

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

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In the Matter of)	Docket No. 63-001-HLW
)	
U.S. DEPARTMENT OF ENERGY)	
)	
(License Application for Geologic)	October 7, 2010
Repository at Yucca Mountain))	
)	
)	
_____)	

**MOTION FOR A COMMISSION ORDER RESTORING THE TECHNICAL REVIEW
OF THE YUCCA MOUNTAIN LICENSE APPLICATION**

Aiken County and the states of South Carolina and Washington have petitioned to intervene in the above-captioned proceeding to oppose withdrawal of the Department of Energy’s (DOE’s) license application for the construction of the Yucca Mountain geologic repository. Petitioners argue that the license application is required to be submitted and considered by the Nuclear Regulatory Commission (NRC) pursuant to the Nuclear Waste Policy Act (NWPA). On June 29, 2010, the Atomic Safety and Licensing Board (Licensing Board) issued an order denying the DOE’s motion to withdraw its license application. The following day, on June 30, 2010, an expedited briefing schedule was set out by the NRC Secretary inviting participants in this proceeding to brief the NRC Commissioners, acting in their adjudicatory capacity (Commission), regarding whether the Commission should review the Licensing Board decision, and if so whether the Commission should uphold or reverse the Licensing Board order. The Commission has not indicated whether it will review the Licensing Board decision.

The present motion is filed by Aiken County, joined by Petitioners Washington and South Carolina, in response to published news reports that one of the five NRC Commissioners, Chairman Gregory Jaczko, has unilaterally directed NRC Staff to stop its review of DOE's Yucca Mountain license application, despite the Licensing Board's denial of DOE's motion to withdraw, which was based in part on the NRC's duty to review the license application. *See, e.g.,* Licensing Board Memorandum and Order (June 29, 2010) at 16 ("unambiguous command of Congress ...that the NRC 'shall consider' the Application"). The Chairman's unilateral decision to halt review of the license application violates NRC regulations, undermines the authority of the Commission as a whole and of other individual Commissioners, constitutes an end-run on the requirement that a quorum of Commissioners make the decisions of the Commission, and disregards pending actions in federal court challenging the lawfulness of the attempted abandonment of Yucca Mountain.

The Petitioners therefore move for an Order restoring NRC Staff's required review of the License Application, and vacating any inconsistent orders heretofore unilaterally issued by the Chairman. Furthermore, Petitioners submit that any other Commissioner can and should notify the Chairman that his directive is inconsistent with NRC regulations and previous Commission policy decisions as contemplated by the Commission's Internal Procedures. The State of Washington and the State of South Carolina join in this motion. The bases for this motion are set forth below.

- I. The Chairman of the Nuclear Regulatory Commission lacks the unilateral authority to direct NRC Staff to discontinue its technical review of the Yucca Mountain license application.**
 - A. The Chairman is not Permitted to Unilaterally Decide to Discontinue the Review of the License Application Under the Pertinent Statute; The Statute Requires the Chairman to Act in Accordance with NRC Policies**

Under the Energy Reorganization Act of 1974, the Chairman has authority in certain areas that goes beyond that of other Commissioners. *See, e.g.*, 42 U.S.C. § 5841(a)(2) (Chairman is principal executive officer for appointment and supervision of certain Commission personnel, distribution of business among those personnel, and expenditure of funds). However, the Chairman's unique powers are primarily ministerial or designed to allow him to effectuate and promote decisions made by the Commission as a whole. *See, e.g.*, 42 U.S.C. § 5841(a)(1) (Chairman presides at meetings of the Commission; is its primary spokesman; and is to "execut[e] the policies and decisions of the Commission. . . .").

However, these enhanced duties do not give the Chairman the ability to unilaterally decide an important issue that is appropriately considered by the Commission, including a decision to suspend consideration of the pending Yucca Mountain license application. The Energy Reorganization Act explicitly provides that "[e]ach member of the Commission, including the Chairman, shall have *equal responsibility and authority in all decisions* and actions of the Commission . . . and shall have one vote." 42 U.S.C. § 5841(a)(1)(emphasis added). Of course, a quorum of Commissioners is required in order to conduct NRC business. 42 U.S.C. § 5841; 10 C.F.R. § 2.4.

