UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY	)	
	)	ALSBP No. 09-892-HLW-CAB04
(High Level Waste Repository)	)	
_____	)	July 19, 2010

REPLY BRIEF OF PRAIRIE ISLAND INDIAN COMMUNITY IN RESPONSE TO INITIAL BRIEFS OF DOE, STATE OF NEVADA ET AL, AND NRC STAFF

PRAIRIE ISLAND INDIAN COMMUNITY

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I. INTRODUCTION

The Prairie Island Indian Community (PIIC) files this Reply Brief in response to the Initial Briefs filed by the U.S. Department of Energy (DOE), the State of Nevada (and allied parties), and the Nuclear Regulatory Commission (NRC) Staff.

II. REPLY TO THE DEPARTMENT OF ENERGY

DOE's brief claims that general provisions of the Atomic Energy Act (AEA), 42 U.S.C. § 2011, *et seq.,* and the DOE Organization Act, 42 U.S.C. § 7133(a)(8)(C) (authorizing the DOE Secretary to make policy decisions regarding disposal of nuclear waste and spent nuclear fuel), along with the plain language of Section 114(d) of the Nuclear Waste Policy Act (NWPA), 42 U.S.C. § 10134(d), *et seq.,* incorporating by reference NRC procedural rules such as 10 C.F.R. § 2.107 (that the Commission "shall consider" any application "in accordance with the laws applicable to such applications") grants the DOE Secretary the authority and discretion to withdraw its License Application in this case.

The June 29, 2010 Memorandum and Order of the Atomic Safety and licensing Board ("Board"), has correctly determined that the DOE Secretary does not have such authority or discretion in the current context. The Board has properly determined that Congress in the NWPA has established the applicable policy, and the mandated process, for the filing and processing of the License Application for the Yucca Mountain repository. The NWPA is a much more comprehensive, specific, and later-enacted statute dealing with this subject as compared to the AEA, the DOE Organization Act, and NRC's procedural rules such as 10 C.F.R. § 2.107.

DOE improperly relies upon the most general snippets of vague statutory or rule authority to assert that the plain language of the NWPA, assigning both DOE and this Commission certain mandatory duties regarding the consideration of, and a decision on, the

License Application, can be overturned or ignored, so as to permanently terminate Yucca Mountain as an option for a repository. DOE's interpretation flies in the face of the plain language of the NWPA as adopted in 1982, and as amended in 1987, and also the Standard Contract, signed by DOE with the nation's nuclear utilities or generating companies, *Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste,* 10 C.F.R. § 961.11 *et seq*. DOE's interpretation is also contrary to extensive site recommendation findings of the DOE Secretary in 2002 (wherein the DOE Secretary explained at length the policy reasons why the Yucca Mountain site selection is in accordance with the public interest), as promptly adopted by the President, and by the follow up vote by Congress in 2002 adopting the site application. (Pub. 2. No. 107-200, 116 Stat. 735). All of these actions determined the nation's policy to make Yucca Mountain the subject of the License Application and to obtain a decision by this Commission on the merits of the application.

The DOE states that the DOE Secretary may make a policy decision at this time (to withdraw the License Application) and that the Commission may approve its Motion to Withdraw even though such actions are or would be directly inconsistent with duties clearly assigned to the DOE and this Commission under the NWPA. The DOE makes this assertion despite the final Court rulings in *Indiana Michigan Power Company v DOE,* 88 F.3d 1272 (DC Cir. 1996), and *Northern States Power Co, et al. v DOE*, 128 F.3d 754 (1997), that held that the NWPA (and the Standard Contract) in plain language established DOE's duty to dispose of SNF on a timely basis (and by January 31, 1998), and which reversed DOE's Final Interpretation to the contrary. *Final Interpretation of Nuclear Waste Acceptance Issues*, 60 Fed. Reg. 21793, *et seq*. (1995). The Courts in *Indiana Michigan* and *Northern States* also held that there existed no gap in policy for the DOE Secretary to fill, and that the DOE Secretary had no discretion to reach

a different interpretation of the NWPA. These Court holdings are binding upon DOE and the Commission here, and in fact, DOE's arguments here should be barred under principles of *res judicata* and *collateral estoppel*, or should be rejected by the Commission on the basis of *stare decisis*.

