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STATEMENT

Counsel for South Carolina submits that there is probably little left to say in support of affirming the Board that has not already been said. As a result, South Carolina will only comment briefly on the arguments of the three parties who are the main proponents of reversing the Board order. Those parties are DOE, Nevada (and the parties who joined with it) and the NRC staff. Each party's arguments will be addressed herein under a separate heading. In addition, the issue of dismissal with prejudice will be briefly addressed.

ARGUMENT

- 1. DOE's contentions would have the Commission ignore the unique nature of this proceeding, and instead treat it like any private commercial reactor license application.**

The short answer to virtually all of the DOE brief on the merits is that it is infused throughout its length with the fundamental error of trying to treat this unique, ten-billion-dollar public policy matter as a routine private power reactor proceeding. In so doing, the DOE arguments simply ignore the forest for the trees. DOE relies on intricate, micro-level principles of statutory construction, and ignores the plain intent of Congress decreeing that Congress itself has made the policy decision that a license for a repository at Yucca Mountain should be pursued. This issue has been removed from the discretion of the Executive Branch. No amount of parsing the fine details of the language of the NWPA or of NRC regulations can empower the current Administration to contravene the clearly-expressed will of Congress.

DOE's efforts in this case are similar to the attempt of the FDA, rejected in *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), to make a

major policy decision by relying on a novel construction of very general statutory language. (Specifically, the FDA tried to have tobacco regarded as a “drug,” and therefore within the regulatory power of the FDA.) In a single paragraph of its opinion, 529 U.S. at 132-33, the Court set forth a number of principles of statutory construction requiring that the FDA’s novel attempt should be held to be beyond its authority. Those same principles require the rejection of DOE’s attempt to stretch its authority in the present case.

First, the Court noted that “a reviewing court should not confine itself to examining a particular statutory provision in isolation.” 529 U.S. at 132. As noted above, this is the overarching error in the DOE approach to the statute in this case. The Court further pointed out that “the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.” *Id.* at 133. This is the case here, where the NWPA is later and more specific than prior statutes and regulations.¹

Finally, the Court held that “we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.” *Id.* This latter point, the invocation

¹ DOE argues that the Board’s Order effectively held that a disfavored implied repeal had occurred. DOE Br., 7/9/10, at 18-25. A more accurate characterization, however, is the one expressed by the Board, which is that the NWPA is an instance of a later, more specific, statute controlling an earlier general one. Order at 11-12. *See also, e.g., Harris v. Owens*, 264 F.3d 1282, 1296 (10th Cir. 2001)(“the new statute is simply a preemptive congressional resolution of a discrete controversy that arose long after the [the earlier statute] was enacted. The later statute simply addresses one particular application and carves out an exception. We see no repeal-by-implication problem;” *Strawser v. Atkins*, 290 F.3d 720, 733 (4th Cir. 2002)(“specific, discrete exception” in a later statute did not constitute repeal by implication).

of common sense, is another factor missing from DOE's analysis. DOE concedes that the "[t]he plain text of NWPA § 114(b) requires 'the Secretary [to] submit to the Commission an application.'" DOE Br., 7/9/10, at 10. DOE then argues, however, that Congress intended to permit DOE to withdraw the application later if it saw fit to do so. While DOE does not say it, its argument means that it could file the application, withdraw it the next day, and contend that it had been faithful to its statutory duty. Such a result would be nonsensical. Common sense requires the contrary conclusion, that is, that once Congress enacted its 2002 Joint Resolution selecting the Yucca Mountain site, Congress intended for the license application not only to be filed, but also to be considered and decided on its merits.

