEI has previously set forth the relevant background regarding the Nuclear Waste Policy Act ("NWPA"),[4] the Yucca Mountain Development Act ("YMDA"),[5] the DOE license application for the Yucca Mountain high level waste repository, DOE's Motion to withdraw the license application and terminate this proceeding, and the Board Order. NEI Initial Brief, at 2-5. No further discussion is necessary here.

III. DISCUSSION

A. The Commission Should Not Review the Board Order

NEI focuses in this reply on the arguments raised by DOE and other parties related to the merits of the Board Order. On the threshold question of whether the Commission should take review, NEI continues to believe that the Commission can and should exercise restraint. *See* NEI Initial Brief, at 5-7. The Board Order provides a sound basis for agency action and will provide the Court of Appeals that will be hearing these and related matters with ample agency guidance based on a substantial record. Additionally, in light of the pending motion for recusal or disqualification, it is essential that, if the Commission does take review, it specify precisely which issues will be subject to review to allow the Commissioners to, among other things, appropriately disposition the motion for recusal and disqualification.[6]

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4 42 U.S.C. § 10101, *et seq*.

5 Pub. L. No. 107-200, 116 Stat. 735 (2002).

6 *See*, *e.g.*, "Initial Brief of the State of Washington Pursuant to the June 30, 2010, Commission Order," dated July 9, 2010 ("Washington Initial Brief"), at 10-11; "State of Washington, State of South Carolina, Aiken County, South Carolina, and White Pine County, Nevada's Motion for Recusal/Disqualification," dated July 9, 2010.

B. The Board Decision Should Be Upheld

1. DOE Lacks Authority to Withdraw the License Application

The arguments relied upon by DOE,[7] Nevada,[8] the NRC Staff,[9] and others, in support of the DOE Motion are — for the most part — not new. The arguments have been made in filings before the Board and at the lengthy and wide-ranging oral argument. DOE continues to assert, based on a patchwork of legal citations and argument, that the Secretary has unfettered discretion to terminate the Yucca Mountain project based on no more than a policy determination that the strategy for spent nuclear fuel established by Congress in the NWPA needs to be changed. As succinctly stated by DOE: "The policy determination whether to terminate the Yucca Mountain project rests with the Secretary, as the official ultimately responsible under the [Atomic Energy Act ("AEA")], the DOE Organization Act, and the NWPA for management and disposition of radioactive waste." DOE Initial Brief, at 7. NEI respectfully disagrees. Nothing in the AEA, DOE Organization Act, or the NWPA gives the Secretary any authority to revoke the NWPA. Nor does the Secretary have authority to vitiate NRC's separate obligations under the NWPA.

DOE primarily argues that the Secretary has broad discretion to make policy for the high level waste disposal program — discretion that it asserts flows from the AEA, 42 U.S.C. § 2013(c), and the DOE Organization Act, 42 U.S.C. § 7133(a)(8)(C). *Id*., at 8. Further, DOE

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7 "U.S. Department of Energy's Brief in Support of Review and Reversal of the Board's Ruling on the Motion to Withdraw," dated July 9, 2010 ("DOE Initial Brief").

8 "Brief of the State of Nevada in Support of Review and Reversal of the Licensing Board's Decision Denying the Department of Energy's Motion to Withdraw its License Application with Prejudice," dated July 9, 2010 "("Nevada Initial Brief").

9 "NRC Staff Brief in Response to the Secretary of Commission's June 30, 2010 Order," dated July 9, 2010 ("Staff Initial Brief").

maintains that the NWPA "preserves that grant of power with respect to the decision to discontinue the Yucca Mountain license application." *Id*., at 9. Indeed, DOE asserts that the NWPA "preserves the Secretary's discretion to withdraw that application after it has been filed, if, as has now occurred, the Secretary determines that proceeding with the application is contrary to the public interest." *Id*., at 10. The problem with DOE's assertion of authority is twofold. First, the scope of authority claimed by DOE for the Secretary to determine the "public interest" is unbounded, and itself lacks any specific statutory basis in either the AEA, the DOE Organization Act, or the NWPA (the statute directly governing the activity involved). Second, DOE focuses on what DOE cannot find in the NWPA (any provision that "directs or circumscribes DOE's actions regarding the license application after its submission"), and ignores the very purpose of the entire NWPA (to site and license a high level waste repository).