DOE's claim that the DOE Secretary, as a matter of policy, may withdraw its License Application and thereby terminate the Yucca Mountain repository project, as being "contrary to the public interest," is also completely unexplained. The DOE Secretary undertook no process whatsoever to evaluate any policy considerations, such as to undertake a formal process such as that used by the DOE to issue its *Final Interpretation*, to develop a reasoned policy decision that the DOE now claims the Secretary has made.[1] No reasons are given for DOE's unforeseen reversal of its duties under the NWPA and Standard Contract, although DOE itself has acknowledged that the reason does not relate to safety concerns.

The DOE's brief also avoids any explanation as to how its major decision to seek withdrawal of its License Application complies with the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321 since it has undertaken no adequate study as to how this major change in the status quo (i.e., the reversal of the NWPA's strategy and program for developing a repository for HLW and SNF) impacts the environment, and particularly with respect to localities where the nuclear waste will thereby become stranded, either indefinitely or permanently. Similarly, DOE's Brief fails to justify the reasons for its policy reversal, and has

[1] *Final Interpretation of Nuclear Waste Acceptance Issues*, 60 Fed. Reg. 21793, *et seq.* (1995). The DOE's *Final Interpretation* was issued following a process by which DOE issued a Notice of Inquiry on Waste Acceptance Issues requesting comments and input from the nation's stakeholders on these issues, 59 FR 27007, May 25, 1994.

DOE's *Final Interpretation* purported to absolve DOE of any duty to dispose of SNF until it had access to a federal repository. DOE's *Final Interpretation* was reversed by the Court in *Indiana Michigan*, 88 F.3d at 1272.

provided no formal process to allow input by affected stakeholders so as to reach a deliberative record-based decision. As noted in PIIC's initial brief, DOE's approach here has also been arbitrary and capricious, in violation of the Administrative Procedures Act, 5 U.S.C. § 706(2)(A) for these reasons.

III. REPLY TO THE STATE OF NEVADA

The brief of the State of Nevada (joined in by three other parties) also contains several erroneous arguments. Nevada's reference to pre-NWPA regulatory history, such as DOE's initial examination of a repository site at Lyons, Kansas, may suggest some DOE missteps that occurred before the NWPA was adopted, and do not have relevance here. Congress in the NWPA, Section 111, 42 U.S.C. § 10131, noted that the NWPA was adopted to correct for such matters, and the present license application has been undertaken under a process mandated by the NWPA (and not the pre-1983 process discussed in Nevada's brief).

Nevada (p 2) also asserts that the federal government should not commit to a site unless the necessary scientific investigations are completed (with favorable results), and also only if there is state and local support for the site. Nevada fails to acknowledge that the necessary scientific studies have been performed to support the License Application here, a process that has taken decades and has cost $8 - $10 billion. Moreover, it is this NRC docket where review would focus on the License Application and the underlying studies. Nevada also fails to acknowledge that the local host community for the Yucca project generally supports the project and opposes the withdrawal of the License Application, as do four additional neighboring Nevada counties. Yucca Mountain is also located within a large area of federally-owned land.

Nevada (p 4) also claims that the 1987 Amendment directing DOE to limit its future site characterization efforts to Yucca Mountain "notwithstanding… that the scientific information

was insufficient to make an informed safety conclusion" and "before any final licensing standards were in place." However, Congress had the power to make this policy decision to focus site characterization at Yucca Mountain, and did so, no doubt considering the immense cost of fully studying one site, let alone other additional locations. Also, however, Congress still required the extensive studies to be undertaken, which are now the subject of review in this Licensing Application case. There is no substance to Nevada's intimations that the scientific studies now subject to review are flawed or deficient, and in any event, such matters would be the subject of the review to be undertaken in this case.

