

**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 :)	June 30, 2011
)	
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 NRC STAFF'S REQUEST FOR STAY AND TO
THE DEPARTMENT OF ENERGY' MOTION FOR LEAVE TO FILE MOTION FOR
RECONSIDERATION**

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") Motion for Leave to File Motion for Reconsideration of this Atomic Safety and Licensing Board's ("CAB04") June 10, 2011 Order and NRC Staff's Request for Stay of CAB04's April 11, 2011, and June 9, 2011. Both DOE's and the NRC Staff's filings challenge aspects of CAB04's recent administrative orders governing the Licensing Support Network ("LSN"). Therefore, Nye County's responses have been consolidated to avoid repetitive and duplicative filings. Nye County supports the three challenged CAB04 Orders as appropriate actions to safeguard, and maintain accessibility to, the contents of the Yucca Mountain LSN, a scientific record which cost public taxpayers billions of dollars to generate.

II. BACKGROUND AND PROCEDURAL OVERVIEW

The Licensing Support Network (LSN) was established pursuant to 10 C.F.R. Part 2, Subpart J, to assist the Commission and the assigned licensing Board in reaching a decision in the Yucca Mountain repository licensing proceeding consistent with timeframes in the Nuclear Waste Policy Act. The LSN is a web-based system that makes documents electronically available to NRC and the parties.

Pursuant to 10 C.F.R. § 2.1001, the LSN Administrator (LSNA) is the NRC official responsible for coordinating access to and maintaining the integrity of data available on the LSN. On December 17, 2009, the LSNA filed a memorandum regarding potential LSN impacts if certain actions took place beyond the LSNA's control.¹ Pursuant to a December 22, 2009, CAB04 Order, the parties filed comments regarding the LSNA's 2009 Memorandum.² During a January 27, 2010, case management conference, CAB04 asked each LSN participant present, other than DOE and the Staff, to commit to preserve their LSN document collections and provide compact disc (CD) copies to the LSNA, if circumstances warranted. On February 4, and 19, 2010, respectively, DOE answered Board questions posed during the January conference, and filed a status report on its LSN archiving plan. On March 3, 2010, DOE filed a motion to withdraw its license application.

This Commission directed CAB04 to expeditiously decide the Motion to Withdraw, and after briefing by the parties, CAB04 held oral arguments regarding DOE's Motion on June 3, 2010. At the conclusion of a case management conference held the next day, June 4, 2010, CAB04 instructed all the parties to confer and agree upon proposed conditions regarding DOE's LSN document collection should the Motion for Withdrawal be granted. Tr. at 443 (June 4, 2010).

¹ Memorandum from Daniel J. Graser, LSNA, to Administrative Judges, dated December 17, 2009 (2009 Memorandum).

² See Order (Concerning LSNA Memorandum), dated December 22, 2009 (unpublished) (December 2009 Order); NRC Staff Comments Concerning LSNA Memorandum, dated January 21, 2010; State of Nevada's Comments on LSNA Queries, dated January 21, 2010; Nye County, Nevada Response to LSNA Questions, dated January 25, 2010.

Consistent with CAB04's direction, the parties filed a joint report addressing proposed conditions on June 18, 2010. *See* CAB04 Order, dated June 7, 2010 and Order (Questions for Several Parties and LSNA), dated April 21, 2010, at Appendix A (unpublished) (April 2010 Order). On June 29, 2010, CAB04 denied DOE's Motion to Withdraw, and certain parties subsequently filed requests for review of that decision with this Commission. The Commission was briefed by all of the parties on CAB04's decision denying DOE's Motion to Withdraw on July 9, 2010, with reply briefs filed ten days later. The matter is still pending before the Commission nearly a year later.

In a memorandum to CAB04 dated February 18, 2011, the LSNA indicated that (1) the LSN would need to be shut down by October 1, 2011, if the Administration's budget proposal for FY 2012 is approved, (2) the Board could no longer presume that the LSN website would be operational or that the LSNA could take custody of documents, and (3) that parties' LSN document collections will no longer be electronically accessible when the LSN website is shut down.³ CAB04 issued the challenged orders, in part, to meet these contingencies.

