

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

_____)	March 11, 2010
In the Matter of :)	
U.S. Department of Energy (Docket No. 63-001))	
(High Level Waste Repository Construction)	Docket No. 63-001-HLW
Authorization Application))	ASLBP No. 09-892-HLW-CAB04
_____)	

**NYE COUNTY NEVADA'S ANSWER TO DEPARTMENT OF ENERGY MOTION TO
RENEW TEMPORARY SUSPENSION OF THE PROCEEDING**

I. INTRODUCTION

Nye County, Nevada ("Nye County" or "County"), a party to this proceedings and the host County for the proposed Yucca Mountain repository, opposes the Department of Energy's ("DOE") request that the Nuclear Regulatory Commission ("NRC" or "Commission") "exercise its inherent authority to suspend this proceedings" due to the alleged existence of "significant budgetary, legal, and legislative uncertainty."¹ DOE's "request for relief" is in essence an attempt to circumvent and overturn the Order issued by the Atomic Safety and Licensing Board ("CAB04") on February 25, 2010, denying DOE's request for a suspension in the Yucca Mountain repository licensing proceeding. DOE's request to the Commission, couched as a Motion, is made without demonstrating that NRC regulatory authority exists allowing such an interlocutory appeal or extraordinary relief under the facts of this case. For those reasons alone, the request should be denied.

Moreover, any further NRC suspension of this licensing proceeding would appear to be an official Commission sanctioning of DOE's desire to abandon its Nuclear Waste Policy Act

¹ DOE Motion to Renew Temporary Suspension of Proceeding at 1 (Filed on March 4, 2011) [hereinafter cited as "DOE Suspension Motion"]

duties relative to the repository. Yet NRC already has that very issue-- whether or not DOE can unilaterally withdraw its license application without safety justification-- pending before it for decision. Thus, the Commission can properly resolve the fundamental issue underlying the Motion at any time by officially releasing the Commission's votes and decision on the pending challenge to CAB04's refusal to allow DOE to unilaterally withdraw its licensing application with prejudice. NRC essentially directed CAB04 to expeditiously resolve that issue on April 23, 2010, when the Commission vacated the April 6, 2010, CAB04 Order suspending the licensing case and noted that the CAB should render a decision on DOE's Motion to Withdraw no later than June, 2010.² Even though CAB04 rendered its decision denying the Motion to Withdraw on June 29, 2010, and the parties re-briefed the issue before the Commission in July of 2010,³ NRC itself has not been forthcoming in rendering its decision after reviewing the CAB04's decision. NRC's delay in rendering a final decision is not justification for further delay in the proceeding before CAB04, nor is the annual Congressional debate over funding for government programs.

II. DETAILED RESPONSE TO DOE'S APPEAL TITLED REQUEST FOR RELIEF

A. DOE Has Not Demonstrated a Legally Sound Basis for the Requested Extraordinary Commission Action in Further Suspending the Yucca Mountain Licensing Proceeding

It is well-settled that the "Commission considers suspension of licensing proceedings a 'drastic' action that is unwarranted absent 'immediate threats to public health and safety.'"⁴ Furthermore, the Commission "generally [has] declined to hold proceedings in abeyance pending

² *U.S. Dep't of Energy (High-Level Waste Repository)*, CLI-10-13, 71 NRC ____ (slip op. at 5.) (Apr.23, 2010).

³ On June 30, 2010, the Secretary to the Commission issued an Order establishing the briefing schedule for participants to support or oppose CAB04s decision.

⁴ *In re AmerGen Energy Co., LLC*, 68 N.R.C. 461, 484 (N.R.C. Oct. 6, 2008) (quoting *Vermont Yankee Nuclear Power Corp. & AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station) 52 NRC 151, 173-74 (2000)).

the outcome of other Commission actions or adjudications.”⁵ As CAB04 correctly noted in its Order of February 25, 2011, “DOE’s request is not so much a motion to stay discovery—given that reportedly none is threatened or underway—as a request for the Board’s unqualified approval of the parties continued ‘collective inaction.’”⁶

DOE’s argument that a suspension of this licensing proceeding is necessary due to the alleged existence of "significant budgetary, legal, and legislative uncertainty" and to avoid wasteful expenditures is simply illusory, fails to meet the above-stated NRC standards for suspension, and contravenes the principles of the NWPA.

B. There is No Relevant "Legislative and Budgetary Uncertainty" and Funding Has Been Made Available to DOE and NRC for the Yucca Mountain Licensing Proceeding

DOE confuses the Administration's current budget request with an appropriation that has actually been passed by Congress. Congress has not removed DOE or NRC funding for the Yucca Mountain licensing proceedings, as this Commission well knows. In a series of Continuing Resolutions, Congress has continued to fund DOE and NRC programs without legislating an exception for Yucca Mountain which would withhold funds for that program. Congress has been presented with several opportunities to do so, but has refused.⁷ Nor has Congress amended the mandatory provisions of the NWPA that direct NRC to proceed with the licensing hearing. *See* 42 U.S.C. §§10134(d).