Nevada's Brief (pp 5, 6, 9, 12, 13) also makes a number of oblique intimations that the DOE License Application, or underlying studies, suggest that Yucca Mountain is or may be unsafe as a repository. Of course, DOE itself has not made this claim, and any such suggestions are meritless and off-limits because the license review process in this case is supposed to determine these matters.

Nevada (pp 9-10) states that the NWPA indicates that Congress has not spoken to the precise question whether DOE may withdraw its License Application, so that this decision is left to the "reasonable exercise of agency discretion." However, as well noted by the Board, the plain language of the NWPA, the stated purpose and objectives of the Act, and Congressional intent, was to mandate the filing of the License Application for Yucca Mountain, and the processing of the License Application by the Commission.

Nevada endeavors to side-step the plain language of the NWPA with a series of "straw man" hypothetical arguments. Nevada states:

> There is ample support for the proposition that Congress must have contemplated that a withdrawal would be possible; otherwise, DOE could be placed in the

> absurd and untenable position of pressing forward with an application for an unsafe repository. (p 9).
>
> . . . .
>
> But it also may be argued that it makes no logical sense to suppose that Congress would have insisted that DOE prosecute an application for a facility that it believes will never be built or operated (p 11).
>
> . . . .
>
> Such a reading would prevent DOE from withdrawing an application for a repository it believed was unsafe. (fn omitted) (p 12)
>
> . . . .
>
> Construing section 114(d) so as to prevent DOE from withdrawing an application for a repository it believed was unsafe would be absurd and also contrary to the ultimate purpose of the Act to provide reasonable assurance that any repository will adequately protect the public and the environment. (p 13).
>
> . . . .
>
> But construing these sections of the NWPA such that DOE cannot terminate its activities during the "application phase" would mean that DOE could not even withdraw an application for a repository it believed was unsafe. As explained above, such an interpretation would be absurd and contrary to one of the fundamental purposes of the NWPA. (pp 15-16 in discussing Section 113(c)(3) of the NWPA, 42 U.S.C. § 10133(c)(3) and Section 114, 42 U.S.C. § 10134).
>
> . . . .
>
> Clearly, no NWPA policy or purpose requires DOE to go forward with an application for a repository project that is very unlikely to succeed. (p 22).

These Nevada arguments constitute "straw man" hypotheticals that do not exist. As the Board properly found, the site characterization process under NWPA Section 113, 42 U.S.C. § 10133 provides for all of the scientific studies leading to a determination whether to file a License Application, while Section 114, 42 U.S.C. § 10134, provides the mandates for the processing of the License Application through to the merits. Congress has determined that, once the studies are done and the License Application filed, it would then be up to the NRC to determine whether the License Application is suitable and the repository is safe. Nevada's hypothetical of preventing DOE from withdrawing an application because it believed the repository site or

proposal was unsafe is a situation that does not exist here -- DOE has not sought to withdraw its license application on this basis. Nevada's argument on this point is thus inapplicable and irrelevant.

Nevada's arguments (pp 8-13) in favor of discretion being granted the DOE to withdraw its License Application based upon the Supreme Court's methodology in *Chevron U.S.A., Inc. v National Resources Defense Council*, 467 U.S. 837 (1984) is also misplaced. The DOE has already been the recipient of binding Court decisions holding that the plain language of the NWPA and Standard Contracts placed a duty upon DOE to undertake timely disposal of SNF, and that no ambiguity in the NWPA supported the application of the *Chevron* analysis with regard to that duty. *Indiana Michigan Power Company v DOE*, 88 F.3d 1272 (DC Cir 1996), and *Northern States Power Co, et al v DOE*, 128 F.3d 754 (1997). Contrary to these binding Court decisions, Nevada now argues that the DOE Secretary nevertheless has the discretion to violate this duty by seeking to withdraw its own License Application, which is an important step to accomplishing SNF disposal.

