

March 4, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)

Docket No. 63-001-HLW)

U.S. DEPARTMENT OF ENERGY)

ASLBP No. 09-892-HLW-CAB04)

(High Level Waste Repository))

**U.S. DEPARTMENT OF ENERGY'S MOTION TO
RENEW TEMPORARY SUSPENSION OF PROCEEDING**

Request for Relief

The United States Department of Energy (DOE) respectfully requests that the Commission hold this proceeding in abeyance through May 20, 2011. Both temporary and limited, the requested suspension would be without prejudice to any party's right to move to lift the suspension prior to that date if it believes changed circumstances warrant that relief. It would be without prejudice to any party's right to oppose an extension of the suspension past May 20. And it would not apply to the parties' continuing obligation to make their documentary material available on the Licensing Support Network (LSN) or to the Commission's consideration of the pending requests for review of LBP-10-11. DOE requested identical relief from the Construction Authorization Board (CAB) on January 21; the CAB denied its request last Friday, February 25.

The Commission should exercise its inherent authority to suspend this proceeding because of the significant budgetary, legal, and legislative uncertainties overshadowing this matter. Abeyance would preserve what has been, effectively, the status quo for the past year, and there is no pressing need to go forward now. To the contrary, resuming discovery in the face of those uncertainties would be impractical, counterproductive, wasteful, and counter to the

public interest. Simply put, going forward at this point risks an on-again, off-again proceeding that would involve the expenditure of substantial resources for potentially no purpose. Yo-yoing back and forth in that manner is not necessary and is contrary to sound policy. The modest suspension DOE requests would help avoid those adverse consequences and allow time for the uncertainties to be resolved, or at least narrowed.

Importantly, the requested suspension is the prudent and sensible course of action regardless of one's views on the proper disposition of DOE's motion to withdraw its License Application. However the Commission or the courts ultimately resolve that issue, it makes little sense to resume discovery until the parties know whether this proceeding will move forward. At the same time, it makes a great deal of sense to await resolution of the present budgetary uncertainty so the parties will know whether there will be appropriations for this proceeding going forward.

Mindful of NRC practice that allows parties to seek stays before either the Commission or a licensing board, but not both simultaneously, *cf.* 10 C.F.R. § 2.342, DOE first sought this relief before the CAB.¹ DOE did so as a prudential matter in response to the CAB's *sua sponte* order of December 8, 2010, which asked the parties for a status report on discovery and appeared to indicate the CAB's desire for resumption of active discovery.² The CAB denied that relief in an order issued on February 25, 2011.³

¹ DOE's Motion to Renew Temporary Suspension of the Proceeding (filed Jan. 21, 2011). A copy of this motion is attached hereto as Exhibit A and incorporated herein.

² Order (Addressing Nevada's Motion and Discovery Status) (Dec. 8, 2010).

³ Memorandum and Order (Denying Motion to Renew Temporary Suspension of the Proceeding) (Feb. 25, 2011) ["Memorandum and Order"].

As DOE explained in its motion to the CAB, this proceeding has been on hold for the past year. The CAB suspended it starting in February 2010, when DOE announced its intent to move to withdraw its license application⁴ and then again during the pendency of the CAB's consideration of DOE's motion.⁵ While that latter stay technically expired last June 29 when the CAB denied DOE's withdrawal motion, the parties have uniformly acted as though it remained in effect. No party has taken or noticed depositions, nor has any party conducted other discovery since then (other than supplementing and maintaining the availability of their documentary material on the LSN). These facts reflect an apparent consensus that it makes no sense to restart discovery given the uncertainties surrounding this matter.

Before the CAB, the vast majority of intervenors – including the Nuclear Energy Institute (NEI) and other parties that opposed DOE's motion to withdraw – either affirmatively supported (as was the case with NEI) or did not object to DOE's stay motion. The only two exceptions were Aiken County, South Carolina and Nye County, Nevada, neither of which had any admitted contentions at issue in the current phase of this proceeding.⁶ In contrast, the State of Nevada, Clark County, White Pine County, Inyo County, Joint Timbisha Tribe, NEI, which together have 187 contentions at issue in the current phase of the proceeding and thus are the intervenors that would bear the burden of discovery, either supported or did not oppose the stay.

