

October 18, 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))

NRC STAFF ANSWER TO MOTION FOR AN ORDER RESTORING
TECHNICAL REVIEW OF THE YUCCA MOUNTAIN LICENSE APPLICATION

INTRODUCTION

The staff of the U.S. Nuclear Regulatory Commission (Staff) files this answer in response to the “Motion for a Commission Order Restoring the Technical Review of the Yucca Mountain License Application,” dated October 7, 2010 (Motion) filed by Aiken County, South Carolina, and joined in by the States of Washington and South Carolina (Movants). Movants seek an order directing the Staff to resume its review of the Department of Energy (DOE) license application (LA) and vacating any orders issued to the staff to discontinue its review. *Id.* at 2 and 7. For the reasons discussed below, the Motion should be denied.

BACKGROUND

On May 11, 2009, Construction Authorization Boards granted intervention petitions regarding the June 3, 2008, DOE LA that seeks authorization to construct a permanent

high-level waste repository at Yucca Mountain, Nevada. After commencement of discovery on Phase I Legal issues,¹ DOE filed a motion to withdraw its LA with prejudice. U.S. Department of Energy's Motion to Withdraw, dated March 3, 2010 (Withdrawal Motion).

On June 14, 2010, Nevada filed a petition with the Commission seeking suspension of the Staff's work on the Yucca Mountain Safety Evaluation Report (SER) until the Commission issues a final decision on DOE's Withdrawal Motion. State of Nevada Petition for Relief with Respect to Possible Issuance of a Partial Safety Evaluation Report for Yucca Mountain, dated June 14, 2010 (Nevada SER Petition), at 3, 11. Nevada's SER Petition is currently pending before the Commission.

On June 29, 2009, Construction Authorization Board 04 issued a decision that held that DOE could not withdraw the LA with prejudice. *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-10-11, 71 NRC ____ (June 29, 2010).² Petitions for review of the Board's decision are currently pending before the Commission.³ On October 7, 2010, the Movants filed the instant Motion.

¹ Phase I discovery includes all safety, environmental and legal contentions related to the subject matter reviewed in Safety Evaluation Report (SER) Volume 1 (Review of General Information) and SER Volume 3 (Review of Repository Safety After Permanent Closure), and began with initial witness disclosures, which were made on or before October 10, 2009. See CAB Case Management Order #2, dated September 30, 2009 (unpublished), at 3, 5.

² This decision was issued after the Commission ordered the Board to rule on the DOE Withdrawal Motion, without awaiting a ruling on related matters in Federal Court. *U.S. Dept. of Energy*, (High-Level Waste Repository), CLI-10-13, 71 NRC ____ (Apr. 23, 2010).

³ See, e.g., 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; 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; NRC Staff Brief in Response to the Secretary of the Commission's June 30, 2010 Order, dated July 9, 2010.

DISCUSSION

The Movants state that the filing is “in response to published news reports” that the Commission Chairman “unilaterally” directed the Staff to stop its technical review of the LA. Motion at 2. First, Movants argue that the Chairman lacks authority to unilaterally direct the Staff to discontinue its technical review of the Yucca Mountain LA – a direction that does not effectuate decisions made by the Commission as a whole. See Motion at 2-4. Second, Movants claim that the Chairman’s “direction” to the Staff constitutes a unilateral adjudication of the Nevada SER Petition and LBP-10-11, *supra*. Motion at 4-6. The Motion should be denied because it erroneously presumes that “unilateral” guidance from the Chairman has been provided which is inconsistent with Commission policy, contravenes the Board’s decision, and grants the Nevada SER Petition.

On October 4, 2010, the NRC Executive Director for Operations and Chief Financial Officer jointly directed the Staff to “continue its activities on the Yucca Mountain license application in accordance with the Commission’s decisions on the FY 2011 budget using available Nuclear Waste Fund resources during the period of the Continuing Resolution (CR).” Memorandum from J. E. Dyer, Chief Financial Officer, and R.W. Borchardt, EDO, to Office Directors and Regional Administrators, Guidance Under a Fiscal Year 2011 Continuing Resolution, dated October 4, 2010 (ML102770484).