The Energy Reorganization Act also explicitly constrains the Chairman to act in accordance with policies of the Commission: "In carrying out any of his functions under the provisions of this section the Chairman shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make." 42 U.S.C. § 5841(a)(3). As discussed below, the normal policy of the Commission is for the Commission -- not solely the Chairman -- to direct NRC Staff, through the utilization of Staff Requirements Memoranda.

B. The Chairman's Actions Contravene Commission Policy by Directing NRC Staff to Discontinue its Review of the License Application Without the Benefit of Commission Deliberation and Issuance of a Staff Requirements Memorandum

Staff Requirements Memoranda (SRM) are the mechanism by which NRC Staff is generally directed to take action in the non-adjudicatory context. This includes action pertaining to the high-level waste repository. *See, e.g.*, Staff Requirements Memorandum SECY-97-279, Jan 13, 1998¹ (discussing transportation of high-level waste in vicinity of high-level waste repository). Furthermore, the SRM is the appropriate manner in which action currently underway by NRC Staff is suspended by the Commission. *See* Staff Requirements Memorandum SECY-07-0135, Aug. 29, 2007² (approving NRC Staff request to discontinue semi-annual status reports on fully operational High-Level Waste Meta-System). SRM's require a majority vote of the Commission.³ The Chairman's directive to NRC Staff to suspend its technical examination of the license application is a back-door method to accomplish something that appropriately requires Commission action.

II. The Chairman's Directive to the NRC Staff Was a Singlehanded Adjudication of a Vital Commission Decision.

The Chairman's directive to the NRC Staff is in fact an adjudicatory decision made without the required quorum of Commissioners. First, the directive flatly contravenes the Licensing Board decision denying DOE's motion to withdraw, which is currently poised for review by the Commission. That Licensing Board Order was based not only on DOE's duties under the NWPA, but also NRC's own duties to review the license application. *See, e.g.*,

¹ <http://www.nrc.gov/reading-rm/doc-collections/commission/srm/1997/1997-279srm.html>.

² <http://www.nrc.gov/reading-rm/doc-collections/commission/srm/2007/2007-0135srm.pdf>

³ *See* Nuclear Regulatory Commission's *Internal Commission Procedures*, <http://www.nrc.gov/aboutnrc/policy-making/internal.html>, at <http://www.nrc.gov/about-nrc/policy-making/internal.html#StaffRequirements>

Licensing Board Memorandum and Order (June 29, 2010) at 5 (“we conclude that Congress directed both that DOE file the Application (as DOE concedes) and that the NRC consider the Application and issue a final, merits-based decision approving or disapproving the construction authorization application”). The second indication that the Chairman has embarked on a lone adjudication is that the State of Nevada previously requested essentially the same relief granted by the Chairman through his actions, by way of motion to the Commission, on June 14, 2010. Nevada requested that the Commission suspend preparation of its next Yucca Mountain Safety Evaluation Report (SER), and upon granting of DOE’s motion to withdraw, “the Commission should direct its Staff to permanently cease all efforts to complete and issue all volumes of the SER.” Nevada Petition for Relief with Respect to Possible Issuance of a Partial Safety Evaluation Report for Yucca Mountain, June 14, 2010, at 3. As Nevada stated in its motion, “only the Commission is empowered to grant relief” in the form of suspending the technical review. *Id.* at 3. The Chairman’s directive to NRC Staff to end its review of the license application is a *de facto* reversal of the licensing board order, and a *de facto* grant of Nevada’s motion to suspend preparation of the Safety Evaluation Report. It is a directive that requires a decision by the Commission rather than a lone Commissioner, and the Chairman’s actions undermine the authority of the Commission as a whole and of the other individual Commissioners in particular.