⁴ Order (Granting Stay of Proceeding) (Feb. 16, 2010) ["Initial Stay Order"].

⁵ Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) (Apr. 6, 2010) ["Suspension Order"].

⁶ The CAB admitted Aiken County to this proceeding for the sole purpose of opposing DOE's motion to withdraw. LBP-10-11, 71 N.R.C. ___, Memorandum and Order (Granting Intervention to Petitioners and Denying Withdrawal Motion) (Jun. 29, 2010). The list of admitted contentions and their sponsors for Phase 1 of the discovery period is located at CAB Case Management Order #2 (Sept. 30, 2009), Appendix at 1-4.

DOE has again consulted with the parties to this proceeding. As before, Aiken and Nye Counties are the only intervenors who stated they opposed this motion. The other intervenors who responded either reaffirmed their previous positions or stated that they took no position and reserved their right to respond.

Grounds for Motion

The Commission should follow its sound precedent and exercise its inherent authority to suspend this proceeding.⁷ The circumstances for abeyance are compelling. Wholly apart from the outcome of DOE's pending withdrawal motion, discovery should not go forward in the face of the multi-faceted uncertainties that surround this proceeding. Significant public and private resources would be wasted if discovery and related proceedings were resumed now, only to find that the NRC and DOE are deprived of funding to continue.

Moreover, there are no countervailing factors that compel the proceeding to go forward immediately. There is no imperative for discovery. There is no hearing date. There is no looming discovery deadline. No party will be prejudiced by the requested suspension.

In sum, the public interest favors an orderly proceeding. That is not feasible under present circumstances. A suspension will provide time for those circumstances to clarify, to avoid this proceeding from becoming a wasteful on-again, off-again affair.

⁷ See *EnergySolutions* (Radioactive Waste Import Export Licenses), CLI-08-24, 68 N.R.C. 491, 495 (2008) (holding proceeding in abeyance because "it would be inefficient to devote further adjudicatory (and NRC Staff) resources to this proceeding now."); see also, e.g., *Bledsoe v. Crowley*, 849 F.2d 639, 645 (D.C. Cir. 1988) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."), citing *Landis v. North American Co.*, 299 U.S. 248, 254 (1936).

On the budgetary front, the Administration's budget requests for FY2011 and FY2012 seek no funding for the Yucca Mountain project or to support this licensing proceeding.⁸ In accordance with the Administration's FY2011 budget request, DOE's Office of Civilian Radioactive Waste Management, which had responsibility for the Yucca Mountain project, ceased operations in September 2010. An active licensing proceeding would thus require DOE to, among other things, re-hire employees, enter into new contracts, and re-create capabilities, especially for the level of discovery contemplated when the proceeding was suspended last year. The Commission and Staff would likely need to expend funds to support an active proceeding. None of that makes sense given the current potential that the proceeding will not ultimately move forward.

On the legal front, the Commission is considering the requests by several parties to review the CAB's denial of DOE's withdrawal motion.⁹ Simultaneously, the United States Court of Appeals for the District of Columbia is considering related petitions by several other parties.¹⁰ Oral argument on those petitions is scheduled for March 22, 2011. These reviews could affect this proceeding in fundamental ways, including termination of the proceeding, which would render meaningless and wasteful any discovery that occurs in the meantime.

⁸ Budget of the U.S. Government, Fiscal Year 2011, Terminations, Reductions, and Savings at 62 (available at <http://www.whitehouse.gov/omb/budget/fy2011/assets/trs.pdf>); NUREG-1100, Vol. 26, Congressional Budget Justification for FY2011 at 56 (Feb. 2010) (indicating the NRC commencement of "orderly closure of the technical review and adjudicatory activities."); DOE FY 2012 Congressional Budget Request, Nuclear Energy, Defense Nuclear Waste Disposal, Nuclear Waste Disposal, Repository Program, at p. 147 (available at: <http://www.mbe.doe.gov/budget/12budget/index12.html#Detailed%20Budget%20Justifications>).