a. The AEA and DOE Organization Act Do Not Provide the Authority DOE Claims

The AEA, 42. U.S.C. § 2013(c), provides for "a program for Government control of the possession, use, and production of atomic energy and special nuclear material." The statute is silent on the authority asserted by DOE — it makes no reference to any DOE authority to determine the "public interest" or set policy for the high level waste program subsequently established in the NWPA. Recognizing the vacuum, DOE further claims that the very general AEA authority is amplified by the DOE Organization Act. But that statute, 42 U.S.C. § 7133(a)(8)(C), provides only that the "functions" for which the Secretary has responsibility include "the establishment of temporary and permanent facilities for storage, management, and ultimate disposal of nuclear wastes." This is undoubtedly an important function — one that is given specificity in the NWPA. Notably, however, the DOE Organization Act, like the AEA,

provides no specific power germane to the current Motion, and no specific power to contravene the explicit responsibilities of DOE established in the NWPA.

DOE also argues that Section 114(d) of the NWPA "controls here, and it authorizes DOE to withdraw this application (and this Commission to grant such a request)." *Id*., at 11. However, Section 114(d) of the NWPA does no such thing. No language in that statute says what DOE argues. Rather, against the specific direction in Section 114(b) requiring the Secretary to submit the application, DOE is relying on no more than an attenuated reference to the NRC's obligation under Section 114(d) to review the license application in accordance with the "laws applicable to such applications." This, in turn, is argued to be a reference to and incorporation of the NRC's procedural regulation in 10 C.F.R. § 2.107. The Board effectively and correctly addressed this point. Board Order, slip. op. at 13-15; NEI Initial Brief, at 10-11. This argument based on Section 2.107 — that the NRC's procedural regulation somehow constitutes an affirmative grant of authority — remains a very thin reed on which to support DOE's sweeping claim of discretionary authority.[10] This is especially true given that DOE would now exercise that purported authority to take an action that is clearly contrary to the "prime directive" (Board Order, slip. op. at 15) of the NWPA.

DOE and Nevada both argue that if DOE did not have authority to withdraw the application, "absurd" or "untenable" results could occur. For example, DOE argues that otherwise a dispirited DOE would need to press forward, compelled to pursue an "adjudicatory proceeding that the applicant has determined should not proceed." DOE Initial Brief, at 5. However, this argument is circular. It is premised on DOE having the authority to determine that

[10] The applicability of 10 C.F.R. § 2.107 itself remains in doubt. *See* NEI Initial Brief, at 11, n. 17. Significantly, there are certain provisions of subpart A, such as 10 C.F.R. § 2.101(e), that are — by their terms — explicitly applicable to this proceeding. Accordingly, it can be inferred that Section 2.107(a) was <u>not</u> intended to apply.

the proceeding should not proceed. The reality is that Congress, by law, has established that the proceeding should go forward. DOE must meet its current statutory obligations unless and until those obligations are changed. DOE offers no reason that it cannot meet its obligations, other than its own claim that it doesn't agree with the policy any longer.[11]

DOE's concern that "absurd" or "untenable" results could occur if it does not have the authority to withdraw the application is also inconsistent with the structure of the NWPA. As recognized by the Board and discussed previously (*see* NEI Initial Brief, at 9), Congress in the YMDA adopted the Secretary's recommendation of the Yucca Mountain site. This ended the site characterization process. *See Nuclear Energy Inst. v. Envtl. Prot. Agency*, 373 F.3d 1351, 1309 (D.C. Cir. 2004). The time for DOE to determine that the site is not appropriate was in that characterization process. DOE could have, but did not, find the site to be unsuitable. That concern, or other concerns regarding the future of the program arising during the licensing process, should be raised with Congress in accordance with the reporting mechanisms established in Section 114(c) of the NWPA.[12]

Nevada's variant on the argument is that, if DOE could not withdraw the application, then DOE would need to press forward "with an application for an unsafe repository." *See*, *e.g.*, Nevada Initial Brief, at 9, 15-16. This, however, is a hypothetical scenario and is definitely not the case at hand. DOE has not asserted that the repository is unsafe, only

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[11] Also, as a practical matter, NEI has observed that uncertainties with regard to the future of the project, including uncertainties regarding funding, can be addressed by the NRC suspending the proceeding for an interim period. NEI Initial Brief, at 16-17. This would avoid any wasteful expenditures of resources. This is an interim remedy that is far more pragmatic, and far more consonant with the NWPA, than a withdrawal with prejudice based on an unprecedented assertion of DOE authority.

