

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**Before the Commission**

<b>In the Matter of</b>	)	
	)	
<b>U.S. DEPARTMENT OF ENERGY</b>	)	<b>Docket No. 63-001-HLW</b>
	)	
<b>(High Level Waste Repository)</b>	)	<b>August 23, 2013</b>

**STATE OF NEVADA MOTION FOR COMMISSION ACTION  
RELATED TO A POSSIBLE RESTART OF THE  
YUCCA MOUNTAIN LICENSING PROCEEDING**

**I. Introduction.**

As the Commission is aware, on August 13, 2013, the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) issued an opinion requiring the U.S. Nuclear Regulatory Commission (“Commission” or “NRC”) to continue the currently suspended proceeding on the issuance of a construction authorization for a geologic repository at Yucca Mountain, about ninety miles from Las Vegas in the State of Nevada. “On Opinion for Writ of Mandamus”; *In Re: Aiken County, et al.*, No. 11-1271, U.S. Court of Appeals for the D.C. Circuit.

Petitions for rehearing (including rehearing *en banc*) may yet be filed in the D. C. Circuit by the State of Nevada (“Nevada”), an intervening party in the judicial proceeding, or by some other party in the proceeding. Nevertheless, Nevada files this Motion now before the opinion is “final” so that its views on how a restarted proceeding may be conducted may be factored into the earliest Commission deliberations on the matter, which could occur as a part of early Commission consideration of the budgetary and personnel implications of a possible restart, including the scheduler effects on pressing Commission matters such as the Waste Confidence

proceeding.<sup>1</sup> Also, this early filing is necessary to moot any argument that a later motion would be untimely because it occurred more than ten days after the “occurrence or circumstance from which the motion arises,” taking the “occurrence or circumstance” as the issuance of the D.C. Circuit’s mandamus. *See* 10 C.F.R. § 2.323 (a) (2).

Filing with the Commission, as opposed to the Licensing Board (Construction Authorization Board (“CAB”) -04), is appropriate because (1) the D.C. Circuit’s restart order is directed to the Commission, (2) the proceeding before the Licensing Board is suspended based upon direction from the Commission, and (3) some of the relief requested herein is outside of the jurisdiction of a Licensing Board.

In accordance with 10 C.F.R. § 2.323(b), counsel for Nevada certify that they made a sincere effort to contact the other parties to the proceeding prior to filing this Motion to advise them of the issues that are addressed in the Motion, and the relief requested, and to resolve those issues. Movant’s efforts to resolve the issues have been unsuccessful, due to the irreconcilable viewpoints expressed by the eighteen other parties, as follows:

- a. Clark County concurs in the Motion;
- b. Inyo County concurs, but reserves the right to respond in detail after it sees the Motion;

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<sup>1</sup> Restarting the Yucca Mountain licensing proceeding would not eliminate the need for the NRC to analyze the environmental effects of failing to establish a geologic disposal facility in accordance with the National Environmental Policy Act of 1969 (“NEPA”) and *State of New York v. NRC*, 681 F.3d 471 (D. C. Cir. 2012). The *State of New York* Court required an analysis of these effects because the possibility that no such disposal facility would ever be developed was not “remote and speculative.” *Id* at 478. This factual predicate for the Court’s holding would still be true even if the Yucca Mountain licensing proceeding were to be restarted because (1) the NRC cannot now opine that the possibility that it would deny DOE’s application for a construction authorization is “remote and speculative” without engaging in the most egregious kind of unlawful prejudgment and (2) the possibility that no repository at Yucca Mountain would ever be constructed or operate would not be “remote and speculative” even if the NRC were to authorize construction given the many other regulatory and legislative hurdles that would still need to be surmounted.

c. Aiken County, Nye County and State of Washington concur in the portion of the Motion requesting that the composition of the CAB remain the same, in any continuation of the proceeding, but oppose those portions of the Motion in which Nevada asks that the LSN be recreated and that venue of the proceeding be in Las Vegas;

d. Joint Timbisha Shoshone Tribal Group, State of California, Department of Energy, State of South Carolina, Four Counties, Eureka County, Prairie Island Indian Community, Native Community Action Council, White Pine County and the Nuclear Regulatory Commission Staff neither concur in nor oppose the Motion, but reserve the right to respond to the Motion after having had an opportunity to review it;

e. NEI disagrees with the Motion and reserves the right to respond; and

f. Despite attempting to contact counsel of record for NARUC and Lincoln County both via email and telephone, Movant was told that both counsel were on travel and unavailable, and so Movant has had no response from either at the time of this filing.