Finally, the directive to the NRC Staff to halt review of the license application is too important to be decided by a single commissioner. Earlier this month, the NRC’s Office of Inspector General identified oversight of radioactive waste, and specifically the Yucca Mountain license application, as one of the “most serious management and performance challenges facing NRC.” *See* Inspector General’s Assessment of the Most Serious Management and Performance

Challenges Facing NRC, OIG-11-A- 01, Oct. 1, 2010 at 16-17. The Chairman is simply not permitted to usurp from the Commission the authority to shut down review of the license application by NRC Staff. Again, such unilateral action weakens the authority of both the Commission and other Commissioners.

III. Because the Directive to Discontinue Technical Review of the License Application Contravenes Previous Policy Decisions, an Objection by any Commissioner Should Defer Acting on the Chairman’s Directive Until the Commissioners Re-Visit the Decision

When a Commissioner believes an issued tasking memorandum is inconsistent with previous policy decisions, that Commissioner should notify the Chairman of the departure and action on the objectionable tasking should be suspended until the Commission resolves the issue by vote. According to Internal Commission Procedures:

If a Commissioner believes an issued tasking memorandum is *not consistent with previous Commission policy decisions*, he or she should notify the Chairman. The Chairman *will request the staff to defer action* only on the issue(s) in question until a majority of the Commission has resolved the question of whether the memorandum text on those issue(s) is consistent with previous Commission policy on those issue(s).⁴

Because the Chairman’s unilateral decision and directive to stop technical review of the license application contravenes NRC procedures and the Licensing Board Order, and neglects the existence of other pending federal court actions challenging the lawfulness of DOE’s attempt to abandon Yucca Mountain, the other Commissioners should invoke NRC procedures to ensure the technical review of the license application continues until such time as a majority of the NRC holds otherwise. Petitioners submit that such action can be effectuated immediately, as it does not require responsive pleadings from other participants in this proceeding.

⁴ See Nuclear Regulatory Commission’s *Internal Commission Procedures*, at <http://www.nrc.gov/about-nrc/policy-making/internal.html#Chairman> (emphasis added).

For the reasons stated above, any and all directives for the NRC Staff to discontinue its review of the license application for construction authorization of the Yucca Mountain high-level waste repository should be VACATED and technical review should be RESUMED.

Respectfully Submitted,

Signed (electronically) by
Thomas R. Gottshall
tgottshall@hsblawfirm.com

Executed in accordance with
10 C.F.R. 2.304(d) by
S. Ross Shealy, Esq.
rshealy@hsblawfirm.com

HAYNSWORTH SINKLER BOYD, P.A.
P. O. Box 11889
Columbia, SC 29211-1889
(803) 779-3080

Attorneys for Petitioner Aiken County
October 7, 2010

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CERTIFICATE OF SERVICE

I hereby certify that copies of the **MOTION FOR A COMMISSION ORDER RESTORING THE TECHNICAL REVIEW OF THE YUCCA MOUNTAIN LICENSE APPLICATION** in the above-captioned proceeding have been served on the following persons this 7th day of October, 2010, by Electronic Information Exchange.

CAB 04
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell
Atomic Safety and Licensing Board Panel U.S.
Nuclear Regulatory Commission Washington,
D.C. 20555-0001
E-mail: tsm2@nrc.gov
psr1@nrc.gov
rew@nrc.gov

Martin G. Maisch, Esq.
Egan, Fitzpatrick & Maisch, PLLC
1750 K Street, N.W. Suite 350
Washington, D.C. 20006
E-mail: mmalsch@nuclearlawyer.com

Office of the Secretary
ATTN: Docketing and Service Mail Stop: 0-
16C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
E-mail: HEARINGDOCKET@nrc.gov

Brian W. Hembacher, Esq.
Deputy Attorney General
California Attorney General's Office 300 South
Spring Street
Los Angeles, CA 90013
E-mail: brian.hembacher@doLca.gov

Office of Commission Appellate Adjudication
ocaamail@nrc.gov

Timothy E. Sullivan, Esq.
Deputy Attorney General California Department of
Justice 1515 Clay Street., 20th Fir.
P.O. Box 70550
Oakland, CA 94612-0550
E-mail: timothy.sullivan@doLca.gov