It proves nothing to argue, as DOE and others have argued, that Congress could have expressly provided that the application could not be withdrawn by a subsequent Administration that had its own nonscientific reasons for wanting to withdraw it. There is no suggestion at all in the legislative history that anyone contemplated the possibility that a later Administration would attempt to decline to proceed with the Yucca project. What is clear, however, is that Congress has consistently decided for decades now "to provide close Congressional control [over the repository development process] to assure that the political and programmatic errors of our past experience will not be repeated." H.R. Rep. No. 97-491(1)(1982) at 29-30, 1982 U.S.C.C.A.N. (97 Stat.) 3796, 3797. On the scale of what is most probable and what is least probable, the history of the process makes it clear that if this specific issue had come to the attention of Congress, the NWPA would have contained an express provision that would have prohibited the Secretary from withdrawing the application for the kinds of reasons given for the present proposed

withdrawal. Congress did not intend for its policy choices about Yucca Mountain, choices that had been in the making for fifteen years, to be overturned at the whim of a subsequent Administration.

2. Nevada’s contentions regarding construction of the NWPA are unrelated to the issues actually presented by DOE’s Motion to Withdraw.

Nevada’s brief, in discussing interpretation of the NWPA, is devoted primarily to addressing the presently-nonexistent situation of what to do if the Congressionally-selected Yucca Mountain repository site proved at some course in the proceeding to be unsafe. That issue has not been presented in this case. DOE has conceded that “the Secretary’s judgment here is not that Yucca Mountain is unsafe or that there are flaws in the [Application], but rather that it is not a workable option and that alternatives will better serve the public interest.” Order at 4, quoting DOE Reply.² As a result, Nevada focuses primarily on a hypothetical controversy. As a result, its arguments should be disregarded.

Even if the Commission were to consider what to do if DOE believed the Yucca site to be unsafe, the answer is not problematical at all, and appears to have been anticipated by Congress in 2002. In that year, the Governor of Nevada protested the President’s request that Congress select the Yucca site, claiming among other things that the site was geologically unsuitable. However, after several days of Congressional hearings, the appropriate Senate committee concluded that

² This is not unlike an earlier DOE attempt to make its own rules in another context. *See Natural Resources Defense Council, Inc. v. Herrington*, 768 F.2d 1355, 1396 (D.C. Cir. 1985), where it was held that “an agency may not ignore the decisionmaking procedure Congress specifically mandated because the agency thinks it can design a better procedure.”

Whether the combination of natural and engineered barriers proposed by the Secretary will meet the licensing requirements of the NRC will ultimately be for the Commission, rather than this Committee, to decide.

Senate Report 107-159 at 8 (emphasis added). To the same effect, the Committee additionally stated:

The Governor raises serious questions about the geology of the Yucca Mountain site, the design of the repository, the credibility of DOE's performance assessments, and the safety of nuclear waste transportation. These questions must be more fully examined and resolved before the NRC can authorize construction of the repository. But they should be resolved by the Commission, rather than by the Committee or the Senate as a whole. We cannot find on the basis of the record before us that any of the objections raised by the Governor warrants termination of the repository program at this point.

Id. at 13 (emphasis added). In a section of the same Report entitled "The Case for Going Forward," the Senate Committee noted that:

The Committee believes that the Secretary's recommendation to the President, combined with his testimony before the Committee, and the voluminous technical documents supporting the recommendation meet the burden of going forward imposed by the Act and are sufficient to justify allowing the Secretary to submit a license application for the repository to the Nuclear Regulatory Commission for its review.

Id. In other words, the legislative history makes it clear that if safety concerns were to arise after 2002, they should be reviewed and ruled on by the Commission. To reiterate what has been said earlier, Congress removed any subsequent decisions about the licensing of the Yucca Mountain repository from the Secretary, and required that the Commission rule on them. Nevada's concerns, therefore, in addition to being hypothetical, would lack merit even if the facts posited by Nevada were actually present.

3. The position of the NRC Staff, which to some extent combines the erroneous arguments of both DOE and Nevada, is without merit.

The NRC Staff brief, like DOE, would have the Commission treat this unique proceeding no differently from the average private commercial reactor licensure case, applying each and every NRC regulation, regardless of whether not the application of every regulation is consistent with the specific Congressional intent regarding the Yucca Mountain repository. That assertion is at odds with the overall statutory scheme, as well as with common sense, as discussed above and in many other filings.