## **II. Summary.**

As explained further below, Nevada makes three requests: (1) that the Licensing Support Network (“LSN”) be reconstituted so that the texts of relevant documents are electronically accessible and searchable by parties in the proceeding and interested members of the public; (2) that any in-person hearings required by the Licensing Board as part of the restarted proceeding take place in the Las Vegas area, as before; and (3) that the restarted proceeding be conducted by CAB 04, whose members have extensive and unique experience in addressing the parties and issues in this proceeding.

## **III. Argument.**

### **A. The Licensing Support Network Should Be Reconstituted.**

The Licensing Support Network, which was conceived in 1988<sup>2</sup> and grew and flourished until its suspension in August 2011, is defined in 10 C.F.R. § 2.1001 as:

the combined system that makes documentary material available electronically to parties, potential parties, and interested governmental participants to a proceeding for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area, and an application for a license to receive and possess high level radioactive waste at a geologic repository operations area under parts 60 and 63 of this chapter.

Throughout the history of the LSN the NRC has functioned as its gatekeeper. Indeed, by definition, the administrator of the LSN is “the person within the U.S. Nuclear Regulatory Commission responsible for coordinating access to and the integrity of data available on the Licensing Support Network.” *See* 10 C.F.R. § 2.1001.

On February 18, 2011, the NRC’s LSN Administrator advised the Licensing Board (CAB 04) that due to funding shortages, the LSN could not continue to function beyond September 2011. *See* ML110490397. In response, on April 11, 2011, the Licensing Board entered an Order providing as follows:

[I]n order to fulfill our responsibility to preserve the document discovery materials residing on the LSN, a system mandated by 10 C.F.R. Part 2, Subpart J, and over which CAB-04 was established to preside, the Board directs, pursuant to its authority under 10 C.F.R. § 2.319, that each party shall take the following actions:

- preserve all LSN documents in "PDF" format;
- submit its LSN document collection together with the associated bibliographic files to the NRC Office of the Secretary (SECY) on optical storage media as specified in Guidance for Electronic Submissions to the Commission for inclusion into the docket, notifying all other parties when the submission has been completed;
- for large collections taking more than a month to complete the PDF conversion, submit the documents that have been converted no later than the seventh day of the month for those documents converted the previous

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<sup>2</sup> *See* 53 Fed. Reg. 44411 (November 3, 1988) (Notice of Proposed Rulemaking). The proposed system was then called the “Licensing Support System” or “LSS.”

month.

Once received, SECY shall install the documents and associated bibliographic information into a separate LSN docket library of ADAMS for public access via [www.nrc.gov](http://www.nrc.gov).

*U.S. Department of Energy (High Level Waste Repository)*, \_\_NRC \_ (2011); ML111010483 at pg. 3.

The NRC Staff challenged the April 11 Order and its requirement that the NRC SECY install the LSN collections of all parties in a separate library on its ADAMS website “for public access.” In response to that challenge, the Licensing Board entered another Order on June 9, 2011. *U.S. Department of Energy (High Level Waste Repository)*, \_\_ NRC \_ (2011), ML111600504. It recognized the fact that the NRC Staff’s own documents were already on ADAMS and that it would be “repetitious” to require NRC Staff to again produce its own LSN collection to the SECY. But, with that single exception, NRC Staff’s challenge to the Board’s April 11 Order was rejected. Indeed, so there would be perfect clarity, the Licensing Board reiterated that “[t]he order requires each party (now with the exception of the Staff) to submit its LSN document collection to the Secretary by August 31, 2011,” (Order at pg. 6) and “the Board’s April 11 order further instructed the Secretary to install the documents in a separate LSN library docket of ADAMS for public access via the agency’s website.” *Id.*

