

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High-Level Waste Repository)

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Docket No. 63-001-HLW

NRC STAFF RESPONSE TO
AUGUST 30 COMMISSION ORDER

Jessica A. Bielecki
Mitzi A. Young
Shelbie R. Lewman
Daniel W. Lenehan
Counsel for NRC Staff

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TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	1
DISCUSSION.....	6
A. Issuance of Staff Review Documents	8
1. Safety Evaluation Report.....	8
2. Environmental Impact Statement Supplement	10
B. Adjudicatory Proceeding (Including Formal Discovery)	11
1. Location of Prehearings and Evidentiary Hearing	17
2. Presiding Board	17
3. Licensing Support Network.....	17
CONCLUSION	22

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INTRODUCTION

On August 13, 2013, the U.S. Court of Appeals for the District of Columbia Circuit granted a writ of mandamus, directing the NRC to “promptly continue with the legally mandated” high-level waste licensing process. *See generally In re Aiken County*, No. 11-1271 (D.C. Cir. Aug. 13, 2013) (slip op. at 22). Pursuant to the Commission’s August 30, 2013 Order, the NRC staff (Staff) files this response 1) providing views as to how the agency should continue with the Yucca Mountain licensing process, and 2) responding to the Nye County, Nevada, and State of Nevada motions.¹ *See* Order, dated August 30, 2013 (unpublished), at 1 (Order).

BACKGROUND

This proceeding involves the Department of Energy’s (DOE) application for authorization to construct a high-level waste repository at Yucca Mountain, Nevada. On October 17, 2008, the Commission issued a “Notice of Hearing and Opportunity to Petition for Leave to Intervene” regarding the DOE application.² The notice also indicated that the Staff determined it was

¹ Nye County’s Motion for Lifting Suspension of Yucca Mountain Licensing Proceeding, Scheduling of Immediate Case Management Conference, and Issuance of Related Administrative Orders (Aug. 23, 2013) (essentially identical motions made before the Commission and the Atomic Safety and Licensing Board) (Nye County Motion); State of Nevada Motion for Commission Action Related to a Possible Restart of the Yucca Mountain Licensing Proceeding (Aug. 23, 2013) (Nevada Motion).

² Notice of Hearing and Opportunity to Petition for Leave to Intervene on an Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, 73 Fed. Reg. 63,029 (Oct. 22, 2008) (Notice of Hearing).

practicable to adopt, with supplementation, DOE's Environmental Impact Statement (EIS) and supplements.³

In May 2009, three Construction Authorization Boards designated to rule on intervention petitions, granted intervenor and interested government participant status, and admitted nearly 300 contentions.⁴ A fourth Construction Authorization Board (CAB-04 or Board), was later established "to preside over matters concerning discovery, Licensing Support Network [LSN] compliance, new or amended contentions, grouping or consolidation of contentions, scheduling, [and] case management matters relating to any of the foregoing"⁵ This Board issued a case management order pacing discovery with the Staff's planned Safety Evaluation Report (SER) issuance schedule. See Case Management Order #2, dated September 30, 2009 (unpublished) (CMO #2), at 3. Phase I discovery, which was to address issues that relate to SER Volume 1 or 3, was authorized to begin on October 1, 2009 (although depositions could not commence until February 16, 2010). *Id.*

Subsequent to the briefing of legal issues and commencement of discovery, but prior to any depositions, DOE filed a "Motion to Stay the Proceeding," dated February 1, 2010 (Stay Motion), stating that the President, in the proposed budget for fiscal year 2011, "directed that the Department of Energy 'discontinue its application to the U.S. Nuclear Regulatory Commission for a license to construct a high-level waste geologic repository at Yucca Mountain in 2010'" See Stay Motion at 1 (internal citation omitted). DOE requested an interim suspension of discovery and a stay of the proceeding in order to avoid unnecessary expenditure of resources. See *id.* at 2. CAB-04 granted DOE's suspension and stay requests, pending

³ *Id.* at 63,029. See also U.S. Nuclear Regulatory Commission Staff's Adoption Determination Report for the U.S. Department of Energy's Environmental Impact Statements for the Proposed Geologic Repository at Yucca Mountain (Sept. 5, 2008) (ML082420342) (2008 Adoption Determination Report), at ES-1.

⁴ *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-09-06, 69 NRC 367, 381, 422, 455, 485-500 (2009), *rev'd in part, aff'd in part*, CLI-09-14, 69 NRC 580 (2009).

⁵ Establishment of Atomic Safety and Licensing Board; Department of Energy, 74 Fed. Reg. 30,644 (June 26, 2009).

disposition of DOE's expected motion to withdraw,⁶ which was filed on March 3, 2010. See U.S. Department of Energy's Motion to Withdraw, dated March 3, 2010.

On June 29, 2010, the Board denied DOE's motion to withdraw the application and granted five late intervention petitions.⁷ The next day, parties were invited to file briefs "as to whether the Commission should review, and reverse or uphold, the Board's decision" by July 9, 2010. Order, dated June 30, 2010 (unpublished).

Pending a Commission decision on DOE's motion to withdraw, the adjudicatory proceeding continued. The Board ruled on Phase I legal issues and directed the parties to attempt to stipulate to the effects of its rulings on admitted contentions.⁸ The Board later issued orders dismissing safety contentions proffered by the State of Nevada and the Nuclear Energy Institute (NEI).⁹

With regard to discovery activities, on February 25, 2011, the Board denied DOE's motion to renew a temporary suspension of the proceeding,¹⁰ but later, recognizing the uncertain course of the proceeding, granted DOE's motion for a protective order quashing

⁶ See Order (Granting Interim Suspension of Discovery), dated February 2, 2010 (unpublished); Order (Granting Stay of Proceeding), dated February 16, 2010 (unpublished).

⁷ *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-10-11, 71 NRC 609, 649 (2011), *review declined*, CLI-11-7, 74 NRC 212 (2011). As a result, the State of South Carolina (South Carolina), the State of Washington (Washington), Aiken County, South Carolina (Aiken County), the Prairie Island Indian Community (PIIC), and the National Association of Regulatory Utility Commissioners (NARUC) joined the ten intervenor parties—(1) the State of Nevada, (2) Nye County, Nevada, (3) four Nevada Counties (Churchill, Esmeralda, Lander, and Mineral) jointly, (4) Clark County, Nevada, (5) the Nuclear Energy Institute, (6) White Pine County, Nevada, (7) the State of California, (8) County of Inyo, California, (9) the Joint Timbisha Shoshone Tribal Group, and (10) the Native Community Action Council—and two interested government participants under 10 C.F.R. § 2.315(c) (Eureka County, Nevada, and Lincoln County, Nevada). See *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-11-74, 74 NRC 368, 369 (2011).