Nevada (p 17) states that "[t]he absence of any language in the NWPA removing DOE's AEA authority to withdraw from a nuclear waste project bolsters the argument that withdrawal is allowed." Nevada's argument ignores the plain language of the NWPA, and the several steps undertaken by previous Administrations and the Congress, which has led to the selection of Yucca Mountain for site characterization purposes and the filing of the License Application.

DOE's Motion to Withdraw, if granted, would not only make a nullity of the NWPA, but would constitute a direct violation of the NWPA by the DOE and the Commission. Such authority or discretion to withdraw the License Application based upon such a general inference is illogical or unreasonable, particularly when such action would fly in the face of the provisions

of the NWPA as well as its purposes, and when such an action would result in the permanent rejection of Yucca Mountain despite Congress's expressed selection of that site for site characterization purposes and a License Application.

Nevada's brief (pp 25-28) erroneously asserts that the Commission's grant of DOE's Motion would not violate NEPA, on the basis that such action would not change the status quo. Nevada (p 26) states that the present environmental states quo, is that "there is no geologic repository for the disposal of spent nuclear fuel and high-level waste in the United States" and that "withdrawing the application does not change this". The problem with Nevada's argument is that the withdrawal of the License Application will change the states quo by destroying the provisions of the NWPA, and the objectives and intent of Congress, to site, construct and operate a repository at Yucca Mountain (albeit subject to the possibility of disapproval pursuant to safeguards to ensure safety under a multi-step process). Congress both in the NWPA and AEA has signaled its findings that SNF and HLW are highly toxic substances that can pose a hazard to the environment and to the nation's citizens. The grant of the motion to withdraw would seriously undermine further progress toward the disposal of SNF and HLW, and would, by default, strand the waste at present localities which have never been studied for indefinite or permanent waste storage and disposal, and which are <u>not</u> suitable for such a purpose.

Nevada (p 26) is also erroneous in stating that the required EIS studies under NEPA are already covered by the "no action" alternative included in DOE's 2002 FEIS and 2007 SEIS (quoted in part in PIIC's initial brief, pp 30-31). The bulk of those studies, undertaken at great cost, focused on Yucca Mountain. None of those studies focused specifically upon any other site, such as PIIC's location. These studies simply may not be characterized on a "post-hoc"

basis to apply to sites that will now become indefinite or permanent waste sites if DOE's motion is granted.

Nevada's citation or to the *Shoreham* cases *(e.g. Long Island Lighting Company, Shoreham Nuclear Power Station, Unit 1*, CL1-90-08, 32 NWC 201, 1990), and subsequent review cases, also does not appear to be applicable. That case involved a withdrawal for a single privately-owned nuclear plant, and did not come close to the unique circumstances here - where Congress in the NWPA has mandated, with stated environmental concerns and safeguards, a program to establish a repository for SNF and HLW to serve the nation, and to facilitate the removal of such waste at numerous sites around the country that are not suitable for keeping the waste on a long term basis. Here, the destruction of the Yucca program directly affects the safety and environmental interests and concerns associated with the many sites around the country where waste is presented stored and stranded, including the SNF stored adjacent to the PIIC.

Nevada (Brief, pp 28-38) also erroneously argues that the DOE Application should be withdrawn with prejudice. Nevada (pp 29-31) claims that a dismissal with prejudice does not constitute or presume a decision on the merits of the Application, but then admits that:

> Such a dismissal gives rise to claim preclusion (*res judicata*), which usually means that the plaintiff may not refile the same cause of action. (p 29).
>
> . . . .
>
> The claim preclusion (*res judicata*) effect of a dismissal with prejudice is appropriately decided only if and when an attempt is made to refile the application. (p 31).