ARGUMENT

I. CAB04'S ACTIONS TO PRESERVE THE FUNCTIONS OF THE LSN AND MAINTAIN ACCESSIBILITY TO ITS CONTENTS WERE PROPER AND NECESSARY

When CAB04 denied DOE's motion to withdraw and identified proposed conditions for preservation of the DOE LSN,⁴ the Board could not have anticipated that the Commission would ignore its own internal policies for expeditiously resolving the parties' requests for review of CAB04's decision on DOE's Motion to Withdraw. Nor could CAB04 have anticipated that the Chairman of the Commission would unilaterally direct the NRC staff to closeout staff work on the Yucca Mountain licensing proceeding and the safety evaluation reports (SERs) before NRC had finally ruled on the

³ Memorandum from Daniel J. Graser, LSNA, to Administrative Judges, dated February 18, 2011, at 1-2 (2011 Memorandum).

⁴ *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-10-11, 71 NRC __ (June 29, 2010) (slip op.) (LBP-10-11),

Motion to Withdraw and before Congress had acted upon NRC's appropriations for the Yucca Mountain licensing proceeding. As a result, the additional measures imposed by the CAB04's contested orders to safeguard the LSN contents and to ensure ease of accessibility to those documents are within CAB04's authority and are appropriate and justified. Therefore, NRC staff's request and DOE's Motion should be denied.

A. NRC Staff Has Not Demonstrated a "Substantial Likelihood of Success on the Merits" of its Petition for Review of the CAB04 Orders Before the Commission

On the same day that it filed its Motion for Stay with CAB04, June 20, 2011, NRC Staff also filed a Petition for the Commission to Exercise its Inherent Supervisory Authority To Review April 11, 2011 and June 9, 2011 Board Orders with the Commission itself. Rather than repeat the entire Nye County submittal to the Commission which demonstrates the that Staff's position is without merit, Nye County will simply summarize its arguments and incorporate by reference the complete filing with the Commission.⁵

Until Congress amends the NWSA to eliminate Yucca Mountain as the sole designated repository site, or the Commission fulfills its obligation to issue a final order and decision on the review of the CAB04 June 29, 2010, decision, and/or a federal court rules otherwise, NRC regulations require that the LSN record be preserved in a manner that insures accessibility by the parties. 10 C.F.R. Part 2, Subpart J.

For example, 10 CFR § 2.1007 (a)(2) unequivocally states:

A system to **provide electronic access** to the Licensing Support Network **shall be provided** at the NRC Web site, <http://www.nrc.gov>, and/or at the NRC Public Document Room beginning in the pre-license application phase (emphasis added)

⁵ NYE COUNTY, NEVADA'S RESPONSE IN OPPOSITION TO NRC STAFF'S JUNE 20, 2011 PETITION FOR REVIEW OF BOARD ORDERS, filed June 30, 2011, with Nuclear Regulatory Commission

In addition, **nothing** in Subpart J authorizes NRC or the LSNA to terminate the LSN while the license proceeding is still pending. Indeed, the Commission's own rules regarding the Yucca Mountain licensing proceeding preclude appeals or petitions for review of Board decisions regarding the LSN. 10 CFR § 2.1015 (a) ("No appeals from a... presiding Officer's order or decision under this subpart are permitted, except as prescribed [later in the section].") The NRC staff admits that no such grounds for appeal related to LSN operation exist in this case, but rather invokes the Commission's inherent supervisory authority to overturn the CAB04 orders. However, there is no basis in law or fact for granting NRC staff's petition.

Contrary to assertions by LSNA in his 2009 Memorandum and in NRC staff filings, appropriated funds are available for execution of the CAB04 Order. Moreover, nothing in the appropriations passed by Congress precludes such use. Finally, funds used for such purposes serve the national interest, and are not wasteful. As Nye County stated in a previous filing: "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, regardless of future Congressional actions that could impact additional funding for the rest of the fiscal year."⁶ Such funding necessarily includes full maintenance of a functional LSN. If NRC simply orders the LSNA to continue operation of the LSN network at least until a final un-appealable decision is reached on DOE's motion to withdraw, or until Congress amends the NWPA to eliminate Yucca as the sole designated nuclear repository site, the challenged CAB04 Orders would be unnecessary. Right now, however, the Orders, including the requirement regarding DOE indices, are essential to prevent further delay and wasted resources should the discovery process be restarted by court order, Congressional mandate, or NRC action.