The NRC Staff promptly appealed both the April 11, 2011 and June 9, 2011 Orders to the Commission, which concluded the matter on November 29, 2011 by denying the NRC Staff’s challenge. *U.S. Department of Energy (High-Level Waste Repository)*, CLI- 11-13, 2011 NRC LEXIS 20, \_\_ NRC \_ (2011). Thus the requirement that the LSN document collection be loaded on ADAMS still stands. Notably, the Commission could have relied only on a technicality, inasmuch as it found the NRC Staff’s challenge not to be reviewable (Order at pg. 3). Instead, it

went on to say “were the appeal properly before us . . . we would not be inclined to disturb the challenged decisions as a matter of discretion” (*Id.*). Notably, and most important for the purposes of this motion, the Commission restated the basic purpose of the LSN: “[t]he LSN was indeed intended to be primarily a discovery tool, enabling parties to quickly view materials generated by the others without the time delays associated with traditional discovery.” (Order at pp. 3-4.) Among the considerations the Commission stated in establishing the LSN was to “allow full text search and retrieval access to the relevant documents for all parties and potential parties to the HLW repository licensing proceeding. A readily available search and retrieval function is now lost, since the LSN has been discontinued.” *Id.* at 4.

Remedying this loss is critical to the proper conduct of any restarted Yucca Mountain licensing proceeding. As the Commission held in 1989, when the LSN’s predecessor was first established:

The Commission does not believe that the mere *availability* of documents in hard copy or microfiche without electronic full text search capability will permit an adequate substantive review of the documents in the HLW proceeding by the staff itself or any other party, nor will it permit the hearing to be completed within the NWPA timeframe.

54 Fed. Reg. 14925, 14929 (April 14, 1989). What was true then is still true today: an adequate review of the relevant documents, which is necessary both to complete discovery and to prepare for and participate in the hearing (even a hearing on a limited number of contentions) requires electronic full text search capability of all of the relevant documents.

Further, a critical attribute of the LSN (which would have been, but has not yet been, replicated by the NRC SECY’s compliance with the Licensing Board’s April 11 and June 9 Orders) is access of every interested member of the public to the documentary backdrop to the Yucca Mountain license application and the (now to be restarted) licensing proceeding. Only by

a recreation of the LSN with all its original capabilities (or creation of an ADAMS database with similar access and search capabilities) can this be achieved.

It should be noted that so-called Documentary Material (required to be placed on the LSN by the parties to the Yucca Mountain licensing proceeding) has not fallen into some void, creating a documentary gap from the time when the LSN suspended operation in August 2011 to the present. The Licensing Board took care to prevent that. On July 28, 2011, it entered yet another Order directing all parties to retain all Documentary Material which was newly created or newly discovered so that “the LSN may be reconstituted in the future.” *U.S. Department of Energy (High Level Waste Repository)*, \_\_ NRC \_ (2011), ML1109C291 at 1. And on September 16, 2011, the Board addressed one more possible “gap,” directing each party to also retain all Documentary Material in its possession which might not ever be placed in full text form on the LSN, due to claims of privilege. *U.S. Department of Energy (High Level Waste Repository)*, \_\_ NRC \_ (2011), ML11259A097. Suffice it to say, the prior LSN documents and all new Documentary Material are readily at hand only awaiting NRC’s re-creation of the LSN (or placement of material on ADAMS) upon restart of the Yucca Mountain licensing proceeding.

Accordingly, if the Yucca Mountain licensing proceeding must be restarted, a first order of business must be to re-establish NRC-sponsored electronic search capability of documentary material, both for parties and interested members of the public. As explained above, this action has already been ordered by the Licensing Board and, after it was challenged, affirmed by both the Licensing Board and the Commission.<sup>3</sup> Indeed, the Commission appears to have recognized

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<sup>3</sup> If the LSN cannot be revived then it would be necessary and desirable for the Commission to engage in a public rulemaking to amend its Rules of Practice in 10 C.F.R. Part 2 to reflect this fact. A rulemaking to replace the LSN with a separate, accessible, and searchable collection of documentary material on ADAMS, as contemplated by the Licensing Board, could be accomplished on an immediately-effective basis, subject to post-effectiveness public comment, because this would reflect the current status quo, but a full rulemaking (including a notice of proposed rulemaking and consultation with the LSNARP) should be conducted before implementing any other approach that does not include electronic full search capability of all documentary material.

very recently that NRC sponsored electronic search capability of documentary material must be re-established because on December 3, 2012 the Commission renewed the charter of the Licensing Support Network Advisory Review Panel (“LSNARP”). *See* ML12339A028.