The Staff's position also contains an argument somewhat similar to Nevada's. The Staff posits a hypothetical scenario in which DOE is held to be required by the NWPA to go forward with the application, but then, for some reason, does not actively sponsor it. NRC Staff Br. at 11. In its footnote 11, also on p. 11, the Staff raises hypothetical concerns about what would happen "if DOE were unable (due to a lack of funding) or unwilling to pursue its application." If indeed funding were actually to be withdrawn by Congress, such a Congressional action would almost surely change the playing field, permitting the inference, not now permissible, that Congress supports the Administration's plan to abandon Yucca Mountain. On the other hand, if the Administration simply declined to use already-authorized funding to pursue this application, its actions would contravene the NWPA for all the reasons previously stated. As for the idea that DOE would be unwilling, as opposed to being unable, to pursue the application, the Department has stated that it "does not assert that it is entitled to act contrary to the statutes passed by Congress." DOE Reply Br. 23. Presumably, this means that if the NWPA is held to require the Secretary to pursue the application, he will do so.

As a result, the Staff's second concern is almost surely one that even DOE has denied will occur.

Finally, the Staff hints that even if some catastrophic technical flaw were to be found with the Yucca site, the Commission would still be required to subject the application to the full panoply of technical reviews for which the regulations provide. *See* NRC Staff Br. at 10-11. This concern, similar to one raised by Nevada, but expressed in a somewhat different context, is similarly hypothetical. If the site is later claimed to be technically or environmentally unsuitable, the level of review necessary would depend on the strength of the claim of unsuitability. Thus, on the one hand, if an earthquake were to cause the entire site to cave in, presumably no one would claim it was still suitable, and the application could probably be summarily dismissed for lack of opposition to its dismissal. On the other hand, if the claim of unsuitability was one on which scientific experts held conflicting views, then the public interest would be best served by having the Commission conduct a full review, presumably with at least one party in the case advocating the continuation of the project, because otherwise there presumably would be no conflict between scientific experts. No legitimate interest of the Commission would be adversely affected in such a scenario. Regardless of what might be argued in the many hypothetical situations that can be imagined, the clear fact remains that Congress never intended for its policy choices about Yucca Mountain to be reversed by the Executive Branch.

4. Dismissal with prejudice would be inappropriate even if dismissal were otherwise permitted.

The proponents of reversal of the Board decision have also asserted that if a dismissal occurs, it should be with prejudice. This, however, is simply an attempt to have

one Administration's policy or political choices set in stone in the form of a binding decree. South Carolina submits that while dismissal should not occur at all, if it does happen, it should be without prejudice. The public interest would not be served by a dismissal with prejudice. Such a dismissal would raise the possibility of future claims that no one, not even Congress, can subsequently attempt to revive Yucca as an alternative. There is no reason why a dismissal should carry such possible future uncertainty and preclusive effect with it.³

The reasons cited by DOE for its desire to have this matter dismissed without prejudice are unconvincing. DOE claims in its Reply Brief before the Board that

The Secretary's conclusion is that, absent finality, the issues about whether or not to go forward with the Yucca Mountain project will continue to plague the attempts by the Blue Ribbon Commission (as well as later policymakers informed by the Commission's recommendations) to advance alternative solutions to the disposal of nuclear waste. Simply put, 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, as they will be absent finality to the Yucca Mountain repository.