⁸ *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-10-22, 72 NRC 661, 691 (2010).

⁹ See Memorandum and Order (Ruling on Motion to Dismiss), dated July 13, 2011 (unpublished), at 11; Order (Dismissing NEI Safety Contention 05), dated May 10, 2011 (unpublished), at 2; Order (Dismissing Contentions), dated March 24, 2011 (unpublished), at 2.

¹⁰ Order (Denying Motion to Renew Temporary Suspension of the Proceeding), dated February 25, 2011 (unpublished), at 3.

deposition notices filed by the State of Nevada.¹¹

On September 9, 2011, the Commission announced that it was evenly divided¹² as to whether the Commission should review, and reverse or uphold, the Board's denial of DOE's motion to withdraw. See *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-11-07, 74 NRC 212, 212 (2011). The Commission directed the Board to "complete all necessary and appropriate case management activities, including disposal of all matters currently pending before it and comprehensively documenting the full history of the adjudicatory proceeding." *Id.*

Consistent with the Commission's direction, the Board suspended the adjudicatory proceeding on September 30, 2011, documenting the proceeding's history and citing fiscal constraints.¹³ At the time the proceeding was suspended, fifteen parties had been granted intervention in the proceeding, two counties had been permitted to participate as interested government bodies, and one organization had been permitted to participate as *amicus curiae*. See *U.S. Dep't of Energy*, LBP-11-24, 74 NRC at 369.¹⁴ In addition, the Board noted that two hundred eighty-eight contentions were pending and would be ripe for adjudication at evidentiary hearings after completion of discovery, issuance of the four remaining SER volumes, which were in various states of completion,¹⁵ and any needed supplementation of the DOE EIS. See *U.S. Dep't of Energy*, LBP-11-24, 74 NRC at 369. Discovery was in progress although no depositions had been held. See CMO #2 at 3, 7. Due to lack of budgeted funds, the Licensing

¹¹ See Order (Granting Motion for Protective Order), dated May 20, 2011 (unpublished), at 3 (Order Granting Protective Order).

¹² Commissioner Apostolakis recused himself from this adjudication and, therefore, did not participate. See Notice of Recusal (July 15, 2010).

¹³ See *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-11-13, 74 NRC 635, 639 (2011); *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-11-24, 74 NRC 368, 370 (2011).

¹⁴ Florida Public Service Commission was participating as *amicus curiae*. See *U.S. Dep't of Energy*, LBP-10-11, 71 NRC at 649.

¹⁵ The remaining four SER Volumes were in various states of completion. See Letter from A. Macfarlane, Chairman United States Nuclear Regulatory Commission, to F. Upton, Chairman, Committee on Energy and Commerce (Sept. 6, 2013) (ML13255A485), at Enclosure, Response 2.

Support Network (LSN)¹⁶ was shut down, and consistent with Board orders, all participants other than the NRC staff (whose LSN collection resides in NRC's Agencywide Documents Access and Management System (ADAMS)), delivered electronic copies of their LSN collections to the Secretary. See *U.S. Dep't of Energy*, CLI-11-13, 74 NRC at 637-38.

Also by September 30, 2011, Staff had completed orderly closure of its Yucca Mountain Repository Program and associated licensing review activities.¹⁷ As part of its orderly closure process, the Staff issued three Technical Evaluation Reports (TERs) as knowledge management tools and completed more than 40 other knowledge capture documents. Closeout Memorandum at 1.

On August 13, 2013, the U.S. Court of Appeals for the District of Columbia Circuit granted a writ of mandamus, directing the NRC to resume the licensing process. *In re Aiken County* (slip op. at 22). Citing this ruling, on August 23, 2013, Nye County, supported by the States of South Carolina and Washington, Aiken County, South Carolina, and the National Association of Regulatory Utility Commissioners,¹⁸ filed essentially identical motions before the Commission and Atomic Safety and Licensing Board, asking that (1) the suspension of the above-captioned licensing proceeding be lifted, (2) the ASLB schedule a case management conference at NRC Headquarters to revise and reinstitute the discovery schedule suspended on September 9, 2011, and (3) an order be issued directing immediate release of the Safety Evaluation Report (SER). Nye County Motion at 1.

On that same date, a Nevada motion, supported by Clark County, Nevada and Inyo County, California asked the Commission to (1) reconstitute the LSN thereby making text of relevant documents electronically accessible and searchable by parties and interested members

¹⁶ See 10 C.F.R. § 2.1001 (defining "Licensing Support Network").

¹⁷ See Memorandum from R. W. Borchardt to the Commission, Closeout of Yucca Mountain Repository Program (Jan. 3, 2012) (ML120100050) (Closeout Memorandum), at 1.

¹⁸ These parties submitted "Nye County, Nevada, the States of South Carolina and Washington, Aiken County, South Carolina, and [NARUC] Consolidated Response to NRC Order of August 30, 2013 and to other Parties' Submittals" on September 30, 2013.

of the public; (2) require in-person hearings held by the Licensing Board be convened in the Las Vegas area; and (3) provide that CAB-04 preside over restarted proceedings due to their extensive and unique experience.¹⁹ NEI responded to the motions, stating that remaining funds should be used to complete unfinished SER volumes because, in the absence of Staff conclusions, it would be premature to consider resumption of hearing activities.²⁰

On August 30, 2013, the Commission invited participants in the above-captioned proceeding to provide their views as to how the agency should continue with the licensing process. Order at 1.

DISCUSSION

The Commission cannot reach a decision on the DOE application until completion of (1) Staff's safety and environmental reviews, (2) formal discovery (including depositions, interrogatories, and requests for admissions), (3) litigation, including a hearing, on admitted contentions and any new contentions, and (4) Commission review of contested and uncontested issues. See 10 C.F.R. Part 2, Appendix D; 10 C.F.R. § 2.1023.