Therefore, there is no salient legislative "uncertainty." The NWPA is law and Congress has already appropriated sufficient funds for DOE to complete this phase of discovery and for NRC to continue its adjudication of the license application through the end of FY-2011,

⁵ *Entergy Nuclear Vt. Yankee, L.L.C.*, 2010 NRC LEXIS 27 (N.R.C. July 8, 2010).

⁶ Memorandum and Order (Denying Motion to Renew Temporary Suspension of the Proceeding) at 2 (February 25, 2011).

⁷ *See* text accompanying note 20, *infra*.

regardless of future Congressional actions that could impact additional funding for the rest of the fiscal year.

Following CAB04's denial of DOE's Motion to Withdraw on June 29, 2010, the temporary stay of the proceedings expired. The expiration of that stay was no mere technicality as DOE implies. DOE and other parties were free to reinstitute discovery pursuant to the agreed upon CAB04 Management Order. They chose not to. Had they done so, the first phase of discovery on party contentions would be completed, with the possible exception of deposing NRC staff and experts regarding the unredacted version of Volume 3 of the Safety Evaluation Report ("SER"). NRC staff recently informed the CAB04 that it cannot release the unredacted SER because it is a "preliminary draft" and not a "circulating draft."⁸ While the NRC staff's belabored response to the CAB04's show cause order repeated numerous irrelevant details from a previous explanation found wanting by the CAB04, it still fails to inform the CAB04 precisely why official clearances or non-concurrences on the SER are being withheld, and also curiously fails to provide any concrete reasons why a schedule for the SER's release is "indeterminate due to circumstances beyond the Staff's control."⁹ It is clear, however, that this Commission has the authority to reverse the previous February 17, 2011, decision to release only a redacted version of the SER, referenced in the staff response, and to direct the staff to expeditiously finalize the SER.¹⁰ The Commission should do so immediately, as several members of Congress have requested.

DOE's further assertion that Congress has funded a Blue Ribbon Commission (BRC) to consider "alternatives to Yucca Mountain" is inaccurate, irrelevant, and constitutes a thinly-

⁸ NRC Staff Response to February 25, 2011, Board Order, filed March 3, 2011 at 6.

⁹ See NRC Staff Response to February 25, 2011, Board Order, filed March 3, 2011 at ¶ 6 of Catherine Haney affidavit.

¹⁰ NRC Staff Response to February 25, 2011, Board Order, filed March 3, 2011 at 3.

veiled attempt to revisit arguments already rejected by CAB04¹¹ in its denial of DOE's Motion to Withdraw the license application in this proceeding.¹² The existence of the BRC does not constitute a "legislative uncertainty" justifying a stay.¹³ DOE cites Congressional funding for the Blue Ribbon Panel's examination of nuclear waste disposal alternatives as support for its position. However, as a matter of law, the existence of the Blue Ribbon Panel is irrelevant. Most importantly, the same Act that funded the Blue Ribbon Panel also appropriated \$93,400,000 for "nuclear waste disposal activities to carry out the purposes of the [NWPA];" that is, for Yucca Mountain licensing activities.¹⁴

The Administration requested, and Congress approved, funding for the 2010 fiscal year that continued the Yucca Mountain license application process. DOE, *FY 2010 Congressional Budget Request, Vol. 5*, 504 (FY-2010 budget request "is dedicated solely to supporting ... the NRC LA process."), 505, 520, 540; P.L. 111-85, 123 Stat. 2864, 2868. Thus, there is nothing inconsistent with proceeding with the NRC licensing while the Blue Ribbon panel deliberates. Indeed, in the FY 2010 House Committee Report, the Committee actually stated its support for the position that the Yucca Mountain application review should continue in order to answer all relevant technical questions. The Committee made \$5,000,000 available for the Blue Ribbon Commission "*provided that Yucca Mountain is considered in the review.*" H.R. Report No 111-203 at 82, 85 (emphasis added). The Conference Report states that the Blue Ribbon Commission shall "consider *all* alternatives for nuclear waste disposal." Energy and Water Development and Related Agencies Appropriations Act, 2010 Conference Report, H.R. Report No. 111-278 at 21

¹¹ DOE Suspension Motion at 5.

¹² See Memorandum and Order (June 29, 2010) at 18 n.69.

¹³ DOE Suspension Motion at 1.

¹⁴ FY-2010 Appropriations Hearing Before the Subcomm. on Energy and Water Development, and Related Agencies of the S. Comm. on Appropriations, 111th Cong. (2009).