⁹ Those parties are DOE; Nevada; Joint Shoshone Tribal Group, NCAC; Clark County; State of California; and NRC Staff.

¹⁰ Those parties are States of Washington and South Carolina, Aiken County, South Carolina, and NARUC..

On the legislative front, Congress has authorized and funded a Blue Ribbon Commission to consider alternatives to Yucca Mountain. The Blue Ribbon Commission must provide draft recommendations by this July and a final set of recommendations six months later. These recommendations may well lead to the pursuit of alternative ways for disposal of high-level waste and spent nuclear fuel, which would also affect this proceeding. A number of parties have recognized that this proceeding should be suspended as a result. As NEI stated last year, when it then proposed suspension of this proceeding as an alternative to the dismissal being sought by DOE: “the NRC clearly cannot ignore the fact that the Administration and DOE have decided, and Congress has funded, a re-evaluation of the technical and policy issues previously addressed in the NWPA” through the creation of the Blue Ribbon Commission.¹¹ NEI accordingly advocated that “*the NRC should simply continue to suspend this proceeding ... pending legislative action on the appropriations or other legislative developments impacting the requirements of the NWPA or YMDA. ... The best course of action for the NRC is to suspend this proceeding while the policy direction is fully ventilated and resolved by Congress.*”¹²

Similarly, Nye County, although it opposes DOE’s current request, previously urged suspension “pending further Congressional review” as an alternative to withdrawal of the license application.¹³ According to Nye County, it would be “untenable” to continue with a proceeding in which “the best efforts of DOE would not be able to overcome the inherent conflict of interest of defending an LA that its own Administration seeks to bury.”¹⁴

¹¹ Opposition of NEI to DOE’s Mot. to Withdrawal at 6-7 (May 17, 2010).

¹² *Id.* at 7-8 (emphasis added).

¹³ Nye County Resp. in Opp. to DOE’s Mot. to Withdraw with Prejudice Its License Application for the Yucca Mountain Repository at 22-23 (May 17, 2010).

¹⁴ *Id.*

Substantial prior Commission precedent, most prominently the five-year suspension of the Clinch River breeder reactor proceeding from 1977 to 1982, supports a suspension of proceedings in these circumstances. As in those cases, the prudent course here is to abate this proceeding while these pressing uncertainties remain unresolved.¹⁵

Notwithstanding that precedent (cited to, but not addressed by, the CAB), the CAB denied DOE's suspension motion and admonished that the parties that they forgo discovery "at their own risk."¹⁶ The CAB's order does so even while conceding that "continuation of the Yucca Mountain project remains subject to congressional funding and the possibility that our ruling might be reversed on appeal."¹⁷ The order further acknowledges that there is currently "no hearing date" that would require going forward with discovery in the present circumstances.¹⁸ Finally, and importantly, the CAB concedes that "the parties face difficult choices" absent a stay of discovery and that "common sense may counsel careful allocation of resources."¹⁹ Nevertheless, the CAB denied the motion and additionally stated that it "intends to

¹⁵ See *U.S. Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant)*, LBP-85-7, 21 N.R.C. 507, 509-10 (1985); *U.S. Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant)*, LBP-84-4, 19 N.R.C. 288, 291-98 (1984) (summarizing case history); see also, e.g., *EnergySolutions*, CLI-08-24, 68 N.R.C. 491 (2008) (placing in abeyance a proceeding regarding the import of low-level waste generated outside of the United States until a federal court resolved whether the applicant could do so under the Northwest Interstate Compact); *CBS Corporation (Waltz Mill Facility)*, CLI-07-15, 65 N.R.C. 221 (2007) (hearing request placed in abeyance when issues might be mooted by ongoing arbitration or independent review of a related decommissioning plan).

¹⁶ Memorandum and Order at 3.

¹⁷ *Id.* at 2.

¹⁸ *Id.*

¹⁹ *Id.* at 3.

move this proceeding forward as expeditiously as circumstances permit” once Volume 3 of the Safety Evaluation Report is made available.²⁰

The CAB’s result is inconsistent with law and the practical realities. A temporary suspension of the proceeding will avoid large and potentially wasteful expenditures of scarce resources on the part of both the Commission and the parties during a period when actions may occur that will relieve or narrow current uncertainties. Indeed, the CAB never identified any countervailing factor that counseled for continuing discovery in the current circumstance despite the difficulties the CAB conceded that would create.