Nevada (p 31) further claims that "a withdrawal with prejudice will prejudice no one, but a withdrawal without prejudice will prejudice Nevada" and erroneously states that "DOE's

Motion for a Withdrawal With Prejudice Must Be Granted Because No Other Party (or Petitioner) Demonstrated Prejudice." Nevada's assertions fail to recognize the arguments of PIIC and other parties concerning the adverse impact that would occur if the License Application is dismissed and the nation is left without a repository program. PIIC's arguments were supported by the Affidavit of Ronald C. Callen, which was attached to PIIC's March 15 Petition to Intervene, and also to PIIC's May 17, 2010 Brief in Opposition to DOE's Motion. The PIIC has claimed that it would be prejudiced by the dismissal of the License Application because it would bring an end to the process established by the NWPA to site and license a repository, which in turn would strand SNF at PIIC's location, and in similarly-situated host communities. The Callen Affidavit, with attachments, also indicated the reliance by the nation on the NWPA and Standard Contracts to deal with SNF disposal, including the fact that SNF will be stranded at numerous locations and also the fact that the nation's ratepayers have paid $17 billion ($33 billion with accumulated interest) for the SNF disposal program. Ratepayers are also paying extra costs for utilities to store SNF for longer periods because of DOE's default in its SNF disposal duties. PIIC and other similarly situated parties are also prejudiced if the nation's SNF disposal policy and strategy as set forth in the NWPA is effectively destroyed by the grant of the withdrawal motion.

Nevada (pp 31-28) cites as examples of prejudice it faces (unless dismissal is granted with prejudice) such matters as the past costs spent by Nevada to prepare for this case, or future costs if the application is re-filed, or the possible difficulty of obtaining expert witnesses if the case is restarted at a future time. Nevada (p 33) speculates, without explanation, that it would find it almost impossible to put its scientific team of experts together again at a future time. Nevada (p 34) also speculates concerning the viability of some of its legal issues, that were

briefed and argued by the time DOE moved to suspend the proceeding and (p 35) that "the pendency and imminence of a ruling on the 11 legal issues" that were pending also supports withdrawal with prejudice, as does "DOE's excessive delay and lack of diligence in prosecuting the action" (p 38).

Nevada's assertions are without merit. First, as noted, the other parties as well as substantial regions of the country would be severely prejudiced by the demise of the NWPA and its purposes that would result from the grant of such relief. The procedural tactic effected by a vague and unexplained 9-page motion by outside counsel for the DOE would supplant the nation's policy as determined by Congress and by previous Administrations. Second, while Nevada may have paid some costs to prepare for this case, so have the other parties and the nation ($8 to $10 billion for site characterization, $17 billion in fees paid by ratepayers under the Standard Contracts, costs paid by ratepayers for SNF storage, etc.). Third, Nevada's claims regarding unavailability of witnesses in the future are theoretical and speculative. Fourth, DOE's delays in filing the License Application arose in part due to Nevada's own tactics concerning the License Application. Nevada sought and benefitted from the delays in preparing its own case. Fifth, the Motion to Withdraw, which Nevada claims is prejudicial, arose in part due to Nevada's own actions. In other words, Nevada supports withdrawal here, and has long opposed the Yucca Mountain License Application. So, Nevada is really claiming that it will be prejudiced if DOE's Motion, which Nevada supports, is granted without prejudice(as opposed to with prejudice). Nevada's argument is circular. Nevada is now claiming harm resulting from an action (DOE Motion) that Nevada is responsible for causing (through its long-time opposition to DOE which is really the genesis for the DOE Motion).

The high cost of studying Yucca Mountain and preparing the License Application, and the substantial time expended to finally complete this step, provide strong grounds for the Commission to deny DOE's Motion in its entirety. Now that the nation has a filed License Application pursuant to the NWPA, the application should be reviewed and decided on the merits. Such an approach would provide important answers regarding Yucca Mountain, and will preserve that alternative if the application is ultimately granted.