The Commission’s proposed FY 2011 budget, issued in early 2010, noted that DOE may file a motion to withdraw its Yucca Mountain license application, the licensing review could be suspended, identified resources (ten million dollars) associated with “orderly closure” of the technical review, and the NRC’s intent “to document the work and insights gained from the review.” See NUREG-1100, Volume 26, Congressional Budget Justification for FY 2011 at 94 (Feb. 2010) (ML100490733). “This would involve archiving material, completion of some technical work, knowledge capture and management, and maintenance of certain electronic

systems to support these efforts.” *Id.* at 95. Clearly, the prospective actions delineated in the Commission’s budget submittal were made by the Commission as a whole. Thus, the Staff has not been directed to take actions that are inconsistent with this Commission guidance.⁴

Congress has not as yet acted on the NRC’s Fiscal Year 2011 appropriation, and the Commission is currently operating under a Continuing Resolution (CR) that expires on December 3, 2010. See Section 106 of Pub. L. 111-242, 124 Stat. 2607 (Sept. 30, 2010). As a baseline for its activities when operating under continuing resolutions in the past, the NRC typically relies on funding anticipated in the upcoming fiscal year. There is nothing in the Commission FY 2011 budget or the continuing resolution that prevents NRC senior management from exercising discretion in expending limited Nuclear Waste Funds in a manner that meets current and anticipated funding needs. In fact, Congress has cautioned Federal agencies to act prudently in expending funds when operating under a Continuing Resolution. Pub. L. 111-242, section 110 (“This Act shall be implemented so that only the most limited funding action of that permitted in the Act shall be taken in order to provide for continuation of projects and activities.”).⁵ Further, a direction to “continue . . . activities on the Yucca Mountain license application in accordance with the Commission’s decisions on the FY 2011 budget,” and

⁴ Commissioner Ostendorff has expressed his views on the matter in two documents. See COMWCO-10-0002-Redacted, Commission Direction on Staff Budget Guidance under Fiscal Year (FY) 2011 Continuing Resolution, dated October 6, 2010 (ML102871228); Memorandum from Commissioner Ostendorff to Chairman Jaczko, Commissioners Svinicki, Apostolakis and Magwood, Disagreement with Staff Budget Guidance Under Fiscal Year 2011 Continuing Resolution, dated October 8, 2010 (attached). Commissioner Svinicki’s views are reflected in “Commissioner Svinicki’s Comments on COMWCO-10-0002, Commission Direction on Staff Budget Guidance under Fiscal Year 2011 Continuing Resolution,” dated October 14, 2010 (ML102871233).

⁵ See *also* Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-11, Preparation, Submission, and Execution of the Budget, § 123 (2010) (“Note that you may not obligate funds under the CR that would impinge on final funding prerogatives of Congress. CRs usually include provisions directing agencies to execute programs using the most limited funding actions permitted in order to provide for continuing projects and activities.”).

to document work and insights gained in reviewing the Yucca Mountain LA will not preclude completion of an SER should Congress or the courts later direct continuation of the Yucca Mountain licensing process.

With respect to Movants' claims that the Chairman's action contravenes the Board's decision in LBP-10-11, *supra*, or is a unilateral adjudication of the Nevada SER Petition, the Movants' assertions are also unfounded. See Motion at 2-6. There is nothing in the Board's decision that prevents NRC senior management from exercising discretion in expending limited Nuclear Waste Funds consistent with the NRC's FY 2011 budget proposal. See *Duke Energy Corp.* (Catawba Nuclear Station Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004) ("...licensing boards do not. . .supervise or direct NRC Staff regulatory reviews."). In addition, the Staff has not been directed to take actions that are inconsistent with the Commission's budget proposal. Nor is there anything that constitutes a unilateral adjudication of the Nevada SER Petition. The NRC's FY 2011 budget proposal reflects Commission policy prior to the submission of Nevada's SER Petition and the direction to continue to document license application activities is consistent with the proposed budget. Further, commencement of actions that are consistent with orderly closure (i.e., documentation of technical activities regarding the LA) would not preclude or otherwise interfere with either the Commission's ability to decide petitions for review of LBP-10-11 or the Nevada SER Petition. Accordingly, the Motion should be denied.

CONCLUSION

The Motion should be denied because the grounds asserted to support the Motion are erroneous and therefore, there is no basis to grant the relief requested.

Respectfully submitted,

/signed (electronically) by/

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Dated at Rockville, Maryland
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UNITED STATES
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001

October 8, 2010

OFFICE OF THE
COMMISSIONER

MEMORANDUM TO: Chairman Jaczko
Commissioner Svinicki
Commissioner Apostolakis
Commissioner Magwood

FROM: Commissioner Ostendorff *W. Ostendorff*

SUBJECT: DISAGREEMENT WITH STAFF BUDGET GUIDANCE UNDER
FISCAL YEAR 2011 CONTINUING RESOLUTION

The purpose of this memorandum is to record my disagreement with guidance given to the NRC Staff related to the fiscal year 2011 Continuing Resolution (CR). The contents of this memorandum are consistent with a memorandum to file I signed on October 6, 2010.