The agency currently has approximately \$11.1 million in unobligated carryover funding derived from the Nuclear Waste Fund.²¹ There is also an additional \$2.5 million of obligated,

¹⁹ Nevada Motion at 2-3. Aiken County, Nye County, and the State of Washington supported the request that the same CAB be assigned to preside over continuation of the proceeding, but opposed the request for recreation of the LSN and holding the proceeding in Las Vegas, Nevada. *Id.* at 3. On September 30, 2013, Nevada, joined by Inyo County, Clark County, Timbisha Shoshone Tribe, and Native Community Action Council, filed views in response to the Order, stating that 1) steps must be taken with the objective of reconstituting the LSN, 2) steps must be taken with the objective of completing all remaining SER volumes (in parallel with reconstitution of the LSN), 3) the Commission should address specified petitions, and 4) CAB-04 should be directed to convene a case management conference in the Las Vegas area. State of Nevada Comments in Response to the Secretary's August 30, 2013 Order (Sept. 30, 2013).

²⁰ See Nuclear Energy Institute's Answer to Motions Concerning Resumption of Yucca Mountain Licensing Activities (Aug. 30, 2013), at 2, 4 ("it is premature for the Commission to direct the expenditure of funds on any other licensing or hearing activity" because it is unknown the amount of funds that will remain after completion of SER volumes). NEI also opposes Nevada's motion because reconstitution of the LSN would expend limited funds "on fruitless tasks" and is otherwise premature. *Id.* at 6.

²¹ Letter from J. Dyer, Chief Financial Officer, to R. Frelinghuysen, Chairman, Subcommittee on Energy and Water Development, Committee on Appropriations (Sept. 13, 2013) (ML13252A237) (September 2013 Letter). See also Nuclear Waste Policy Act (NWPA) § 302(c), 42 U.S.C. § 10222(c).

unexpended funding. September 2013 Letter at 1. This limited funding will not allow the Commission to complete all of the steps necessary to make a licensing determination as to a construction authorization for the Yucca Mountain repository.²² If all adjudicatory and Staff review activities were resumed under the limited funding, it is possible that none of the discrete activities would be completed, and it is uncertain where in the process they would have to again shut down. See Affidavit of Josephine Piccone, dated September 30, 2013 (Piccone Affidavit), at ¶15 (“Completion of SER Volumes 2-5 and the EIS supplement, assuming the Staff prepares the supplement, would likely expend most of” the agency’s Nuclear Waste Fund resources). The Staff proposal examines the discrete activities necessary to complete the application review process, and what can be reasonably accomplished under the current limited funding.

Staff recommends that limited agency resources should first be devoted to completion of the remaining SER volumes and National Environmental Policy Act (NEPA)²³ document (EIS supplement) – discrete tasks that likely can be accomplished with available funds and a focused effort. See Piccone Affidavit at ¶¶3-5. Given the limited funding available, the Commission should not follow the established schedule for this licensing proceeding, which contemplates that discovery will proceed while the Staff is developing its SER,²⁴ and should instead continue to hold the adjudicatory proceeding suspended through the completion of the SER and the preparation of, or adoption of a DOE supplement to the EIS. This would enhance the Staff’s ability to complete its review documents before further loss of key personnel, while minimizing the effect of the uncertainty associated with future availability of funds. In effect, the

²² See *In re Aiken County* (Garland, C.J., dissenting) (slip op. at 3) (“No one disputes that \$11 million is wholly insufficient to complete the processing of the application.”).

²³ National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*

²⁴ See Notice of Hearing, 73 Fed. Reg. at 63,032 (revising the Appendix D schedule so that the discovery schedule would be set by day 200); 10 C.F.R. Part 2, Appendix D (providing the SER to be issued by day 548); 10 C.F.R. § 2.1026(a) (“the Presiding Officer shall adhere to the schedule set forth in appendix D of this part.”).

Commission should balance meaningful progress in Staff review of the application against the resumption, but lack of completion, of the adjudicatory proceeding.

A. Issuance of Staff Review Documents

As described below, the Staff recommends that the Commission direct the Staff to first use available funds to complete the SER and EIS Supplement.

1. Safety Evaluation Report

The SER contains the Staff's independent analysis of the DOE license application, the supporting information and the applicable regulatory requirements, and contains findings describing how the application meets or does not meet regulatory requirements. Completion of the SER is a prerequisite both to completion of a hearing and a Commission licensing determination. Although discovery in the adjudicatory proceeding could resume prior to issuance of an SER, the SER must be issued prior to the commencement of the evidentiary hearing on safety issues. See 10 C.F.R. Part 2, Appendix D.²⁵

As noted earlier, the Staff issued TERs as part of the orderly closure of NRC activities related to Yucca Mountain. See Closeout Memorandum at 1. These documents do not include conclusions as to whether the DOE application satisfies all applicable Commission regulations.²⁶

Completion of the SER volumes—discrete tasks that likely could be accomplished with available funds—would preserve Staff regulatory conclusions, which would not be available until the SER is complete, would make information available to participants and the general public

²⁵ Related to SER completion, Nye County argues that the Board should order immediate issuance of the SER. Nye Motion at 16. The Board does not, however, have authority to supervise or direct NRC regulatory reviews. See *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-04-6, 59 NRC 62, 74 (2004) (“NRC Staff reviews, which frequently proceed in parallel to adjudicatory proceedings, fall under the direction of Staff management and the Commission itself, not licensing boards.”).

²⁶ See NUREG-2107, Technical Evaluation Report on the Content of the U.S. Department of Energy's Yucca Mountain Repository License Application, Postclosure Volume: Repository Safety After Permanent Closure (Aug. 2011), at xvii; NUREG-2108, Technical Evaluation Report on the Content of the U.S. Department of Energy's Yucca Mountain Repository License Application, Preclosure Volume: Repository Safety Before Permanent Closure (Sept. 2011), at xv; NUREG-2109, Technical Evaluation Report on the Content of the U.S. Department of Energy's Yucca Mountain Repository License Application, Administrative and Programmatic Volume (Sept. 2011), at ix.

prior to a hearing, could inform any national repository decisions, and the scientific methods and analyses could enlighten any future repository reviews.²⁷ In addition, if the Commission directs that the adjudicatory proceeding resume and the SER is completed prior to the continuation of the proceeding, the Staff's analyses and conclusions could inform parties' participation in the adjudicatory proceeding, and facilitate resolution of contested issues. Thus, a complete SER could serve multiple purposes.