In view of the latest relevant actions of the Commission regarding availability of accessible, searchable documentary material for the proceeding, Nevada's strong preference is that the LSN be reconstituted as it previously existed – a stand-alone internet page fully available for public access and search. This would facilitate all potential users' access to the documents supporting the proceeding by providing access through direct and customary internet protocols, rather than users first having to familiarize themselves with the more complex ADAMS access procedures. In the interest of transparency, this more user-friendly approach would better serve all interested members of the public and have no detrimental effect on the day-to-day use of the document library by the parties to the proceeding.

**B. The NRC Should Conduct Any Restarted Proceedings in the Las Vegas Area.**

It has long been the NRC's policy to conduct adjudicatory proceedings within close proximity to where the licensed activity will occur so that affected members of the public can participate more easily in the proceeding. *See e.g.*, “Information Guide for Atomic Safety and Licensing Board Proceedings at the NRC Las Vegas Hearing Facility,” NUREG/BR-0336, Rev. 1, March 2009 at 2. In fact, for many years the NRC had a dedicated hearing facility in Las Vegas, specifically designed and operated to provide a suitable venue to conduct the Yucca Mountain licensing proceeding.

The NRC's selection of Las Vegas as the forum site for this licensing proceeding was done in accordance with its long-standing policy. This policy facilitated the effective party participation of the states of Nevada and California (and most recently after DOE sought to

withdraw its application the states of South Carolina and Washington), the Nevada counties of Clark, Nye, Lander, Esmeralda, Churchill, Mineral and White Pine, Inyo County in California, and several Indian Tribes, among others. It also facilitated public attendance in the licensing proceedings in the host state. In an era of limited resources, the need to facilitate this continued participation by selecting a geographically convenient venue for the proceeding still exists.

Moreover, it is not practicable to use the NRC's hearing facility at its headquarters in Rockville, Maryland, to conduct a restarted Yucca Mountain licensing proceeding. That facility is not designed to handle easily (or possibly at all) a formal proceeding with seventeen parties (counting Lander, Esmeralda, Churchill, and Mineral counties as one consolidated party). In addition, given the concentration of effort that will be required to conduct any restarted proceeding that is reasonably expedited, the use of the NRC's facilities in Rockville would preclude their regular and continual use for other NRC proceedings or activities. Finally, using facilities in the Washington D.C. Metropolitan Area would not only impose a prohibitive burden on many of the parties and interested members of the public living in Nevada seeking to observe and participate in the proceeding, but it would engender a level of distrust in the licensing process and its outcome, and aggravate the perception that the distant federal government in Washington, D.C. is seeking to impose the burden of nuclear waste disposal upon a populace via a distant and non-transparent process.

Accordingly, Nevada respectfully requests that the Commission persist in its original policy, and select or establish a new facility in the Las Vegas area to host any restarted licensing proceeding.<sup>4</sup> Although the specific building that housed NRC's Las Vegas hearing facility may no longer be available, the NRC routinely rents conference or hearing room space to conduct

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<sup>4</sup> This would not preclude an appropriate continuation of the practice of using conference calls to address procedural and other similar matters.

adjudicatory proceedings in the vicinity of the proposed licensed activity, often in large hotels or other similar venues.<sup>5</sup> There are a number of buildings being leased by the federal government in the City of Las Vegas, including 6 buildings located on the same street (Pepper Lane) as its previous Yucca Mountain hearing facility. Accordingly, NRC (and as needed GSA) should be able to secure another location in Las Vegas, Nevada to conduct the Yucca Mountain licensing proceeding.