On October 4, 2010, the EDO and CFO issued a memorandum to the Staff providing direction on the fiscal year 2011 Continuing Resolution. This memorandum stated that "[w]ith respect to the High-Level Waste Program, the CR legislation does not include specific restrictions on spending funds. Therefore, the staff should continue its activities on the Yucca Mountain license application in accordance with the Commission's decisions on the fiscal year 2011 budget request using available Nuclear Waste Fund resources during the CR." On October 6, 2010, I issued COMWCO-10-0002 for the Commission's consideration to provide specific direction to the staff with respect to this guidance, but I wanted to write separately to express my strong personal disagreement with the direction given to the Staff by this guidance.

I believe it is inconsistent with the intent of the Continuing Resolution to direct the Staff to follow direction in the budget request for fiscal year 2011. My conclusion comes not only from a plain reading of the Continuing Resolution and applicable guidance, but also from my past experience as Principal Deputy Administrator at NNSA and as counsel for the House Armed Services Committee. With respect to the fiscal year 2011 Continuing Resolution, Section 101 expressly provides that the funds to be appropriated are those "as provided in the applicable appropriations Act for fiscal year 2010 and under the authority and conditions provided in such Acts, for continuing projects or activities ... that are not otherwise specifically provided for in this Act..." (emphasis added). Absent any express exception in the Continuing Resolution, the NRC is obligated to follow its fiscal year 2010 budget ... including any Commission direction contained in that budget. The Continuing Resolution does not specifically provide for the NRC to follow its yet-to-be-approved fiscal year 2011 budget request, nor does it even specifically mention the NRC or the High-Level Waste repository review. Thus, under the express language of the Continuing Resolution, special treatment for this activity is "not otherwise specifically provided for." A basic canon of statutory construction is *expressio unius est exclusio alterius*: the express mention of one thing excludes all others. Congress expressly outlined all of the exceptions to the general rule in Section 101 that agencies should follow their fiscal year 2010 budgets, and the NRC's High-Level Waste Program is not one of those exceptions, therefore

making the fiscal year 2010 budget direction operable.

Further, Section 104 of the Continuing Resolution states that "except as otherwise provided in Section 102, no appropriation or funds made available or authority granted pursuant to section 101 shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2010." This prohibition reinforces the view that the NRC is to stay the course with respect to how it was undertaking projects or activities during the Continuing Resolution. The Commission's fiscal year 2010 budget specifies that fiscal year 2010 funds will be used to "support the ongoing license review by funding the NRC staff conducting technical license application review activities..." I strongly object to using funds during the Continuing Resolution for a reason inconsistent with this stated purpose, such as "orderly closure" of the licensing review. Commencing orderly closure is not, in my opinion, "conducting technical license application review activities," and therefore is entirely inconsistent with the intent of the Continuing Resolution.

In addition to a plain reading of the Continuing Resolution, this view is also supported by guidance from the Office of Management and Budget (OMB). Section 123 of OMB Circular A-11, for example, states that normally, "the continuing resolution limit[s] the purposes for which funds may be obligated." Circular A-11 goes on to explain that "[a] CR makes amounts available subject to the same terms and conditions specified in the enacted appropriations acts from the prior fiscal year.... Normally, you are not permitted to start new projects or activities." (emphasis in original). Therefore, it is my opinion that under the Continuing Resolution the staff should continue to follow the Commission's direction in the fiscal year 2010 budget as authorized and appropriated by Congress, rather than change course as suggested in the Continuing Resolution guidance memorandum.

The relevance of the fiscal year 2011 budget request is limited to determining the rate at which the programs and activities are to be funded during the Continuing Resolution, not to determine that the programs and activities should be conducted in accordance with direction that is contained in the fiscal year 2011 budget request. To the extent that budget direction in the fiscal year 2011 budget request should be followed (a position I do not agree with), the conditions in that budget request that would authorize "orderly closure" have not been met. The fiscal year 2011 budget request clearly states that such closure would not begin until "withdrawal or suspension of the licensing review..." Since the issue of whether the application may be withdrawn is currently before the Commission and a final decision has not been rendered, that condition clearly has not been met.

cc: EDO
CFO
OGC
SECY
OCAA

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO MOTION FOR AN ORDER RESTORING TECHNICAL REVIEW OF THE YUCCA MOUNTAIN LICENSE APPLICATION" in the above-captioned proceeding have been served on the following persons this 18th day of October, 2010, by Electronic Information Exchange.

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