If the Staff is given sufficient resources, it could complete the discrete task of issuing the remaining SER volumes in a short timeframe. The Staff estimates that, absent any unforeseen issues and with sufficient Staff resources, it could complete and issue SER Volumes 2-5 concurrently in approximately 12 months after Staff initiates work, for less than the currently available Nuclear Waste Fund resources. Piccone Affidavit at ¶¶3, 5.²⁸ This estimate assumes that the Staff will not need additional technical information from DOE, the Center for Nuclear Waste Regulatory Analysis will be available as the principal technical support contractor to Staff, and the Staff will have access to DOE's LSN document collection as a resource for Staff review. Piccone Affidavit at ¶3. This estimate is based on inclusion of a start-up period to replace key technical reviewers who no longer work for the agency, to reassemble technical staff assigned to other tasks, and to enable reviewers to regain familiarity with licensing issues and docketed

²⁷ The NWA contemplates that there would be more than one repository. See, e.g., NWA §161, 42 U.S.C. § 10172a.

²⁸ During a February 28, 2013, Joint Hearing before the Subcommittee on Environment and the Economy, and Subcommittee on Energy and Power, Chairman Shimkus noted that NRC previously stated that it would cost approximately \$6.5 million to complete the SER and that a House investigation "uncovered an estimate by NRC staff indicating that the Yucca Mountain [SER] could be completed in six to eight months." Transcript (Tr.), <http://democrats.energycommerce.house.gov/sites/default/files/documents/Final-Transcript-EE-EP-Nuclear-Regulatory-Commission-2013-2-28.pdf> (last visited Sept. 30, 2013), at 26. However, both the Commission and Staff have noted that the longer the Staff's review activities are suspended, the higher the costs for restarting the SER may be. See *id.* (Commissioner Svinicki's response to a question from Chairman Shimkus); Tr. of Hearing before the House Committee on Appropriations, Subcommittee on Energy and Water (Apr. 11, 2013) (audio record available at <http://thomas.loc.gov/video/house-committee/hsap/3129580>, last visited Sept. 30, 2013) (Michael Weber, Deputy Executive Director of Operations, stated that the previous year's \$6.5 million SER completion estimate would increase as time goes on).

correspondence due to the break in the application review and the shift in Staff focus to other agency activities. *See id.* However, SER Volumes 2-5 would likely expend a substantial amount of the agency's unobligated Nuclear Waste Fund resources. *See Piccone Affidavit at ¶¶5.* Accordingly, if other activities are initiated prior to SER completion, there may not be sufficient funds to complete the SER, and the benefits of having a completed SER would not be realized.

2. Environmental Impact Statement Supplement

Similar to the SER, there would be a benefit to completing the discrete task of issuing an EIS supplement, or if the supplement is prepared by DOE, an adoption review and determination.

The Staff concluded that the Yucca Mountain Final EIS and supplements prepared by DOE needed additional supplementation to address the potential impacts of the proposed action on groundwater and from surface discharges of groundwater. *See 2008 Adoption Determination Report at ES-1.* In October 2008, DOE notified the Staff of its intent to supplement the EIS.²⁹ Subsequently, DOE notified the Staff that it had decided not to prepare a supplement, and instead submitted technical reports that the Staff could use to prepare a supplement.³⁰

Assuming that DOE does not change its decision regarding EIS supplement preparation and the Staff will need to prepare the supplement, the Staff estimates that, provided primary technical analysis can be drawn from the technical document and supporting information provided by DOE in 2009, and that no significant interagency consultation will be needed, it would take approximately 12 months to prepare a draft and final EIS supplement. *See Piccone*

²⁹ *See* Letter from W. Boyle, to Director, Division of High Level Waste Repository Safety, Notification of Plan for Supplementing the Final Environmental Impact Statement (FEIS) (Oct. 3, 2008) (ML082810087).

³⁰ *See* Letter from W. Boyle, to Director, Division of High Level Waste Repository Safety, Notification of Change of Commitment for Supplementing the Final Environmental Impact Statement (July 30, 2009) (ML092150301).

Affidavit at ¶4.³¹ This includes time to create a review team, and issue a draft and final supplement, including receiving and addressing public comments. See Piccone Affidavit at ¶4. Completion of the EIS supplement could be accomplished concurrent with the SER completion, and with the available funds. *Id.* at ¶4, 5.

Completion of an EIS supplement (by NRC or DOE)—a discrete task that likely could be accomplished with available funds—would preserve Staff’s conclusions and make information available to the participants and general public. If the Commission directs that the adjudicatory proceeding resume and the EIS supplement be completed prior to resumption of the proceeding, availability of the EIS supplement, similar to the SER, could facilitate resolution of contested issues and inform participation in the process. In addition, although discovery on certain issues could commence prior to issuance of an EIS supplement,³² the EIS supplement must be issued prior to completion of the adjudicatory proceeding.

Accordingly, given the benefits described above, the current limited funds, most of which would be expended issuing the SER and EIS supplement (see Piccone Affidavit at ¶5), and uncertainty of future funds, the Staff recommends that the Commission first dedicate agency Nuclear Waste Fund resources to completing the SER and EIS supplement.

B. Adjudicatory Proceeding (Including Formal Discovery)

CAB-04 had structured the proceeding schedule consistent with previous Staff plans to issue the SER in volumes on discrete subject matters, enabling litigation to proceed in phases in an effort to support the adjudicatory decision timeframe in 10 C.F.R. Part 2, Appendix D.³³ Absent extraordinary circumstances, it is the Commission’s policy to conduct licensing

³¹ The scope of the supplement was previously defined in the Staff’s 2008 Adoption Determination Report so additional scoping meetings will not be needed. See 2008 Adoption Determination Report at 3-12 (“Given the description in this report of the needed supplementation, and pursuant to 10 CFR § 51.26(d), the staff would not conduct scoping for this supplement.”); Piccone Affidavit at ¶4.

³² Phase I discovery did not include NEPA contentions involving additional groundwater analysis. See CMO #2 at 3.

³³ See, e.g., CMO #2 at 3.

proceedings as promptly as practicable.³⁴ The Commission's adjudicatory policies and procedures are intended to provide a fair hearing process, to avoid unnecessary delays in the NRC's review and hearing process, and to produce an informed adjudicatory record that supports agency decision making.³⁵

The Commission's longstanding practice is to limit orders delaying proceedings to the duration and scope necessary to promote the Commission's dual goals of public safety and timely adjudication and, consistent with the Administrative Procedure Act's directive, to endeavor to complete hearings and reach a final decision "within a reasonable time."³⁶ The Commission has drawn a distinction, however, when going forward would clearly be a waste of resources.³⁷

The schedule in 10 C.F.R. Part 2, Appendix D, the provisions of 10 C.F.R. Part 2, Subpart J, and the schedule in other NRC licensing proceedings³⁸ provide for discovery activities before the Staff issues its technical review documents. As ordered by CAB-04, Phase I discovery includes all safety, environmental (other than those that relate to groundwater) and legal/miscellaneous contentions related to subject matters in SER Volumes 1 and 3, and the Staff's 2008 Adoption Determination Report on the DOE EIS and supplements. CMO #2 at 3. Phase I began in Fall 2009 and was initially scheduled to end on November 30,

³⁴ See *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, N.M. 87174), CLI-04-14, 59 NRC 250, 254 (2004); see also *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, N.M. 87174), CLI-01-04, 53 NRC 31, 38 (2001) (the Commission has a "long-standing commitment to the expeditious completion of adjudicatory proceedings") (citing *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 24 (1998)).