Further, contrary to the CAB’s conclusion, “irreparable harm” is not a necessary predicate for a suspension in these circumstances.²¹ Other proceedings have been suspended without any finding of irreparable harm from their continuation. “Irreparable injury” is one of the four standard factors under 10 C.F.R. § 2.342 used in considering whether to stay the effect of a specific order pending appeal. DOE does not seek to stay an erroneous order pending appeal. It seeks to formalize a *de facto* suspension of the proceeding because of the pervasive uncertainties that make active continuation unduly wasteful and detrimental to the public interest. The Commission’s authority to order such relief -- and the considerations the Commission should weigh in exercising that authority -- are more wide-ranging and flexible than the narrow question of a stay pending appeal.²²

²⁰ *Id.*

²¹ *Id.* at 2.

²² *E.g., Landis*, 299 U.S. at 254-55. In *Landis*, the United States Supreme Court said that “the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Id.* (citations omitted). Continuing, the Court stated that “[e]specially in cases of extraordinary public moment, the individual may be

Conclusion

The Commission should temporarily suspend the proceeding. A suspension will afford an opportunity for resolution of the budgetary, legal and legislative uncertainties that surround the proceeding. The suspension will not prejudice the parties, and it would avoid the significant waste that would result if the parties ramp up for discovery only to find that the proceeding will not go forward.

Certificate of Compliance with 10 C.F.R. § 2.323(b)

DOE informed the other parties to this proceeding that it intended to seek from the Commission the same relief it sought from the CAB, and provided the opportunity to meet and confer with respect to the relief sought by its motion. DOE stated that that it would assume, unless informed otherwise, that the views of the parties with respect to its January 21 motion remained unchanged. DOE also stated that the support, or absence of a position, of any party with respect to its requested relief should not be taken as an indication of that party's views with respect to specific arguments advanced by DOE. On the basis of responses received to its meet-and-confer invitation, DOE understands that Aiken and Nye Counties remain the only parties expressing opposition to a stay. The specific views of the responding parties conveyed to DOE, and their views on DOE's January 21 stay motion, are as follows:

Party	Position (January 21 Stay Request to CAB)	Position (March 4 Stay Request to Commission)
Aiken County	Oppose	No change
California	No position	No position, reserves right to file response
Clark County	Do not oppose	No position, reserves right to file response
Inyo County	Do not oppose	No position, reserves right to file response
Joint Timbisha Shoshone	Do not oppose	No change

required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.” *Id.* at 256.

Party	Position (January 21 Stay Request to CAB)	Position (March 4 Stay Request to Commission)
NCAC	Do not oppose	No change
NEI	Support	No position, reserves right to file response
Nevada	Do not oppose	No position, reserves right to file response
NRC Staff	Do not oppose	Do not oppose
Nye County	Oppose (via Aiken)	No change
Prairie Island Indian Community	No position	No position, reserves the right to file response
South Carolina	No position	No change
White Pine	No position	No change

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

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NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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)	March 4, 2011
U.S. DEPARTMENT OF ENERGY)	
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Construction Authorization Application))	

CERTIFICATE OF SERVICE

I hereby certify that copies of **U.S. DEPARTMENT OF ENERGY'S MOTION TO RENEW TEMPORARY SUSPENSION OF PROCEEDING** have been served on the following persons on this 4th day of March 2011 through the Nuclear Regulatory Commission's Electronic Information Exchange.

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**U.S. DEPARTMENT OF ENERGY'S
MOTION TO RENEW TEMPORARY
SUSPENSION OF PROCEEDING**

EXHIBIT A

The following parties stated at the meet-and-confer that they do not object to the requested relief (without comment on the grounds for DOE's motion): Clark County; Inyo County; Joint Timbisha Shoshone Tribal Group; Lincoln County; Native Community Action Council (NCAC); State of Nevada; and Nuclear Regulatory Commission (NRC) Staff.