⁶ NYE COUNTY ANSWER TO U.S. DEPARTMENT OF ENERGY'S MOTION TO RENEW TEMPORARY SUSPENSION OF THE PROCEEDING at p. 7 and n.22. (March 11, 2011).

Uncertainty surrounding the current proceeding, and the budget, is cited in both the Staff Petition for Review and its Request for Stay as support for its position that the CAB04 orders should be overturned. In fact, such uncertainty is exactly why the LSN documents, particularly those of DOE, should be preserved in a central location, and ready in the event the proceeding is restarted.

B. The CAB04's Order Related to Indices for DOE LSN Document is A reasonable Exercise of the Board's Case Management Authority

DOE's objects to CAB04 requirement that indices to its LSN documents be circulated to the parties as soon as possible, so there can be an opportunity to confer and consult as to their adequacy while the LSN remains operational. This is a reasonable and appropriate administrative order under the unique circumstance that the CAB04 and parties to this proceeding find themselves. Indices are vital to allow parties to quickly navigate the massive set of records compiled by DOE in support of its application. That DOE no longer wants to pursue that application makes ease of access by others who support the project even more critical. The fact that the CAB04's requirement goes beyond the index requirement in 10 CFR § 2.1019(i) is irrelevant, given the Commission's failure to finally resolve the issues related to DOE's Motion to Withdraw. Nor is this an undue burden on DOE or a waste of resources when balanced against the losses and delay that would occur if the CAB04's requirements are not met and Congressional action, court order, or Commission decision requires resumption of the licensing proceeding. Moreover, the value of DOE's LSN collection goes well beyond its usefulness in this proceeding, since the indices makes the record more accessible to the parties, the scientific community, and the public.

CONCLUSION

Congress has not amended the NWPA to eliminate Yucca Mountain as the sole site for the nuclear repository, nor has it altered NRC's statutory duty to reach a decision on the merits of the license application within a prescribed period of time. More importantly, the CAB04 ruling that the license application may not be unilaterally withdrawn by DOE is the law of this case. Therefore, CAB04's efforts to maintain the LSN, or a functional alternative, in a manner that allows ease of access to vital documents by the parties are not only legal, reasonable, and within the Board's authority, the efforts are also essential under the circumstances. For all of the above-stated reasons, DOE's Motion for Leave to File Motion for Reconsideration of this Atomic Safety and Licensing Board's June 10, 2011 Order and NRC Staff's Request for Stay of CAB04's April 11, 2011, and June 9, 2011, should be denied.

Respectfully submitted,

Signed (electronically) by

Robert M. Andersen
Akerman Senterfitt LLP
750 9th Street N.W., Suite 750
Washington, DC 20001
Voice: 202.393.6222
Fax: 202.393.5959
email: robert.andersen@akerman.com
Counsel for Nye County

June 30, 2011

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE CAB04

In the Matter of : U.S. Department of Energy (Docket No. 63-001) (High Level Waste Repository Construction Authorization Application))))))))	May 13, 2011 Docket No. 63-001-HLW ASLBP No. 09-892-HLW-CAB04
--	---------------------------------	---

CERTIFICATE OF SERVICE

I hereby certify that copies of **NYE COUNTY, NEVADA'S ANSWER TO NRC STAFF'S REQUEST FOR STAY AND TO THE DEPARTMENT OF ENERGY' MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION PROTECTIVE ORDER** in the above-captioned proceeding have been served on the following persons and all others recently added to the electronic service list on this 30th day of June, 2011 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. Malsch, Esq. Egan, Fitzpatrick & Malsch, 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
<p>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</p>	<p>Kevin W. Bell, Esq. Senior Staff Counsel California Energy Commission 1516 9th Street Sacramento, CA 95814 E-mail: kwbell@energy.state.ca.us</p>
<p>Bryce C. Loveland Jennings Strouss & Salmon, PLC 8330 W. Sahara Avenue, Suite 290 Las Vegas, NV 89117-8949 E-mail: bloveland@jsslaw.com</p>	<p>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</p>
<p>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</p>	<p>George W. Hellstrom U.S. Department of Energy Office of General Counsel 1551 Hillshire Drive Las Vegas, NV 89134-6321 E-Mail: george.helstrom@ymp.gov</p>
<p>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@moraanlewis.com apolonsky@morganlewis.com lcsedrik@morganlewis.com rkuyler@morganlewis.com</p>	<p>Connie Simkins P.O. Box 1068 Caliente, Nevada 89008 E-mail: icciac@co.lincoln.nv.us</p>
Malachy R. Murphy, Esq.	Susan L. Durbin, Esq.