³⁵ *Hydro Resources, Inc.*, CLI-01-04, 53 NRC at 38-43 (2004) (postponing the conclusion of a hearing for the convenience of the applicant (to save resources) is not warranted given that a delay of years (due to project indecision based on market conditions) to resume proceeding on a voluminous record would require parties to have to begin virtually from scratch to reacquaint themselves with case details; fairness to the parties, including intervenor's concern that expert affidavits could grow stale and previously retained experts could become unavailable, dictate resumption of delayed portion of litigation).

³⁶ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Installation), CLI-01-26, 54 NRC 376, 381, 383 (2001) (quoting 5 U.S.C. § 558(c)).

³⁷ *Id.* at 383 (noting delay warranted because of a state ruling blocking construction of a facility).

³⁸ See, e.g., Model Milestones in 10 C.F.R. Part 2, Appendix B.II (outlining milestones for SER issuance and mandatory disclosures).

2010 (or two months after the issuance of SER Volume 3, whichever is later). *Id.*³⁹ Discovery on contentions outside of the scope of SER Volumes 1 and 3 was permissible only “if necessary or appropriate to lead to the production of admissible evidence associated with the prosecution or defense of a contention that is within the scope of SER Volume 1 or 3.” CMO #2 at 3. Initial witness disclosures were to be made within ten days after the start of Phase I discovery, with subsequent updates. *Id.* at 5.

No discovery against the Staff regarding Phase I safety or miscellaneous contentions could proceed before the issuance of related SER volumes. *Id.* at 7. The Staff was not required to respond to any discovery request, or identify or produce any witness or potential witness, pursuant to 10 C.F.R. § 2.709(a)(1) with respect to Phase I safety or miscellaneous contentions until ten (10) days after issuance of the related SER volume. CMO #2 at 7. The Staff issued SER Volume 1 in August 2010 and identified its witnesses on September 2, 2010.⁴⁰ The Staff subsequently indicated that the issuance dates for SER Volumes 2-5 were indeterminate due to budget uncertainty and orderly closure.⁴¹

The Board ordered the Staff to respond to discovery regarding NEPA Phase I contentions and to produce witnesses only with respect to the 2008 Adoption Determination Report. CMO #2 at 5, 7.⁴² The Staff first identified its Phase I NEPA witnesses on October 8,

³⁹ The Board later issued an order extending Phase I discovery through January 31, 2011, after the Staff represented that its SER Volume 3 issuance date had changed. CAB Case Management Order #3, dated February 1, 2010 (unpublished), at 1.

⁴⁰ See NUREG-1949, Safety Evaluation Report Related to Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada: Volume I: General Information (Aug. 2010) (ML102350193); NRC Staff Identification of Witnesses for SER Volume 1 (Sept. 2, 2010).

⁴¹ See NRC Staff Notification Regarding SER Schedule (Nov. 29, 2010); NRC Staff Response to December 8, 2010 Board Order and Notification Regarding SER Volume 4 Issuance (Dec. 22, 2010); NRC Staff Notification Regarding Technical Evaluation Report Issuance and Safety Evaluation Report Volumes 2 and 5 (Sept. 12, 2011).

⁴² The Board also recognized that there may be circumstances requiring identification of new, additional or replacement Party or Other Witnesses. CMO #2 at 7.

2009,⁴³ and later withdrew one witness due to the individual being no longer affiliated with the NRC.⁴⁴

Of the Phase I issues, only one safety contention, NEV-SAFETY-196, Description of Security Measures, pertains to SER Volume 1, the only SER volume published to date. There are almost 200 other Phase I contentions.⁴⁵

Given that Phase I discovery had begun prior to suspension of the proceeding, rescheduled depositions could proceed if the Commission authorized the adjudicatory proceeding to resume. Commencement of depositions may be beneficial if participants in the adjudicatory proceeding retained experts that could become unavailable if the proceeding continues to be suspended.⁴⁶ In addition, allowing participants to proceed with Phase I depositions could advance litigation in the proceeding.

⁴³ NRC Staff Identification of Witnesses (Oct. 8, 2009).

⁴⁴ NRC Staff Updated Identification of Witnesses and Withdrawal of Witness Related to Phase I NEPA Contentions (Aug. 23, 2011).

⁴⁵ Phase I contentions identified in the December 30, 2009 Order (Concerning Contention Consolidation and Groupings) (unpublished) do not include contentions admitted due to the granting of five intervention petitions (by Washington, South Carolina, Aiken County, NARUC, and PIIC) in June 2010. The Board noted that each raised legal issues that do not require supporting facts. *U.S. Dep't of Energy*, LBP-10-11, 71 NRC at 646. The Board admitted the first contention proffered by each (namely, that DOE lacks authority under the NWSA to withdraw the Application), noting that each proffered virtually identical contentions advancing claims under NWSA, NEPA, the Administrative Procedure Act, and certain constitutional provisions, and reserved judgment on other contentions raised by them. *Id.* at 647-49. The Board did not rule on the admissibility of their other contentions before the proceeding was suspended.

⁴⁶ Fairness to the parties, including an intervenor's concern that retained experts could become unavailable, in part, led the Commission to order resumption of a delayed portion of a materials licensing proceeding. See *Hydro Resources, Inc.*, CLI-01-4, 53 NRC at 38-44 (postponing the conclusion of a hearing for the convenience of the applicant (to save resources) is not warranted given that a delay of years (due to project indecision based on market conditions) to resume proceeding on a voluminous record would require parties to have to begin virtually from scratch to reacquaint themselves with case details). While the intervenors in this proceeding have not raised such arguments here, prioritizing issues to enhance the potential that the agency can complete review activities where there are insufficient funds to complete the licensing proceeding, is not comparable to arranging the proceeding schedule for the convenience of one party so that the conclusion of a hearing would not be postponed. Further, limited funding, a factor outside of the Commission's control, distinguishes the *Hydro Resources* case because the limited amount of funds available to the agency in the instant proceeding creates a legal impediment to continuation and completion of the proceeding once the funds derived from the Nuclear Waste Fund are exhausted.