The following parties took no position on the requested relief and reserved their right to respond to DOE's motion: Aiken County; State of California/California Energy Commission; National Association of Regulatory Commissioners (NARUC); Nye County; Prairie Island Indian Community (PIIC); State of South Carolina; State of Washington; and White Pine County. Amicus Florida Public Service Commission told DOE it takes the same position.

No party told DOE that it opposes the requested relief.

Grounds for Motion

The Board stayed this proceeding last year at DOE's request when DOE announced its intention to file a motion to withdraw.¹ As the Board noted, nearly all parties supported DOE's motion to stay, and no party filed an opposition. The Board accordingly stayed the proceeding "to avoid potentially unnecessary expenditure of resources" while DOE's motion to withdraw was under consideration.²

By its terms, that stay expired last summer when the Board issued its order denying DOE's motion to withdraw.³ The parties, however, have continued as though this proceeding were still suspended. No party has requested to take any depositions in the six months since the suspension expired.

¹ Order (Granting Stay of Proceeding) (Feb. 16, 2010).

² *Id.* at 1.

³ *Id.* at 2.

The parties' collective inaction reflects the considerable legal, budgetary, and legislative uncertainties that continue to surround this proceeding. All parties appear to have implicitly understood that it makes little sense to devote scarce public and private resources to this proceeding until those uncertainties are resolved.

Indeed, one of the parties who opposed DOE's motion to withdraw its application nonetheless conceded at that time that the best course of action would be for the NRC to suspend this proceeding given legislative and budgetary uncertainties. As NEI stated in May 2010, "the NRC should simply continue to suspend this proceeding ... pending legislative action on appropriations or other legislative developments impacting the requirements of the NWPA or YMDA."⁴ NEI added: "The best course of action for the NRC is to suspend this proceeding while the policy direction is fully ventilated and resolved by Congress."⁵

Likewise, Nye County argued, as an alternative, that the Board should stay the proceeding "pending further Congressional action." According to Nye County, it would be "untenable" to continue with a proceeding in which "the best efforts of DOE would not be able to overcome the inherent conflict of interest of defending an LA that its own Administration seeks to bury."⁶

The kinds of uncertainties noted by NEI and Nye County continue to exist today, and present circumstances at least as compelling as when the proceeding was initially suspended last year.

⁴ Opposition of NEI to DOE's Mot. for Withdrawal (NEI Resp.) at 7-8 (May 17, 2010).

⁵ *Id.* at 8.

⁶ Nye County Resp. in Opp. to DOE's Mot. to Withdraw with Prejudice Its License Application for the Yucca Mountain Repository at 22-23 (May 17, 2010).

On the legal front, the Commission is considering appeals by several parties seeking review of the Board's order denying DOE's motion to withdraw.⁷ The United States Court of Appeals for the D.C. Circuit is also considering related petitions involving several other parties.⁸ The briefing on those petitions is complete, with oral argument scheduled for March 22, 2011.⁹ Decisions in either of those proceedings could substantially affect this proceeding.

On the budgetary front, as the Board will recall, the Administration's budget request for FY2011 seeks no funding for the Yucca Mountain project, stating that "all funding for development of the Yucca Mountain facility will be eliminated."¹⁰ The Senate version of DOE's FY2011 appropriations likewise included no money for this proceeding¹¹ Similarly, the NRC's FY2011 budget request to Congress includes only \$10 million, in anticipation of a DOE request to withdraw or suspend its application and a corresponding NRC commencement of "orderly closure of the technical review and adjudicatory activities."¹²

As explained in public filings in the Court of Appeals proceeding, in accordance with the Administration's FY2011 budget request, DOE's Office of Civilian Radioactive Waste Management (which had responsibility for the Yucca Mountain project) ceased operations on

⁷ Those parties are: DOE; Nevada; Joint Timbisha Shoshone Tribal Group, NCAC; Clark County; State of California; and NRC Staff.

⁸ Those parties are: State of Washington; State of South Carolina; Aiken County; and NARUC.

⁹ Order (scheduling oral argument date), *In re Aiken County*, D.C. Cir., No. 10-1050, (Jan. 10, 2011).