(2009) (emphasis added). The Conference Report contains a reconciliation provision directing that "report language included by the House which is not contradicted by the report of the Senate or the conference, and Senate report language which is not contradicted by the report of the House or the conference is approved by the committee of conference." *See* H.R. Report No. 111-278 at 39 (2009). There is no express contradiction of the House Report language, which requires the Blue Ribbon Commission to consider Yucca Mountain, in either the Conference Report or the Senate Report, and thus the language in the House Report is law. *See* S. Report No. 111-45 (2009); H.R. Report No. 111-278. Thus, Congress' decisions to fund both the Blue Ribbon Commission and the Yucca Mountain licensing proceeding do not indicate any Congressional intent to disrupt the licensing process mandated by the NWPA.

In summary, Congress did not, as DOE suggests,¹⁵ preclude consideration of the Yucca Mountain repository. Just the opposite is true. More to the point, the very appropriation which included funding for the BRC included funding for this licensing proceeding,¹⁶ which funding has not since been curtailed by Congress. As Nye County has repeatedly pointed out, no one familiar with the workings of the federal government should presume to know what any committee's official recommendations will be in advance of their issuance, or whether those recommendations will ever be acted upon. The fact that BRC may one day make policy recommendations for consideration by Congress is simply irrelevant and "both DOE and the NRC are bound to follow the existing law."¹⁷

¹⁵ DOE Suspension Motion at 6.

¹⁶ *See* Aiken County Response in Opposition to DOE Motion to Withdraw at 10 (May 6, 2010) (quoting 111 P.L. 85; 123 Stat. 2845; 2009 Enacted H.R. 3183; 111 Enacted H.R. 3183).

¹⁷ Memorandum and Order (June 29, 2010) at 18-19; *see also* *McCready v. Nicholson*, 465 F.3d 1, 12 (D.C. Cir. 2006) (stating that the Veterans Administration is free to raise concerns regarding the Privacy Act to Congress, which can amend the law, but the Courts and Veterans Administration must follow its text).

Because Congress has not accepted the Administration's proposal to eliminate funding for this licensing proceeding, DOE is forced to cite budget requests¹⁸ as a source of “budgetary uncertainty.”¹⁹ Tellingly, DOE fails to mention that during the most recent consideration of the federal budget, House Resolution 1, 2011 ("HR 1"), an amendment to prohibit the use of funds for Yucca Mountain was offered and defeated.²⁰ DOE’s citations to budget documents in the seemingly endless budget debates are not proof of anything.²¹ DOE does not assert that Congress has amended the NWPA to eliminate the Yucca Mountain provisions or even reduced funding for this proceeding, and a Continuing Resolution funding Yucca Mountain is still in effect.

Contrary to the position of DOE, completion of discovery on alleged safety issues is also not wasteful, and has value far beyond the cost to the parties and the monies already appropriated by Congress for the adjudication of the licensing proceeding. Even the President and DOE Secretary Chu recognized, at least initially, that the Yucca Mountain licensing proceeding should continue because it would produce valuable scientific information for future nuclear waste management efforts, regardless of the ultimate fate of the Yucca Mountain project.²²

Indeed, it is DOE's own action in seeking to withdraw the license application that is wasteful of taxpayers' dollars. DOE seeks to abandon a license that has already cost many

¹⁸ DOE Suspension Motion at 5.

¹⁹ Suspension Motion at 2.

²⁰ H. Amdt. 163 (A153) offered Febr. 19, 2011 and failed by voice vote Febr. 19, 2011.

²¹ See, e.g., *In re Shaw Areva Mox Servs.*, 66 N.R.C. 169, 203 n.85 (N.R.C. 2007) (“The Applicant makes much of the inclusion of project funding in the President's budget. But this is only the beginning of the budget process, with a host of Congressional overseers and appropriators involved in the final say as to funding levels.”)

²² In May 2009, the Secretary of DOE testified before Congress that DOE would “continue participation in the Nuclear Regulatory Commission (NRC) license application process, consistent with the provisions of the Nuclear Waste Policy Act.” FY-2010 Appropriations Hearing Before the Subcomm. on Energy and Water Development, and Related Agencies of the S. Comm. on Appropriations, 111th Cong. (2009). The Administration requested, and Congress approved, funding for that fiscal year in order to continue the Yucca Mountain license application process. DOE, *FY 2010 Congressional Budget Request, Vol. 5*, 504 (FY-2010 budget request “is dedicated solely to supporting ... the NRC LA process.”), 505, 520, 540; P.L. 111-85, 123 Stat. 2864, 2868.

billions of dollars to produce-- without first capturing the full scientific value of the application by completing the licensing proceeding, and without determining that repository is unsafe. Indeed, DOE admits that “the Secretary’s judgment here [to withdraw the LA] is not that Yucca Mountain is unsafe or that there are flaws in the LA, but rather that it is not a workable option and that alternatives will better serve the public interest.”²³