However, commencing depositions is not likely to make meaningful progress on the Phase I contentions and the other contentions that were not included in Phase I given existing limited funds (which are not sufficient to complete the licensing process), uncertainty regarding future funds, and the time needed to reschedule multiple depositions.⁴⁷ The Board previously granted a motion for a protective order quashing deposition notices for similar reasons, recognizing the uncertainty of Congressional funding, and “the uncertain course of this unique proceeding,” and its “responsibility to control discovery to avoid undue and potentially unnecessary expense.”⁴⁸

DOE’s active participation is needed in depositional discovery to make DOE experts available for deposition, to depose intervenor experts, and to develop information needed for a full examination of contested issues. If DOE needs time to find replacement witnesses that have become unavailable due to the lapse of time, it is not clear how far the discovery process can progress during the twelve month period it would take to complete Staff review documents.⁴⁹ While the proponents of contentions have the burden of production (or coming forward with evidence) that proves their contention, by a preponderance of the evidence, DOE (the applicant)

⁴⁷ Prior to suspension of the proceeding, approximately 20 depositions had been scheduled for February and March 2010, this included Nevada, DOE, and Staff witnesses. See, e.g., State of Nevada’s Notice Duces Tecum of the Intention to Take the Oral Deposition of Stefan Finsterle (Jan. 28, 2010); U.S. Department of Energy Notice of Deposition of Dr. Adrian H. Bath (Jan 14, 20010); U.S. Department of Energy Notice of Deposition of Dr. Douglas F. Hambley (Jan. 14, 20010); State of Nevada’s Notice Duces Tecum of the Intention to Take the Oral Deposition of Christine Lenore Pineda (Jan. 8, 2010) (noticing deposition for March 12, 2010). Numerous other witnesses, mostly from DOE, had been identified, but not scheduled for deposition. See, e.g., U.S. Department of Energy’s Initial List of Party Witnesses and Related Information (Oct. 13, 2009) (identifying approximately 50 witnesses); State of Nevada Initial Party Witness List for Phase I Discovery (Oct. 13, 2009) (identifying 15 witnesses); Notice of White Pine County’s Party Witnesses (Oct. 9, 2009) (identifying three witnesses).

⁴⁸ See Order Granting Protective Order at 2-3. The Board also stated that “parties are admonished that, until developments warrant the need to establish a new discovery schedule, the Board will look with disfavor upon the noticing of additional depositions—absent a compelling reason, such as the potential unavailability of a witness at a later date.” *Id.* at 3.

⁴⁹ See, e.g., U.S. Department of Energy’s Motion to Renew Temporary Suspension of the Proceeding (Jan. 21, 2011), at 5 (stating that an active licensing proceeding would “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” in 2010).

has the burden of proof as to whether it has demonstrated that it meets applicable safety requirements.⁵⁰ Thus, if DOE does not participate in discovery (or needs substantial time to identify and make witnesses available), it would be difficult to assemble an adequate record upon which to make a construction authorization determination. A delay in discovery until the Staff completes its SER could provide the parties, including the Staff, time to gather resources⁵¹ and assemble knowledgeable witnesses.⁵²

If the Commission were to order the resumption of the proceeding, resources would be needed to facilitate ongoing document production, complete discovery, including depositions and interrogatories, determine the merits of almost 300 contentions (either through motions for summary disposition or evidentiary proceedings), consider any new contentions, and adjudicate party disputes and appeals. It is unclear at which point the existing funds would be exhausted in the adjudicatory process due to the complexity and uncertainty of litigation activities and, thus, it would be difficult to predict or identify a precise or meaningful stopping point. Further, absent sufficient funding, continuation of the proceeding for a brief period likely will not lead to resolution of pending contentions. Because limited funds cannot support the completion of the licensing process, resuming the adjudicatory proceeding would likely result in suspension of the proceeding before all parties have had an opportunity to fully explore, support, and ultimately receive a decision on the issues they have raised. In addition, if the proceeding resumes

⁵⁰ See *Curators of the Univ. of Mo.* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 121 (1995) (because the applicant bears the burden of proof, adequacy of the Staff's review is not determinative as to the safety issues or whether the application should be approved); *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1048 (1983) (citing *Consumers Powers Co.* (Midland Plant, Units 1 & 2), ALAB-283, 2 NRC 11, 17 (1975)); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 191 (1975).

⁵¹ For example, White Pine County has indicated that "absent additional funding being provided through appropriations by the Congress through the Department of Energy or other sources to White Pine County, the County will run out of carryover Nuclear Waste Funding on or about October 15, 2013 and will be compelled to terminate its Yucca Mountain oversight initiatives, including participating in the related NRC licensing proceeding, at that time." White Pine County, Nevada Views Regarding How NRC Should Continue the Yucca Mountain Licensing Process (Sept. 25, 2013).

⁵² As defined in 10 C.F.R. § 2.1001, the Staff is a party to the proceeding. Accordingly, like other parties, it would need resources to participate in the adjudicatory proceeding, including discovery.

without assurance of sufficient funds for completion, the overall cost to the participants and agency could be greater as a result of startup and shut down activities. Accordingly, the Staff recommends that the Commission continue the suspension of the adjudicatory proceeding and first focus limited resources on tasks that can be completed (i.e., Staff technical review documents).

1. Location of Prehearings and Evidentiary Hearing

The Staff takes no position at this time on Nevada's request for all proceedings to be held in Las Vegas, Nevada. See Nevada Motion at 8-10. Venue issues are appropriately left to the discretion of the Board, consistent with Commission guidance, if, for example, the Commission determines that hearings should be held outside the existing ASLBP hearing facilities in Rockville, Maryland. Due to the closing of the Las Vegas Hearing Facility (an electronic courtroom), time may be needed to allow the agency to obtain space that will enable the NRC to fulfill requirements for the proceeding. See, e.g., 10 C.F.R. § 2.1013(b) (hearing transcripts will be available the next day).

2. Presiding Board

The Staff does not object to Nevada's request that CAB-04 continue to preside over the proceeding. See Nevada Motion at 10-11. However, the Commission long ago anticipated and authorized the establishment of multiple licensing boards throughout the proceeding.⁵³ Thus, the Chief Administrative Judge of the ASLBP should retain the authority to establish other boards, as needed, and to reassign judges, if necessary, to ensure efficient conduct of the proceeding.