¹⁰ *Budget of the U.S. Government, Fiscal Year 2011, Terminations, Reductions, and Savings* at 62 (available at <http://www.whitehouse.gov/omb/budget/fy2011/assets/trs.pdf>).

¹¹ S. 3635, 111th Cong., 2d Sess., reported out of committee on July 22, 2010; *see also* S. Rep. No. 111-228, 111th Cong., 2d Sess. (2010).

¹² NUREG-1100, Vol. 26, *Congressional Budget Justification for FY2011* at 56 (Feb. 2010).

September 30, 2010.¹³ An active licensing proceeding would thus require DOE to, among other things, re-hire employees, enter into new contracts for necessary services, and re-create capabilities, all of which necessarily would require time and funds to implement, especially for the level of discovery proposed when the proceeding was suspended last year.¹⁴ The Commission and Staff too would likely need appropriated funds to support an active proceeding. Other parties would need to ramp up their efforts as well. It makes little practical sense for the parties to expend the resources necessary to undertake an active licensing proceeding if DOE and the NRC will be without funding to continue with this application.

On the legislative front, at the President's request Congress has authorized and funded a Blue Ribbon Commission to consider alternatives to Yucca Mountain. To date, the Commission has held 7 full meetings and 10 subcommittee meetings, and its draft report is due by July 2011.¹⁵ The Commission's recommendations may well lead Congress and the Administration to pursue alternative mechanisms for disposal of spent nuclear fuel and high-level waste and thus may affect the future of this proceeding. As NEI has noted: the "NRC clearly cannot ignore the fact that the Administration and DOE have decided, and Congress has funded, a re-evaluation of the technical and policy issues previously addressed in the NWPA" through the creation of the Blue Ribbon Commission.¹⁶

¹³ Brief of Respondents, *In re Aiken County*, D.C. Cir., No. 10-1050, at 18 n.9 (Jan. 3, 2011); DOE Response in Opp. to Petitioners' Motion for P.I., *In re Aiken County*, D.C. Cir., No. 10-1050, at 16-17, 19-20 & nn. 10, 11, and Exhibit 1 thereto (April 23, 2010).

¹⁴ The parties have identified 103 witnesses for the contentions at issue in Phase I. When the stay was ordered last February, the depositions of approximately one-half of these witnesses had been scheduled.

¹⁵ See <http://brc.gov/events.html>.

¹⁶ NEI Resp. at 6-7.

In short, this proceeding is subject to evolving circumstances and events not fully within the control of the Commission or DOE, and any resumption pending their resolution runs a substantial risk of being a costly, and potentially wasteful, on-again, off-again affair. A modest suspension would help avoid that consequence. It would allow time for the uncertainties to be resolved, or at least narrowed.

Nor would the modest extension prejudice the parties. The parties have shown by their actions over the last year -- by consenting to DOE's initial stay motion and then not initiating depositions even after the stay expired -- that they do not feel compelled to proceed in the face of the current uncertainty. There also would be ample time for discovery in the event the proceeding is resumed. As the Board's Case Management Order (CMO) #2 directs, the current discovery period extends until two months after the Staff's issuance of its Safety Evaluation Report for Chapter 3 of the License Application.¹⁷ The Staff has reported that it has no schedule for the issuance of the report.¹⁸ As a consequence, there is no looming discovery deadline or practical need to conduct discovery in the next 120 days.

In this regard, it is notable that the parties whose contentions are the primary subject of discovery in Phase I -- Nevada, Clark County, Inyo County, Joint Timbisha Shoshone Tribe, and NEI -- either support or do not oppose the stay.¹⁹ The parties who have not taken a position at this time are primarily the late intervenors whose contentions are not the subject of Phase I

¹⁷ CMO #2 at 3 (Sept. 30, 2009).

¹⁸ NRC Staff Notification Regarding SER Schedule (Nov. 29, 2010).