[12] Section 114(c) of the NWPA calls for annual reports to Congress on the progress of licensing.

that the Secretary believes that better alternatives may now exist. Nevada frequently refers to the sheer number of contentions that it has filed. *See*, *e.g.*, Nevada Initial Brief, at 35. But neither DOE nor the NRC has agreed with or adjudicated those contentions on the merits. If either DOE or NRC were to decide that the repository is unsafe — based on an evidentiary record that provided a basis for judicial review[13] — NEI is confident that procedural remedies could be fashioned within the AEA and NWPA to address the status of the license application.[14] The Nevada argument is based on an extreme distortion of facts, presents a case not currently before the Commission, and therefore does not support the relief requested in this case.

b. This is Not a Case of "Implied Repeal" by the NWPA; It is a Case of Specific Direction by the NWPA

DOE argues that its broad authority under the AEA and the DOE Organization Act was not expressly repealed by the NWPA. DOE Initial Brief, at 16-18. In contrast, the Board held that the NWPA "is a subsequently-enacted, much more specific statute that directly addresses the matter at hand." Board Order, slip. op. at 11 (footnote omitted.) The Board's decision is more consistent with the facts, the law, and tenets of statutory construction.

DOE first suggests that the Board's view is contrary to Commission precedent in *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-02-29, 56 NRC 390 (2002). There, as quoted by DOE, the Commission found that "through the NWPA 'Congress intended to supplement, rather than replace, existing law.'" DOE Initial Brief, at 16,

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[13] DOE in particular has to date expended substantial resources to support the site characterization, the environmental review process required by the National Environmental Policy Act ("NEPA"), and the license application. A DOE decision that the repository is "unsafe" would need to be based on an appropriate record of decision in conformance with both the Administrative Procedure Act and NEPA.

[14] If the NRC reached a decision on the merits in accordance with Section 114(d) of the NWPA, it could of course deny the license requested or demand revisions to the application.

citing Private Fuel Storage, 56 NRC at 405. Certainly we can agree that the NWPA supplemented existing law to establish a policy and program for licensing a high level nuclear waste repository. However, the situation in *Private Fuel Storage* was very different from the present circumstances, and the Commission decision in that case does not apply here.

As recounted by DOE, in *Private Fuel Storage* the Commission addressed an argument from the State of Utah that the NRC lacks authority to license a private away-from-reactor spent fuel storage facility. The argument was that the NRC's general licensing authority under the AEA was curtailed by the NWPA — because the NWPA established an exclusive strategy for the problem of spent fuel. The Commission was unpersuaded, in the absence of specific language in the NWPA, that its general licensing authority was to be overridden. *Private Fuel Storage*, 56 NRC at 397. In that case there was a clear authority under the AEA for the NRC to license spent fuel storage facilities. And the NWPA did not address interim away-from-reactor storage of spent fuel, as was being proposed by the applicants in that case. So the Commission could correctly conclude in *Private Fuel Storage* that silence in the NWPA did not change the agency's prior AEA licensing authority. In the present case the AEA does not address the spent nuclear fuel strategy or the high level waste repository program, and does not provide the general authority DOE now claims. Congress then articulated in the NWPA a clear policy for high level waste disposal and, pursuant to that statute, subsequently approved the Yucca Mountain site. The instant case therefore is the inverse of the *Private Fuel Storage* situation. It would be too great a stretch in the logic to hold that silence in the NWPA on the issue of application withdrawal (something not even contemplated at the time of the statute) supports reading the AEA to retroactively create authority in that statute — authority that in turn can be employed to override the very regime established by Congress in the NWPA.