Charles J. Fitzpatrick, Esq.
John W. Lawrence, Esq.
Egan, Fitzpatrick, Maisch & Lawrence PLLC
12500 San Pedro Avenue, Suite 555
San Antonio, TX 78216
E-mail: cfitzpatrick@nuclearlawyer.com
jlawrence@nuclearlawyer.com

Bryce C. Loveland
Jennings Strouss & Salmon, PLC
8330 W. Sahara Avenue, Suite 290
Las Vegas, NV 89117-8949
E-mail: bloveland@jsslaw.com

Alan I. Robbins, Esq.
Debra D. Roby, Esq.
Jennings Strouss & Salmon, PLC
1350 I Street, NW Suite 810
Washington, D.C. 20005-3305
E-mail: arobbins@jsslaw.com
drobv@jsslaw.com

Donald J. Silverman, Esq.
Thomas A. Schmutz, Esq.
Thomas C. Poindexter, Esq.
Paul J. Zaffuts, Esq.
Alex S. Polonsky, Esq.
Lewis Csedrik, Esq.
Raphael P. Kuyler, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
E-mail: dsilverman@morganlewis.com
tschmutz@morganlewis.com
tpoindexter@morganlewis.com
pzaffuts@morganlewis.com
apolonsky@morganlewis.com
lcsedrik@morganlewis.com
rkuyler@morganlewis.com

Kevin W. Bell, Esq.
Senior Staff Counsel California Energy Commission
1516 9th Street
Sacramento, CA 95814
E-mail: kwbell@energy.state.ca.us

Martha S. Crosland, Esq.
Angela M. Kordyak, Esq.
Nicholas P. DiNunzio
James Bennett McRae, Esq.
U.S. Department of Energy
Office of the General Counsel
1000 Independence Avenue, S.W.
Washington, DC 20585
E-mail: martha.crosland@hq.doe.gov
angela.kordyak@hq.doe.gov
nick.dinunzio@rw.doe.gov
ben.mcrae@hq.doe.gov

George W. Hellstrom
U.S. Department of Energy
Office of General Counsel
1551 Hillshire Drive
Las Vegas, NV 89134-6321
E-Mail: george.hellstrom@ymp.gov

Jeffrey D. VanNiel, Esq.
530 Farrington Court
Las Vegas, NV 89123
E-mail: nbrjdv@gmail.com

Malachy R. Murphy, Esq.
18160 Cottonwood Rd. #265
Sunriver, OR 97707
E-mail: mrmurphy@chamberscable.com

Susan L. Durbin, Esq.
Deputy Attorney General
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
E-mail: susan.durbin@doj.ca.gov

Robert M. Andersen
Akerman Senterfitt
801 Pennsylvania Avenue N.W., Suite 600
Washington, DC 20004 USA
E-mail: robert.andersen@akerman.com

Frank A. Putzu
Naval Sea Systems Command Nuclear Propulsion
Program
1333 Isaac Hull Avenue, S.E.
Washington Navy Yard, Building 197
Washington, DC 20376
E-mail: frank.putzu@nav.mil

Shane Thin Elk
Fredericks Peebles & Morgan, LLP 3610 North
163rd Plaza
Omaha, Nebraska 68116
E-mail: sthinelk@ndnlaw.com

John M. Peebles
Darcie L. Houck
Fredericks Peebles & Morgan LLP
1001 Second Street
Sacramento, CA 95814
E-mail: jpeebles@ndnlaw.com
dhouck@ndnlaw.com

Ellen C. Ginsberg
Michael A. Bauser
Anne W. Cottingham
Nuclear Energy Institute, Inc.
1776 I Street, N.W., Suite 400
Washington, D.C. 20006
E-mail: eca@nei.org
mab@nei.org
awc@nei.org

Steven A. Heinzen
Douglas M. Poland
Hannah L. Renfro
Godfrey & Kahn, S.C.
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
E-mail: sheinzen@aklaw.com
dpoland@gklaw.com
hrenfro@gklaw.com

David A. Repka
William A. Horin
Rachel Miras-Wilson
Winston & Strawn LLP
1700 K Street N.W. Washington, D.C. 20006
E-mail: drepka@winston.com
whorin@winston.com
rwilson@winston.com