Other arguments raised by Nevada (and DOE) are also unmeritorious. For example, the claim that the License Application itself does not ensure the construction and operation of Yucca Mountain as a repository, because of the need for other approvals by the NRC, or for water rights, railroad construction, or land withdrawal approvals, is irrelevant. The NWPA, for decades, has included or envisioned a multi-step process before a repository could become operational. This is not new. This should not justify spending $8 to $10 billion, and decades of time, to file a License Application, only to then seek to withdraw the License Application. Such arguments are illogical because they could be used to assert that no repository could ever be built or become operational. One thing is clear -- if the License Application is dismissed pursuant to DOE's Motion, Yucca Mountain and the repository program will effectively end, whereas if the Motion to Withdraw is denied, a Yucca Mountain repository can become operational if and when the rest of the steps are completed.

IV. REPLY TO THE NUCLEAR REGULATORY COMMISSION STAFF.

A reply to the NRC Staff brief can best be approached by quoting the essence of its key positions as stated in its brief, and its conclusion (portions of which are quoted next):

> As explained below, LBP-10-11 should be reversed because the Board erred in ruling that the NWPA (1) requires the NRC to make a merits based decision once an application is submitted, regardless of the circumstances, and (2) prohibits the

Commission from entertaining a motion to withdraw under 10 C.F.R. § 2.107, a regulation duly promulgated under the Atomic Energy Act (AEA). (p 8).

. . . .

The Board's ruling, however, incorrectly suggests that the Commission's duty to consider an application and reach a merits based determination is triggered once an application is submitted, without regard to the circumstances including whether an applicant wishes to pursue its docketed application.(fn omitted). (p 8).

. . . .

Nothing in the NWPA or its legislative history indicates that Congress intended that this role would include enforcing DOE's obligations under the Act. The Board states that DOE may not "derail the legislated decision-making process by withdrawing" its LA, but does not explain or identify NRC's authority to in effect enforce DOE's obligations under the NWPA, and declines to permit DOE's decision to withdraw its LA **. . .**

The Board's view would appear to require a merits based determination in all circumstances. (pp 9-10).

. . . .

The Board's rigid interpretation of NWPA § 114, however, suggests that the Commission is required to conduct a detailed technical review to reach a merits based decision on any application that is submitted to the NRC. (pp 10-11).

. . . .

If an applicant no longer wishes to pursue an application and seeks to withdraw it, the regulation governing that request (10 C.F.R. § 2.107) should be applied. (p 11).

. . . .

Significantly, however, there is nothing in the language of § 114 or the legislative history that clearly indicates that procedural rules like 10 C.F.R. § 2.107 are not to be applied. (p 12).

. . . .

The Board's logic that C.F.R. § 2.107 does not apply here, in effect, vitiates the Commission's ability to apply procedural regulations lawfully promulgated under its AEA authority. (p 13).

. . . .

Nothing in the NWPA suggests that the Commission's AEA authority to promulgate regulations should be constrained in any way. (p 14).

. . . .

If Congress intended to preclude DOE from requesting (and the NRC from considering withdrawal) it could have specified that in the NWPA. (pp 14-15).

The NRC Staff brief's conclusion (p 15) states:

> As set forth above, Commission review of LBP-10-11 is warranted because the order raises unique questions that impact the structure of the proceeding and the Commission's ability to interpret and apply its statutory obligations and regulations. LBP-10-11 should be reversed because the Board erred in Interpreting NWPA § 114 to require a merits based determination and to preclude consideration of a motion to withdraw under 10 C.F.R. § 2.107.

A primary problem with the NRC Staff's position is that it: (1) unnecessarily expresses concern regarding other potential circumstances ("in all circumstances") instead of focusing on the singular circumstance involving the License Application presented here, and (2) appears to reflect an over concern to protect the perceived general authority or independence of the NRC (and DOE) under the Atomic Energy Act (AEA), in contrast to resolving the specific matter under the NWPA in the circumstances presented here.