DOE argues that this is a case requiring an "implied repeal" of the Secretary's pre-existing, general AEA authority to set policy for high level waste matters. DOE Initial Brief, at 18-25. However, citing one tenet of statutory construction, DOE ignores other, equally established, principles of statutory interpretation. DOE is correct in its assertion that the law disfavors implied repeals. *Id.* at 19.[15] However, as discussed above, DOE does not have pre-existing general authority under the AEA to override the specific statutory scheme established by Congress in the NWPA. The overriding objective of statutory construction is to effectuate the statutory purpose as expressed in a law's text.[16] The purpose of the NWPA was to establish site recommendation and licensing processes for a high level waste repository. DOE cannot rely upon the pre-existing (and silent) AEA to void the specific Congressional mandate established by the NWPA.

It is well established that if two statutes deal with the same subject — one in general terms, the other in a more detailed way — the general statute yields to the more specific statute. *Morales v. Trans World Airlines, Inc*., 504 U.S. 374 (1992); *Morton v. Mancari*, 417 U.S. 535 (1974). Where the special statute is later in time, it will be regarded as an exception to or qualification of the prior general one. *See State ex rel. Eggers v. Enright,* 609 S.W.2d 381 (Mo. 1980); *In re Colo. Springs Symphony Orchestra Ass'n*, 308 B.R. 508 (Bkrtcy. D. Colo. 2004). Therefore, whatever DOE's general authorities under the AEA and DOE Organization Act may

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15 Thus, the courts and the NRC have found that where an activity is already authorized by another provision of law, declining to "authorize" it anew — or to encourage or require it — is not the same thing as prohibiting it. *See, e.g., Private Fuel Storage*, 56 NRC at 397.

16 *SEC v. Joiner*, 320 U.S. 344, 350-351 (1943) ("However well these rules [of statutory construction] may serve at times to aid in deciphering legislative intent, they have long been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of the context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.")

be, it is the NWPA that specifically outlines DOE's authority and responsibilities with respect to the Yucca Mountain repository.

At bottom, as DOE has argued in court, 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."[17] No party has pointed to specific language in the NWPA, or in the legislative history thereof, that provides explicit direction with respect to whether DOE has the authority to unilaterally and lawfully withdraw the Yucca Mountain license application. The foremost principle of statutory construction is that a reading must give effect to all elements of the statute. DOE's reading of the specific provisions of the NWPA, as well as its attempt to bootstrap general authorities in other statutes, simply fails. Were DOE to withdraw the application, it would result in the unilateral recision by DOE of the specific NWPA provisions directing the DOE to file and the NRC to review the application and reach a decision on whether to issue the construction authorization. The NWPA cannot reasonably be read, as DOE now suggests, to require the Department to submit an application only to withdraw that application shortly thereafter based on a policy determination. This would render the YMDA, the NWPA process for site characterization, and the NWPA language requiring an application, a nullity.[18]

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[17] Final Brief for the Respondents at 22, *State of Nev. 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).

[18] 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). DOE's interpretation of the NWPA is inconsistent with the NWPA, which compels DOE to pursue an application for a repository. *See Bd. of Educ. of City Sch. Dist. of City of N.Y. v. Harris*, 622 F.2d 599, 611 (2d Cir. 1979) (refusing to adopt reading of statute that would render it "in operation, a nullity"); *Trichilo v. Sec'y of Health & Human Servs.*, 823 F.2d 702, 706 (2d Cir. 1987) ("we will not interpret a statute so that some of its terms are rendered a nullity"); *Garnes v. Barnhardt*, 352 F. Supp. 2d 1059, 1065 (N.D. Cal.

Nevada goes to great lengths to illustrate the uncontested point that the NWPA did not address the specific topic of withdrawal. Nevada Initial Brief, at 13-25. Nevada would conclude not only that withdrawal is not prohibited, but that withdrawal is authorized by the silence of Congress and therefore the Secretary may do so at his discretion. In short, such a position amounts to no more than an assertion that the Secretary of DOE, an Executive Branch appointee, could satisfy DOE's obligations under the NWPA by filing the application on Friday, and subsequently withdrawing it on Monday, with no more basis than asserting that he had a policy epiphany over the weekend. A more egregious affront to Congressional authority is difficult to hypothesize.