Robert F. List, Esq.
Jennifer A. Gores, Esq.
Armstrong Teasdale LLP
1975 Village Center Circle, Suite 140
Las Vegas, NV 89134-6237
E-mail: rlist@armstrongteasdale.com
iaores@armstronateasdale.com

Jay E. Silberg Timothy JV Walsh
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037-1122
E-mail: iav.silberg@pilisburvlaw.com
timothy.walsh@pilisburvlaw.com

Diane Curran
Harmon, Curran, Spielberg, & Eisenberg, L.L.P.
1726 M Street N.W., Suite 600
Washington, D.C. 20036
E-mail: dcurran@harmoncurran.com

Gregory L. James
710 Autumn Leaves Circle
Bishop, California 93514
Email: aliamex@earthlink.net

Arthur J. Harrington
Godfrey & Kahn, S.C.
780 N. Water Street Milwaukee, WI 53202
E-mail: aharring@gklaw.com

Curtis G. Berkey
Scott W. Williams
Rovianne A. Leigh
Alexander, Berkey, Williams, & Weathers LLP
2030 Addison Street, Suite 410
Berkley, CA 94704
E-mail: cberkev@abwwlaw.com
swilliams@abwwlaw.com
rleigh@abwwlaw.com

Bret O. Whipple
1100 South Tenth Street
Las Vegas, Nevada 89104
E-mail: bretwhipple@nomademail.com

Bret O. Whipple
1100 South Tenth Street
Las Vegas, Nevada 89104
E-mail: bretwhipple@nomademail.com

Gregory Barlow
P.O. Box 60
Pioche, Nevada 89043
E-mail: lcda@lcturbonet.com

Ian Zabarte, Board Member
Native Community Action Council
P.O. Box 140
Baker, NV 89311
E-mail: mrizabarte@gmail.com

Richard Sears
District Attorney No. 5489
White Pine County District Attorney's Office 801
Clark Street, Suite 3
Ely, NV 89301
E-mail: rwsears@wpcda.org

Donald P. Irwin
Michael R. Shebelskie
Kelly L. Faglioni
Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074
E-mail: dirwin@hunton.com
msherbelskie@hunton.com
kfaglioni@hunton.com

Dr. Mike Baughman
Intertech Services Corporation
P.O. Box 2008
Carson City, Nevada 89702
E-mail: bigoff@aol.com

Michael Berger
Robert S. Hanna
Attorney for the County of Inyo
233 East Carrillo Street Suite B
Santa Barbara, California 93101
E-mail: mberger@bsglaw.net
rshanna@bsalaw.net

Don L. Keskey, Esq.
Public Law Resource Center PLLC
505 N. Capitol Avenue
Lansing, MI 48933
E-mail: donkeskey@publiclawresourcenter.com

Michael L. Dunning
Andrew A. Fitz
H. Lee Overton
Jonathan C. Thompson
State of Washington
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
E-mail: MichaelD@atg.wa.gov
AndyF@atg.wa.gov
Lee01@atg.wa.gov
JonaT@atg.wa.gov

Kenneth P. Woodington
Davidson & Lindemann, PA
1611 Devonshire Drive
P.O. Box 8568
Columbia, SC 29202
E-mail: kwoodington@dml-law.com

Connie Simkins
P.O. Box 1068
Caliente, Nevada 89008
E-mail: icciac@co.lincoln.nv.us

James Bradford Ramsay, Esq.
National Association of Regulatory Utility
Commissioners
1101 Vermont Avenue NW, Suite 200
Washington, DC 20005
E-mail: iramsav@naruc.org

Philip R. Mahowald
General Counsel
Prairie Island Indian Community
5636 Sturgeon Lake Road
Welch, MN 55089
E-mail: pmahowald@piic.org

Respectfully submitted,

Signed (electronically) by
Thomas R. Gottshall
HAYNSWORTH SINKLER BOYD, P.A.
tgottshall@hsblawfirm.com
P. O. Box 11889
Columbia, SC 29211-1889
(803) 779-3080
Attorneys for Petitioner Aiken County

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