B. The "Legal Uncertainty" Described by DOE Is Not A Basis for a Suspension Which Would Contravene the Nuclear Waste Policy Act

DOE's and other parties' continued failure to obtain CAB04 authorization for not proceeding with discovery means they are acting at their own risk, just as the State of Nevada acknowledges in its one page Answer to DOE's Motion, filed with NRC on March 10, 2011. It is wholly irrelevant whether DOE and other parties to the licensing proceedings assumed that NRC would overrule the CAB04 decision on the Motion to Withdraw, or decided for some other reason not to proceed with discovery. The fact that an administrative ruling, or for that matter a court ruling, is subject to appeal and possible reversal is not a "legal uncertainty" that would justify staying this administrative proceeding in light of the clear mandates of the NWPA. It is hard to imagine an administrative hearing, subject to an appeal process, that would ever be concluded if the degree of "legal uncertainty" extant in this case justified a suspension.

Granting a further suspension in this proceeding is inimical to the mandates of the Nuclear Waste Policy Act governing this proceeding. That Act includes a statutory requirement that the licensing proceeding be completed, on the merits, in three years (four with extension) from the date of DOE's filing of the license application. *See* 42 U.S.C. § 10134(d). Had it not been for DOE's delaying action following the decision of the CAB04 on the Motion to Withdraw, considerable discovery would already have been completed.

²³ DOE Reply Brief in Support of the Motion to Withdraw (May 27, 2010) at 31, note 102.

At the end of the day, DOE's Suspension Motion is essentially a re-visitation of the very same grounds and circumstances DOE cited in moving to withdraw the Yucca Mountain license application in the first place. In its March 3, 2010 Motion to Withdraw, the DOE cited the existence of the BRC four times,²⁴ cited the Administrations' budget requests,²⁵ and argued against "expenditure of funds on a licensing proceeding for a project that is being terminated."²⁶ DOE also acknowledged that the issue was already being litigated in Federal Courts.²⁷ The CAB04 denied DOE's Motion to Withdraw, and this Commission has not yet acted on review of the CAB04's denial.

Finally, DOE selectively quotes, out of context, from previous filings by Nye County in an effort to discount Nye County's opposition to further suspensions of this proceeding. For example, DOE cites Nye County's skepticism about DOE continued efforts to prosecute the license application in good faith, given the fact that the Administration no longer wants Yucca built.²⁸ DOE fails to note that Nye County abandoned that position following oral argument on June 3, 2010, when the County filed its reply brief before this Commission supporting CAB04's denial of DOE's Motion to Withdraw. In that filing, Nye County stated "that establishment of 'special counsel' to prosecute the LA, as advocated by numerous other opponents of the Motion to Dismiss at oral argument, is an effective method of assuring independence and good faith prosecution of the application. Therefore, Nye County no longer maintains, as it originally did, that such prosecution is untenable simply because DOE is a reluctant applicant."²⁹

²⁴ DOE Motion to Withdraw at 1, 2, 3, 7 (Mar. 3, 2010).

²⁵ Id. at 2 n.2.

²⁶ Id. at 2.

²⁷ Id. at 4.

²⁸ DOE Motion to Suspend at 6

²⁹ Nye County Reply Brief Supporting CAB04 Decision Denying Department of Energy's Motion to Withdraw Its License Application with Prejudice and Granting Intervention (July 19, 2010) at 16, n.22

Similarly, DOE points out that Nye County originally argued that it would be better to temporarily stay the licensing proceeding than to allow withdrawal of the application with prejudice.³⁰ At that point, Nye County was arguing in the alternative, and did not have the benefit of knowing what Congress would do during the remainder of 2010. As discussed in several of Nye County's previous filings, Congress could have amended the NWPA to eliminate Yucca Mountain, or eliminated funding for the program. It has done neither. DOE's Motion for Suspension asks that NRC suspend the proceeding until May 20, 2011, close to the expiration of the three year period initially allotted by the NWPA for adjudication of the license. Whatever justification existed for the alternative of a short stay awaiting Congressional action has long since passed.

CONCLUSION

The Commission should reject DOE's improper appeal or "request" seeking reversal of the CAB04's interlocutory order on its Motion for Suspension. If DOE's Suspension Motion is reviewed under the Commission's inherent authority, the motion should be denied. As CAB04 correctly noted, suspension of this proceeding is simply unnecessary under the circumstances.

Respectfully submitted,

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³⁰ See generally Nye County Brief Supporting CAB04 Decision Denying Department of Energy's Motion to Withdraw Its License Application with Prejudice and Granting Intervention (July 9, 2010)

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