<p>18160 Cottonwood Rd. #265 Sunriver, OR 97707 E-mail: mrmurphy@chamberscable.com</p>	<p>Deputy Attorney General 1300 I Street P.O. Box 944255 Sacramento, CA 94244-2550 E-mail: susan.durbin@doj.ca.gov</p>
<p>Robert M. Andersen Akerman Senterfitt 801 Pennsylvania Avenue N.W., Suite 600 Washington, DC 20004 USA E-mail: robert.andersen@akerman.com</p>	<p>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</p>
<p>Shane Thin Elk Fredericks Peebles & Morgan, LLP 3610 North 163rd Plaza Omaha, Nebraska 68116 E-mail: sthinelk@ndnlaw.com</p>	<p>John M. Peebles Darcie L. Houck Fredericks Peebles & Morgan LLP 1001 Second Street Sacramento, CA 95814 E-mail: jpeebles@ndnlaw.com dhouck@ndnlaw.com</p>
<p>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</p>	<p>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</p>
<p>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</p>	<p>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</p>
<p>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</p>	<p>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</p>

timothy.walsh@pillsburvlaw.com	
Gregory L. James 710 Autumn Leaves Circle Bishop, California 93514 Email: aliames@earthlink.net	Ian Zabarte, Board Member Native Community Action Council P.O. Box 140 Baker, NV 89311 E-mail: mrizabarte@gmail.com
Arthur J. Harrington Godfrey & Kahn, S.C. 780 N. Water Street Milwaukee, WI 53202 E-mail: aharrington@gklaw.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
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	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 mshebelskie@hunton.com kfaglioni@hunton.com
Bret O. Whipple 1100 South Tenth Street Las Vegas, Nevada 89104 E-mail: bretwhipple@nomademail.com	Dr. Mike Baughman Intertech Services Corporation P.O. Box 2008 Carson City, Nevada 89702 E-mail: bigoff@aol.com
Bret O. Whipple 1100 South Tenth Street Las Vegas, Nevada 89104 E-mail: bretwhipple@nomademail.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
Gregory Barlow P.O. Box 60 Pioche, Nevada 89043 E-mail: lca@lcturbonet.com	Don L. Keskey, Esq. Public Law Resource Center PLLC 505 N. Capitol Avenue Lansing, MI 48933 E-mail: donkeskev@publiclawresourcenter.com

<p>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: MichaelID@atg.wa.gov AndyF@atg.wa.gov Lee01@atg.wa.gov JonaT@atg.wa.gov</p>	<p>James Bradford Ramsay, Esq. National Association of Regulatory Utility Commissioners 1101 Vermont Avenue NW, Suite 200 Washington, DC 20005 E-mail: iramsav@naruc.org</p>
<p>Kenneth P. Woodington Davidson & Lindemann, PA 1611 Devonshire Drive P.O. Box 8568 Columbia, SC 29202 E-mail: kwoodington@dml-law.com</p>	<p>Philip R. Mahowald General Counsel Prairie Island Indian Community 5636 Sturgeon Lake Road Welch, MN 55089 E-mail: pmahowald@piic.org</p>

Respectfully submitted,

Signed (electronically) by

Robert M. Andersen
 Akerman Senterfitt LLP
 750 9th Street N.W., Suite 750
 Washington, DC 20001
 Voice: 202.393.6222
 Fax: 202.393.5959
 email: robert.andersen@akerman.com

June 30, 2011

Counsel for Nye County, Nevada