**C. Any Restarted Proceeding Should be Conducted by CAB 04.**

On January 16, 2009, the Commission entered an Order entitled “Establishment of Atomic Safety and Licensing Boards,” in which it initially established three Licensing Boards “to preside over the Petitions to Intervene and the Requests to Participate” in the Yucca Mountain licensing proceeding. These comprised CAB 01 (Judges Froehlich [Chair], Moore and Wardwell), CAB 02 (Judges Gibson [Chair], McDade and Trikouros); CAB 03 (Judges Ryerson [Chair], Farrar and Barnett). *See* Chief Administrative Judge order dated January 16, 2009, ML090160427 at 2. These three Licensing Boards presided at the oral argument of the various parties’ Petitions to Intervene (and Contentions) and were jointly responsible for the issuance of a May 11, 2009 Memorandum and Order (identifying the participants in the Yucca Mountain licensing proceeding and their admitted contentions). *U.S. Department of Energy (High Level Waste Repository)*, LBP-09-06, 69 NRC 367 (2009).

Shortly thereafter, on June 19, 2009 (and before it had decided the various appeals of that May 11, 2009 Memorandum and Order) the NRC entered a new Order “Establishment of Atomic Safety and Licensing Board” in which it appointed a new Construction Authorization Board

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<sup>5</sup> *See, e.g.*, [www.fbo.gov/index?s=opportunity&mode=form&id=7d832e9dfe26b575411f6eeac6418b6d&tab=core&\\_cview=0](http://www.fbo.gov/index?s=opportunity&mode=form&id=7d832e9dfe26b575411f6eeac6418b6d&tab=core&_cview=0) (NRC announcement in June 2012 of a sole source contract with the Doubletree Hotel in Tarrytown, New York for conference space to conduct the ASLB hearing for the renewal of the Indian Point nuclear power plant license).

(CAB 04) whose assignment was “to preside over matters concerning discovery, Licensing Support Network compliance, new or amended contentions, grouping or consolidation of contentions, scheduling, case management matters relating to any of the foregoing, and all other matters the Chief Administrative Judge may assign.” (Order at p. 1.) CAB 04 is comprised of the following administrative judges: Thomas S. Moore (Chair), Paul S. Ryerson and Richard E. Wardwell. *See* Chief Administrative Judge order dated June 19, 2009, ML091700312.

From the time of its appointment until September 30, 2011 when it entered a Memorandum and Order suspending the proceeding, *U.S. Department of Energy (High Level Waste Repository)*, LBP-11-24, 74 NRC 368 (2011), ML11273A041, CAB 04 handled this proceeding in an effective and expeditious manner. As is evident from a review of pages 6-9 of the Appendix of Actions attached to its September 30, 2011 Memorandum and Order, CAB 04 has been an extremely active and productive Licensing Board. Through the course of numerous conferences, its review of filings and its decisions thereon, CAB 04 has achieved a high level of comprehension of the many issues associated with the Yucca Mountain licensing proceeding, one in which an unprecedented number of nearly 300 contested contentions have been admitted for hearing and decision. The enormous learning curve enjoyed by the Judges comprising CAB 04 is an indispensable and irreplaceable advantage going forward. The body of knowledge attained by CAB 04 could not be replicated without an inordinate expenditure of time and effort by other administrative judges.

Accordingly, Nevada respectfully requests that the Commission continue in force the assignment of CAB 04 (Judges Moore [Chair], Ryerson and Wardwell) for the conduct of the restarted Yucca Mountain licensing proceeding.

Respectfully submitted,

*(signed electronically)*

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Dated: August 23, 2013

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**Atomic Safety and Licensing Board**

<b>In the Matter of</b>	)	
	)	
<b>U.S. DEPARTMENT OF ENERGY</b>	)	<b>Docket No. 63-001-HLW</b>
	)	
<b>(High Level Waste Repository)</b>	)	

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing *State of Nevada Motion for Commission Action Related to a Possible Restart of the Yucca Mountain Licensing Proceeding* has been served upon the following persons by the Electronic Information Exchange:

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