2. The NRC May Not Terminate its Process Under the Current Circumstances

As previously discussed by NEI,[19] the NRC has its own responsibility under the NWPA to conduct a review and render a decision on the DOE license application. *See* Board Order, slip. op at 7 (submission of the application "triggered a duty on the NRC's past to consider and to render a decision on the Application pursuant to section 114(d) of the NWPA"). Section 114(d) states that the Commission "shall consider an application for a construction authorization for all or part of a repository in accordance with the law's applicable to such application . . . ." 42 U.S.C. § 10134(d). Neither the NWPA nor the "laws applicable to such application" give the Commission authority to terminate its review based only on a policy

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2004) (an "agency interpretation that nullifies part of a formally promulgated regulation deserves no deference."); *Frazier v. City of Richmond*, 184 Cal.App.3d 1491, 1496 (1986) ("[u]nder the guise of construction, a court should not rewrite the law, add to it what has been omitted, omit from it what has been inserted, give it an effect beyond that gathered from the plain and direct import of the terms used, or read into it an exception, qualification, or modification that will nullify a clear provision or materially affect its operation so as to make it conform to a presumed intention not expressed or otherwise apparent in the law." (citation omitted)).

[19] NEI Initial Brief, at 9-10.

decision of the Secretary. The only "law" cited, 10 C.F.R. § 2.107, is simply not up to that task. *See*, *e.g.*, Board Order, slip op. at 13-16.

The NRC Staff position appears to be that Section 114(d) of the NWPA does little more than to establish a schedule and to define NRC's role "to review" the application. Staff Initial Brief, at 9. This, of course, raises the question of how defining a role to review the application does not create a responsibility to do so. The NRC Staff observes that it finds "[n]othing in the NWPA or its legislative history [that] indicates that Congress intended that this role would include enforcing DOE's obligations under the Act." *Id*., at 7-10. However, the NRC need not do that. It needs only to fulfill its own role — which is to continue its review and licensing process to the extent practicable. And the NRC's role certainly does not require it to submit to DOE's policy judgment and undermine the NWPA by terminating the NRC licensing process with prejudice.

The NRC Staff's underlying concern appears to be that the "Board's view would appear to require a merits based determination in all circumstances." *Id*., at 10. But this too does not necessarily follow. NEI has always recognized that there are practical considerations that will impact the NRC's ability to reach a merits determination on all issues. And there are currently uncertainties with regard to the Yucca Mountain project that will make it difficult to complete aspects of the licensing process, including the hearing process. However, these considerations do not vitiate the NRC's role (*i.e.*, responsibility) under Section 114(d) of the NWPA. These considerations do not warrant the NRC summarily abandoning the process.

Indeed, NEI recognizes that it is quite likely that DOE's responsibility under the NWPA will need to be enforced in a forum other than the NRC, including through the cases pending before the Court of Appeals. While there are no doubt activities in the licensing process

that can be completed in the interim (such as completion of portions of the NRC's Safety Evaluation Report), the maximum relief that NRC should consider as an interim measure is an appropriate suspension of the hearing process. *See* NEI Initial Brief, at 16-17. Terminating the licensing process does not logically follow from a conclusion that the NRC alone cannot enforce DOE's obligations.

C. Withdrawal With Prejudice is Not Appropriate

DOE is the first NRC license applicant to seek withdrawal of its own application with prejudice. Nevada compares this situation to civil litigation. Nevada Initial Brief, at 31. However, this is a very different context and the analogy is inapt. Here, DOE is required by statute to submit the application, and there are other stakeholders beyond Nevada that will be prejudiced by termination of the proceeding.

In the civil litigation context, courts generally foresee no harm to a defendant when a plaintiff seeks to withdraw an action with prejudice. In those cases the legal action is initiated voluntarily by the plaintiff. The logic is that the defendant will have obtained a judgment on the merits that vindicates his rights and precludes any future suit by the plaintiff.[20] Nevada ignores, however, that DOE has a statutory obligation to file the license application. And, even in civil litigation a dismissal with prejudice will be denied where another party, such as a third party intervenor, would suffer prejudice. *ITV Direct, Inc. v. Healthy Solutions, LLC*, 445 F.3d 66, 70 (1st Cir. 2006). In such situations, a blanket rule that the court must grant the plaintiff's motion would lead to injustice.[21] To the contrary, in such circumstances the motion

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[20] *Smoot v. Fox,* 340 F.2d 301, 302-03 (6th Cir. 1964); *States v. T.J. Manalo, Inc*., 659 F. Supp. 2d 1297 (Ct. Int'l Trade 2009); *Shepard v. Egan,* 767 F. Supp. 1158, 1165 (D. Mass. 1990).