3. Licensing Support Network

The Staff takes no position on how the Commission should address availability of the LSN, but the Staff would need access to DOE's LSN collection and any new supplements filed

⁵³ 73 Fed. Reg. at 63,031 ("The Commission anticipates and authorizes the establishment of multiple licensing boards throughout the proceeding.").

prior to completion of its SER as a resource for Staff review and to ensure documents referenced in the SER are publicly available prior to publication, consistent with agency guidance. See Piccone Affidavit at ¶13. Thus, the Staff provides the following information for the Commission's consideration.

The LSN—the combined, web-based system to make documentary material electronically available—was established under 10 C.F.R. Part 2, Subpart J, to assist the Commission in reaching a decision in a repository licensing proceeding consistent with the timeframes in the Nuclear Waste Policy Act.⁵⁴ The LSN was “intended to be primarily a discovery tool, enabling parties to quickly view materials.” See *U.S. Dep't of Energy*, CLI-11-13, 74 NRC at 637. The predecessor to the LSN, the Licensing Support System (LSS), was developed, in part, through a negotiated rulemaking.⁵⁵

The LSN was shut down in 2011 due to the lack of budgeted funds. See *U.S. Dep't of Energy*, CLI-11-13, 74 NRC at 639. To preserve the documents, CAB-04 directed the parties—except for the Staff whose LSN collection resides within ADAMS—to submit their LSN collections (in portable document format) and the associated bibliographic files to the NRC's Office of the Secretary (SECY).⁵⁶ It also directed SECY to install the documents in a separate LSN ADAMS library when funds became available to do so. June 2011 Order at 6-7. The parties transmitted their LSN collections to SECY, *U.S. Dep't of Energy*, CLI-11-13, 74 NRC

⁵⁴ See *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-04-20, 60 NRC 300, 304 (2004); 10 C.F.R. §§ 2.1001 (defining “Licensing Support Network” and “documentary material”), 2.1011(b) (providing design standards for participant computer systems and requiring that participants make information available on a web accessible server).

⁵⁵ See *Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste*, 54 Fed. Reg. 14,925, 14,926 (Apr. 14, 1989). The LSS was a stand-alone database administered by the NRC. *Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository*, 62 Fed. Reg. 60,789, 60,790 (Nov. 13, 1997).

⁵⁶ Order (Granting in Part and Denying in Part Reconsideration Motion), dated June 9, 2011 (unpublished) (June 2011 Order), at 6; Order (Concerning LSNA Memorandum and Parties' LSN Document Collections), dated April 11, 2011 (unpublished), at 3.

637-38, and SECY is currently storing the LSN collections, but has yet to upload them into ADAMS.⁵⁷

Following the Court of Appeals' August 13, 2013 Order, some of the parties to the licensing proceeding submitted motions articulating their views on the manner in which the Commission should handle the various LSN collections that SECY is currently storing.⁵⁸

In its motion, Nye County argues that because of the Board's foresight requiring the parties to preserve the documentary materials that previously resided on the LSN, Phase I discovery can and should restart, with oversight by the ASLBP, without the resurrection of the LSN. See Nye County Motion at 15. Nye County suggests that any administrative costs, such as restoring the LSN, should be handled through NRC's general administrative budget. See *id.*⁵⁹

⁵⁷ See Preliminary Brief of the Respondents at 45 n.28, *In re Aiken County*, No. 11-1271 (D.C. Cir. Jan. 11, 2012) (ML120110361) (explaining that an informal agreement with the House Appropriations Committee requires NRC to request approval of both the House and Senate Appropriations Committees on any effort to use Nuclear Waste Fund unobligated carryover funds, and that the NRC's request to use some of the Nuclear Waste Fund resources to preserve the LSN document collection was denied).

⁵⁸ See Nye County Motion at 15, 18; Nevada Motion at 3-8.

⁵⁹ Nye County's suggestion ignores the distinction between specific appropriations for Yucca-related activities and the NRC's general appropriations for other agency programs and expenses. Given Section 302(d) of the NWPA establishes a specific funding mechanism for the NRC's licensing activities related to Yucca Mountain, 42 U.S.C. § 10222(d), the agency may not use general appropriations to fund reconstitution of the LSN. This fundamental principle of appropriations law has been described by the Government Accountability Office as follows:

An appropriation for a specific object is available for that object to the exclusion of a more general appropriation, which might otherwise be considered available for the same object, and the exhaustion of the specific appropriation does not authorize charging any excess payment to the more general appropriation, unless there is something in the general appropriation to make it available in addition to the specific appropriation. In other words, if an agency has a specific appropriation for a particular item, and also has a general appropriation broad enough to cover the same item, it does not have an option as to which to use. It must use the specific appropriation. Were this not the case, agencies could evade or exceed congressionally established spending limits.

The cases illustrating this rule are legion. Generally, the fact patterns and the specific statutes involved are of secondary importance. The point is that the agency does not have an option. If a specific appropriation exists for a particular item, then that appropriation must be used and it is improper to charge the more general appropriation (or any other appropriation) or to use it as a "back-up."

(continued. . .)

Nevada contends that the LSN was created to “allow full text search and retrieval access” in order to facilitate an adequate review of the relevant documents. Nevada Motion at 6. Nevada argues that recreation of the LSN is necessary to complete discovery and to prepare for evidentiary hearings. *Id.* It also asserts that a critical attribute of the LSN was its ability to provide access to every interested member of the public. *Id.* Nevada suggests the “first order of business must be to re-establish NRC-sponsored electronic search capability of documentary material.” *Id.* at 7. According to Nevada, this can be accomplished by recreation of the LSN or creation of an ADAMS database with similar access and search capabilities. *Id.* at 6-7. Nevada further argues that “[i]f 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.” *Id.* at 7 n.3.

The Staff takes no position on how the Commission should address availability of the LSN collections. If the Commission chooses to reinstitute the LSN or create an alternative system, it may wish to consider accessibility features provided by the LSN, operational timing, record retention capabilities, and potential closure costs. Alternatives to reinstituting the LSN may include, but are not limited to, using an ADAMS-based system or a cloud-based system. However, if the Commission directs the agency to institute an alternative system, this would require altering the current LSN requirements in 10 C.F.R. Part 2—either by a rulemaking or issuance of an Order from the Commission.⁶⁰ A discovery tool with features similar to LSN

(footnote continued)

GOV'T ACCOUNTABILITY OFF., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, VOL. I, 2-21, GAO-04-261SP (3d ed. 2004) (internal footnotes omitted).