It is not helpful to overstate the suggestion that the Board ruled that the NWPA requires the NRC decision to make a merits-based decision once an application is submitted regardless of the circumstances (i.e. in any or all circumstances). This goes beyond the scope of the facts and legal issues here to contemplate all kinds of hypothetical or speculative circumstances. What is before the Commission here is the circumstances in this case, which in fact are unique and extraordinary, and which need not and should not be confused by all other potential circumstances. Here we are dealing with the only repository license application the Commission has ever had under the NWPA. Here we are also dealing with the situation where DOE seeks to withdraw its License application (prepared over decades at a cost of $8-10 billion), <u>not</u> based upon any stated safety concern or flaw, but based upon no real stated rationale and no deliberative process. These are the actual circumstances that are relevant, and not any others that can be fantasized.

A second problem inherent in the Staff's position is an apparent concern that the Commission should act to preserve its authority under the AEA, including its authority to promulgate and apply Commission Rules of Procedure. This concern regarding agency turf and independence should not color the Staff's position or the Commission's decision. When comparing the specific provisions of the NWPA, its objectives and purposes, its many steps and scheduled milestones for action, as contrasted with the general Commission rules such as 10 C.F.R. § 107, the specific statutory provisions and intent of Congress should not be defeated by a procedural rule. It is unnecessary to create a conflict regarding the statute and the rule when both could remain viable when looking at the specific legal context and circumstances presented here. In other words, not much harm can be caused by interpreting 10 C.F.R. § 2.107 in this case as not permitting a DOE withdrawal of its License Application because the NWPA provides under NWPA Section 114 (d), USC 10134(d), the specific mandate for a merits-based decision in this singular and extraordinary case and in the unique and uncommon circumstances presented here (a case involving a post site characterization License Application for a repository under the NWPA).

NWPA Section 114(d), 42 U.S.C. 10134(d), clearly and unequivocally sets forth a mandated review by the Commission of the License Application in the circumstances presented here:

> (d) Commission Action.--The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws application to such applications, except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of the submission of such application, except that the Commission may extend such deadline by not more than 12 months if, not less than 30 days before such deadline, the Commission complies with the reporting requirements established in subsection (e)(2).

DOE's mandated duties to undertake actions to commence disposal of SNF under the NWPA on a timely basis are made binding by the Court holdings in *Indiana Michigan and Northern States Power,* cited *supra.* The DOE Secretary does not have any discretion to suspend those duties on an "ipsi dixit" basis. Under the same principles, neither does this Commission have the power to suspend the performance of its duties under the NWPA. Yet the Staff brief erroneously suggests such a position in its brief.

Contrary to the NRC brief, the Board's decision and logic does not vitiate (or constrain) the Commission's ability to apply procedural regulations lawfully promulgated under its AEA authority. Rather, the Board has properly found that, in the unique circumstances of this singular case, and given the current step in the process (post-application phase), that the NWPA requires a merits-based final decision on the DOE's License Application. There is no need to create an artificial or exaggerated claim regarding a conflict between 10 C.F.R. § 2.107 and NWPA Section 114(d). The Commission can simply find that in this case, NWPA Section 114(d) governs. Moreover, the phrase in Section 114(d) stating that the "Commission should consider an application for a construction authorization for **. . .** a repository in accordance with the laws applicable to such application" includes the law establishing the mandates, requirements, process, and scheduled steps, as stated in the NWPA itself, including Section 114(d) itself. This law now requires a merits-based decision on DOE's License Application.

V. CONCLUSION AND RELIEF

For the reasons stated in its Initial Brief, dated July 9, 2010, and in this Reply Brief (and also in its March 15, 2010 Petition to Intervene, its May 11, 2010 Reply to Answers thereto, and its May 17, 2010 Response in Opposition to DOE's Motion to Withdraw), the PIIC respectfully requests that the Commission affirm, in its entirety, the Board's June 29, 2010 Memorandum and Order Denying DOE's Motion to Withdraw its License Application.

Respectfully submitted,

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Dated this 19th day of July, 2010

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **REPLY BRIEF OF PRAIRIE ISLAND INDIAN COMMUNITY IN RESPONSE TO INITIAL BRIEFS OF DOE, STATE OF NEVADA ET AL, AND NRC STAFF**, dated July 19, 2010, have been served upon the following persons by Electronic Information Exchange.

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