[21] *County of Santa Fe v. Pub. Serv. Co. of N.M.*, 311 F.3d 1031, 1049 (10th Cir. 2002).

should instead be denied.[22] In this case there are several third party intervenors who are stakeholders with independent interests. NEI is one. As noted by the Licensing Board in its decision admitting NEI as a party, NEI's members[23] are "not only within the zone of interest of the NWPA but also are the intended beneficiaries of that Act. Indeed they can claim to be the real parties in interest in the success of DOE's application . . . ." *U.S. Dep't of Energy* (High Level Waste Repository), LBP-09-06, 69 NRC 367, 431-32 (2009). If DOE is permitted to withdraw its application with prejudice, NEI's members will be directly harmed.

Nevada is dismissive of harm to other parties from allowing withdrawal with prejudice. Nevada Initial Brief, at 31. Nevada goes so far as to assert that "[n]o party (or petitioner) in the case at hand made any showing of prejudice." *Id*., at 32. This assertion ignores that NEI has, since the inception of this proceeding, asserted that uncertainty and delay in (and by extension, termination of) the licensing of Yucca Mountain will harm its members. NEI's petition to intervene included affidavits addressing in the costs (economic and other costs)

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22 *Id.*; *See, e.g.*, *Atwood v. Pac. Mar. Ass'n*, 432 F. Supp. 491, 495-96 (D. Or. 1977) (refusing to dismiss with prejudice plaintiffs' claims against a union because it would adversely affect the co-defendant employers); *Beaver Assocs. v. Cannon*, 59 F.R.D. 508, 512 (S.D.N.Y. 1973) (refusing to dismiss with prejudice a plaintiff shareholder's derivative claims against a corporation because it "might result in the loss to the corporation of its only forum for considering the merits, if any, of the asserted derivative claim").

23 NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear power plant designers, major architect/engineer firms, nuclear fuel fabrication facilities, nuclear materials licensees, unions, and other organizations and entities involved in the nuclear industry or likely to be involved in construction and operation of the Yucca Mountain repository. As such, among NEI's members are the former and present NRC operating licensees that have generated used nuclear fuel from commercial power operations and that presently store used fuel at the sites of both currently operating and shutdown power reactors. In accordance with the NWPA, used nuclear fuel from nuclear power plants operated by these companies is to be accepted by DOE and will be disposed of by DOE at Yucca Mountain if the site is licensed by the NRC.

incurred due to continued onsite storage of spent nuclear fuel.[24] Dismissal with prejudice will surely harm NEI's members.

In arguing for withdrawal with prejudice, DOE similarly dismisses with a passing footnote even the slightest possibility that any other party could suffer legal prejudice from the relief that DOE seeks. DOE Initial Brief, at 37, n. 130. DOE argues that there are other contingencies that must be satisfied before a repository is built, and that the earliest a repository could be built is 2020. *Id*. DOE raises the prospect that some alternative to Yucca Mountain might even lead to taking waste from reactor sites more quickly than would continued pursuit of Yucca Mountain. *Id*. All of this, however, ignores the stark reality that termination of this proceeding — with prejudice no less — will almost necessarily assure that the Yucca Mountain repository will not be built, and with no alternative in sight. At bottom, it defies all logic for DOE and Nevada to assert that NEI and its members will not be prejudiced by allowing the relief that DOE seeks.

[24] *See generally* "The Nuclear Energy Institute's Petition to Intervene," dated December 19, 2008.

IV. CONCLUSION

As discussed in the NEI Initial Brief and 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, if the Commission does review the Board's decision, it should first identify with specificity the issues to be considered on review. NEI believes that in that context the Commission should uphold the Board decision on the merits.

Respectfully submitted,

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Dated in Washington, D.C.
this 19th day of July 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Responsive Brief of the Nuclear Energy Institute Addressing Review of Atomic Safety and Licensing Board Order Denying Motion to Withdraw" have been served upon the following persons on this 19th day of July 2010 by Electronic Information Exchange.

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