¹⁹ See CMO #2, Appendix to CMO (Sept. 30, 2009) (identifying Phase I contentions).

discovery. As their petitions to intervene noted, they sought to intervene solely to oppose DOE's motion to withdraw, a matter that they agreed raised legal issues that did not require discovery.²⁰

Commission precedent over three decades strongly supports the limited suspension sought at this time. Indeed, the Commission has previously granted much longer suspensions of licensing proceedings in analogous circumstances. An instructive precedent -- perhaps the closest in the Commission's licensing history -- is the Clinch River breeder reactor case in the 1970s and early 1980s. It involved both new Executive Branch policy directions and congressional appropriations determinations. For these reasons, even opponents of DOE's motion to withdraw have cited Clinch River as an applicable precedent here.²¹

Those parties' reference to Clinch River is apt. That proceeding, like this one, involved a federal applicant -- DOE's predecessor, ERDA -- and a major, long-term project subject to congressionally controlled funding. There, after filing an application and significant prehearing license review, ERDA requested in the spring of 1977 that the NRC suspend the proceeding, on the basis of a Presidentially initiated policy change.²² The licensing board granted ERDA's

²⁰ *E.g.*, Pet. of the State of South Carolina to Intervene at 18 (Feb. 26, 2010) (stating that its contentions "are not anticipated to involve any contested issues as to any material fact, and would involve only legal argument."); Pet. to Intervene of the PIIC at 14 (Feb. 26, 2010) ("The Petitioner will oppose DOE's March 3, 2010 motion on legal grounds"); State of Washington's Pet. for Leave to Intervene and Request a Hearing at 1 & 13 (Mar. 3, 2010) (State of Washington "seeks intervention to oppose an anticipated motion by [DOE] to dismiss with prejudice its application . . . ; Washington will merely oppose such withdrawal.").

²¹ NEI Resp. at 10 (Clinch River "illustrates that policies and funding priorities may change over time, and that suspending an NRC proceeding pending further developments is an appropriate approach."); *see also* NRC Staff Answer to DOE's Mot. to Withdraw Its Appl. With Prejudice at 15, n.18 (May 17, 2010) (stating that, *if* the Board finds that withdrawal "is not permissible at this time, the Clinch River Breeder Reactor Plant (CRBRP) case provides some guidance on how the Board might proceed.").

²² National Energy Program, April 20, 1977, Weekly Compilation of Presidential Documents Volume 13 Number 17 566 at 571, 581,

request, and the proceedings were placed in abeyance and remained there for the remainder of the Carter Administration.²³

During the period of abeyance, Congress continued to appropriate enough funds to keep minimal levels of research, procurement, and other aspects of the project alive. After the inauguration of President Reagan in 1981, the Executive Branch reconfirmed interest in demonstration of the breeder reactor concept. As a result the applicant, by now DOE, requested in 1982 that the proceedings be restarted. The NRC agreed. However, in the fall of 1983, with the final construction permit hearings pending, funding for the project ended. Congress did not appropriate funds for the coming fiscal year, and prospects for renewal appeared sufficiently bleak that DOE requested that the proceeding be terminated. The NRC agreed.²⁴

This case provides an even more compelling case for abeyance than Clinch River. There is not only significant uncertainty regarding the availability of DOE (and NRC) funding for this proceeding -- and an ongoing, congressionally funded review by the Blue Ribbon Commission of alternative methods of storing and disposing SNF and HLW -- but in addition, legal proceedings regarding DOE's authority to withdraw its license application are not complete. Moreover, DOE is not seeking an indefinite suspension, but rather a 120-day abeyance. A temporary suspension of the proceeding will thus avoid large and potentially wasteful expenditures of scarce resources on the part of both the Commission and the parties during a period when actions may occur that will relieve or narrow current uncertainties.

²³ See *U.S. Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant)*, LBP-84-4, 19 N.R.C. 288, 291-98 (1984) (summarizing case history).

²⁴ *Clinch River*, LBP-84-4, 19 NRC at 291-92; *U.S. Department of Energy, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant)*, LBP-85-7, 21 NRC 507, 509-10 (1985).