DOE Reply Br., 5/27/10 at 34. Given the Secretary's dogged claims that as far as he is concerned, the project will not proceed, the above-quoted claims are not credible. Moreover, Congress has made it clear that Yucca should not be "off the table" for purposes of the Blue Ribbon Commission's discussions. As the Board held, "In

³ DOE's counsel claimed in oral argument that dismissal with prejudice "doesn't mean if Congress passed a new statute requiring us to file an – to file and prosecute an application, that that wouldn't -- that Congress would, obviously, not be bound by that." 6/3/10 Tr. at 85. This statement is not made in any brief. More importantly, no matter what DOE counsel might claim, persons interested in seeing the abandonment of Yucca would almost surely try to argue in the future that a dismissal with prejudice should operate as a complete judicial bar to any further consideration of Yucca, whether ordered by Congress or not.

appropriating funds for the Blue Ribbon Commission, Congress instructed the Commission to ‘consider all alternatives for nuclear waste disposal,’ necessarily including a geologic repository at Yucca Mountain. Appropriations Act at 2865.” Board Order at 18, n.69 (emphasis in original).

DOE’s reliance on typical private lawsuits dismissing private claims with prejudice (such as *U.S. v. Estate of Rogers*, 2003 WL 21212749 (E.D.Tenn. 2003), cited at p. 36 of DOE’s brief) is another example of the Administration’s refusal to recognize that its duties in this matter far exceed those of the average private litigant. Obviously, where a private plaintiff sues a private defendant, the defendant will generally not object to a dismissal with prejudice, but will welcome it. Thus, for example, in *Securities and Exchange Com’n v. American Bd. of Trade, Inc.*, 750 F.Supp. 100, 105 (S.D.N.Y. 1990), the court posited that “[b]ecause the dismissal will be with prejudice, there can be no adverse effect on defendants here.”

As the above case suggests, it is normally not even possible for a defendant in a typical lawsuit to be adversely affected by a dismissal with prejudice. However, and unlike the present matter, a private lawsuit does not have a third party to the transaction, such as all of the intervenors in this matter. Nor does a private lawsuit involve an external source of a duty to proceed, as is the case here with Congress’s directive to DOE and the NRC to have this matter prosecuted and determined on its merits. An analogous situation would occur if Congress were to direct the Attorney General to sue for recovery of stolen money an individual suspected of a large-scale theft from the government. In such a case, the clear implication would be that the Attorney General would not have the discretion simply to drop the case in the absence of demonstrating some reason why the lawsuit

would be futile. This case is no different. Congress told DOE to pursue the license application. This expression of what was in the public interest in this matter cannot be ignored in considering whether the application can be dismissed with prejudice.

A much more accurate analogy is that of class actions, in which the interests of parties other than the immediate litigants are involved. In those instances, as might be expected, the Rules of Civil Procedure provide for the weighing of the interests of the absent parties. *See* Rule 23(e), F.R.C.P. (requiring court approval of dismissal, settlement, etc., of class actions, after notice is given to absent parties, and if binding on them, subject to requirement of being “fair, reasonable, and adequate). Again, such a weighing of the public interest would require the dismissal to be without prejudice, in order to preserve the power of future Administrations and Congresses to change course and revive the Yucca Mountain repository.

While it is understandable that parties such as Nevada would prefer not to be required to repeat the steps that have so far been taken, such interests are not sufficient to outweigh the need to leave open the opportunity for the Yucca project to be submitted for licensure, again assuming without conceding that withdraw of the application is permissible. Moreover, the expense to the existing litigants, while considerable, pales when compared to the ten-billion-dollar cost incurred in the Yucca project so far.

CONCLUSION

For the foregoing reasons, the State of South Carolina respectfully submits that the Board Order should be affirmed in its entirety.

Respectfully submitted,

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July 19, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
U.S. DEPARTMENT OF ENERGY)
)
(High-Level Waste Repository))
)

Docket No. 63-001-HLW
ASLBP No. 09-892-HLW-CAB04

CERTIFICATE OF SERVICE

I hereby certify that copies of the **REPLY BRIEF OF THE STATE OF SOUTH CAROLINA PURSUANT TO COMMISSION ORDER OF JUNE 30, 2010**, dated July 19, 2010, have been served upon the following persons by Electronic Information Exchange.

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Signed (electronically) by Kenneth P. Woodington

This 19th day of July, 2010