Nor is Clinch River the only instance where the Commission has granted reasonable requests for abeyance in order to allow related matters pending in another forum to run their course. In 2008, the Commission placed in abeyance an application for a license to import low-level waste generated outside the United States until a federal court resolved an action to determine whether the applicant was entitled, under the terms of the Northwest Interstate Compact governing disposition of low-level radioactive waste, to dispose of foreign-origin waste at its facility in Utah.²⁵

Similarly, in 2007 the Commission held in abeyance a proceeding involving a contested request by a licensee for amendment of its facility decommissioning plan. There, the Commission concluded that issues that would otherwise need adjudication might be mooted, either by independent review of a related decommissioning-plan issue by the NRC Staff, or by an ongoing arbitration involving liability for decommissioning costs among present and former licensees. Thus, the Commission placed the hearing request in abeyance.²⁶

As in all these prior cases, the prudent course here is to abate this proceeding until these pressing uncertainties are resolved. Indeed, as noted at the outset, even parties that opposed withdrawal of the application have supported within the last year suspension of the proceeding because of these uncertainties.²⁷

²⁵ *EnergySolutions* (Radioactive Waste Import Export Licenses), CLI-08-24, 68 N.R.C. 491 (2008); *see also In the Matter of David Geisen*, Memorandum and Order, CLI-07-06, 65 N.R.C. 112 (2007) (holding NRC enforcement proceeding in abeyance pending the outcome of a federal criminal trial of the individual against whom the NRC was bringing enforcement).

²⁶ *CBS Corporation* (Waltz Mill Facility), CLI-07-15, 65 NRC 221 (2007).

²⁷ In contrast to the situation here, the Commission has been reluctant to suspend proceedings where the reasons for the stay lie within its control. For instance, it declined to suspend either ISFSI licensing proceedings during its review of physical security requirements following the 9/11 attacks, or reactor applications based on standardized designs undergoing simultaneous Staff review. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380-84 (2001); *Duke Energy Corp.* (McGuire Nuclear

Conclusion

The Board should temporarily suspend its proceedings through May 20, 2011, without prejudice to the right of parties to move at any time for its dissolution in light of changed circumstances, and without prejudice to the right of any party to seek, or to oppose, a further stay, and on condition that the parties report to the Board by May 13 on the issue of whether the stay should be renewed, or other measures taken, upon its expiration on May 20.²⁸

Station, Units 1 and 2: Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC 385, 389-91 (2001); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 399-401 (2001) (physical security reviews); *Progress Energy Carolinas* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-08-15, 68 N.R.C. 1 (2008) (standardized design review). Accord, *Entergy Nuclear Vermont Yankee, L.L.C. et al.* (Vermont Yankee Nuclear Power Station, CLI-10-17, 72 N.R.C. ____ (slip op. at 16) (July 8, 2010) (denying request to suspend reactor license-renewal proceeding pending disposition of request for NRC enforcement): “[W]e generally have declined to hold proceedings in abeyance pending the outcome of other Commission actions or adjudications.” (emphasis supplied) In the current case, by contrast, substantial factors militating in favor of placing the case in abeyance are beyond the Commission’s direct control.

²⁸ DOE does not propose that the stay alter the parties’ LSN obligations or the other commitments DOE has provided the CAB concerning the preservation of information pending a final order terminating this proceeding. *E.g.*, DOE’s Answers to the Board’s Questions at the Jan. 27, 2010 Case Management Conference at 2 (Feb. 4, 2010).

Certificate of Compliance with 10 C.F.R. § 2.323(b)

Pursuant to 10 C.F.R. § 2.323(b), DOE counsel made a sincere attempt to confer with counsel for the other parties on January 14, with respect to the relief sought by this motion; the results of this attempt are reported at the outset of this motion.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

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DATED: January 21, 2011

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

Before Administrative Judges:

**Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell**

In the Matter of)	Docket No. 63-001-HLW
)	
U.S. DEPARTMENT OF ENERGY)	ASLBP NO. 09-892-HLW-CAB04
)	
(High Level Waste Repository Construction Authorization Application))	January 21, 2011
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the **U.S. DEPARTMENT OF ENERGY'S MOTION TO RENEW TEMPORARY SUSPENSION OF THE PROCEEDING** have been served on the following persons on this 21st day of January, 2011 through the Nuclear Regulatory Commission's Electronic Information Exchange.

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