⁶⁰ The Commission may use its discretion in deciding whether to make changes to Part 2 by rule or by order, so long as it specifies why it made the choice. *See All Power Reactor Licensees and Research Reactor Licensees Who Transport Spent Nuclear Fuel*, CLI-05-06, 61 NRC 37, 40 (2005) (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)). Potential rulemaking mechanisms could include negotiated rulemaking, notice and comment rulemaking, and final rulemaking. *See, e.g., U.S. Dep't of Energy* (High-Level Waste Repository), LBP-05-27, 62 NRC 478, 503 n.106 (the Subpart J requirements “were the product of negotiated rulemaking that was subsequently adopted, in large part, by the Commission”); NUREG/BR-0053, United States Nuclear (continued. . .)

would include: 1) electronic access to information; 2) content searchable tools; and 3) the ability for parties and participants to upload newly created documents and certify that their respective documents are on the system and complete.⁶¹

The timing within which a new LSN or an alternative system could be operable may also be significant. A system with the LSN features listed above may expedite the parties' ability to resume Phase I discovery.⁶² In addition, timely availability of the documents may facilitate the Staff's publication of its remaining SER volumes. See Piccone Affidavit at ¶3.

Lastly, the Commission may wish to consider how any option could help the agency comply with Federal record keeping requirements because the LSN documents that were transmitted to SECY are now official agency records.⁶³ Some system options may provide for integrated records management, while other options may provide public access more quickly. System efficiencies and capabilities may also impact startup and closure costs.

(footnote continued)

Regulatory Commission Regulations Handbook, Rev. 6 (Sept. 2005) (ML052720461) (describing notice and comment rulemaking activities); Administrative Procedure Act, 5 U.S.C. § 553(b)(A), B (providing, in part, exceptions from notice of proposed rulemakings for "rules of agency organization, procedure, or practice" and when the agency finds good cause "that notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest").

⁶¹ See 10 C.F.R. §§ 2.1001 (defining LSN), 2.1003 (describing requirements for availability of material and collection supplementation), 2.1011 (describing requirements for management of electronic information); Licensing Procedures for the Receipt of High-Level Radioactive Waste at a Geological Repository: Licensing Support Network, Design Standards for Participating Websites, 66 Fed. Reg. 29,453, 29,454 (May 31, 2001) (explaining that the LSN allowed full text search and retrieval access to the relevant documents of all parties and potential parties).

⁶² Before the LSN was shut down, the Board instructed the parties to "access documents [via the LSN] relevant to the depositions of previously-identified Phase I Nevada safety contention witnesses (whether proffered by Nevada or DOE)." Order (Regarding Use of LSN), dated June 10, 2011, at 1. The Board gave this instruction because "if and when the [HLW] adjudicatory process actively resumes, the Board [did] not expect that potential limitations on the initial performance of the LSN should constitute a blanket excuse for deferring these depositions." *Id.* at 2. The Board did acknowledge, however, that "[t]here may, of course, be reasons why certain of these depositions cannot proceed fairly and efficiently without the LSN, and—if and when necessary—the Board will address such exceptions at the appropriate time." *Id.*

⁶³ See 44 U.S.C. § 3301. See also Management Directive 3.53 "NRC Records and Document Management Program" (Mar. 15, 2007) (ML071160026), at 1, 22.

CONCLUSION

For the foregoing reasons, the Commission should direct the Staff to first devote existing agency Nuclear Waste Fund resources to complete the remaining SER volumes and the EIS supplement, and continue to suspend the adjudicatory proceeding through completion of these documents. Although this unusual step would postpone resumption of discovery and could adversely affect witness availability, completion of the remaining SER volumes and EIS supplement are discrete activities that could likely be accomplished with available funds. Documenting Staff findings before additional loss of key personnel would contribute to the development of a full record for the licensing proceeding, make information available to the public, and document Staff's regulatory conclusions on whether the DOE application meets applicable requirements.

Respectfully submitted,

/Signed (electronically) by/

Jessica A. Bielecki
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15-D21
Washington, DC 20555-0001
(301) 415-1391
jessica.bieleck@nrc.gov

/Executed in accord with 10 C.F.R. § 2.304(d)/

Mitzi A. Young
Counsel for NRC Staff
(301) 415-3830
mitzi.young@nrc.gov

/Executed in accord with 10 C.F.R. § 2.304(d)/

Shelbie R. Lewman
Counsel for NRC Staff
(301) 415-5661
shelbie.lewman@nrc.gov

/Executed in accord with 10 C.F.R. § 2.304(d)/

Daniel W. Lenehan
Counsel for NRC Staff
(301) 415-3501
daniel.lenehan@nrc.gov

Dated at Rockville, Maryland
this 30th day of September, 2013

September 30, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

AFFIDAVIT OF JOSEPHINE PICCONE
IN RESPONSE TO AUGUST 30 COMMISSION ORDER

I, Josephine Piccone, do hereby state as follows:

1. I am employed by the Nuclear Regulatory Commission (NRC) as the Director of the Division of Spent Fuel Alternative Strategies in the Office of Nuclear Material Safety and Safeguards (NMSS). This Division would be responsible for completing the Safety Evaluation Report (SER) and Environmental Impact Statement (EIS) supplement related to the Department of Energy's (DOE) license application for a geologic repository at Yucca Mountain, Nevada, if directed by the Commission.

2. The purpose of this affidavit is to briefly describe the Staff's estimates and assumptions for potential completion of SER Volumes 2-5 and an EIS supplement.

3. The remaining SER volumes can be completed and issued concurrently in approximately 12 months after the staff initiates work. The twelve month SER completion estimate is based on the assumptions that A) there are no unforeseen technical and process issues; B) the project would be given a high priority so that appropriate technical staff and resources are available; C) the Staff will not need additional technical information from the Department of Energy to complete the remaining SER Volumes; D) the twelve months includes time to replace key technical reviewers that no longer work for the agency, to reassemble technical staffers assigned to other tasks, and to enable reviewers to regain familiarity with

licensing issues and docketed correspondence due to the break in the application review and the shift in focus to other agency activities; E) the Center for Nuclear Waste Regulatory Analysis will be available as the principal technical support contractor to staff; and F) the LSN or its alternative will be available for Staff use during its completion of the SER volumes, as a resource for Staff review and to ensure documents referenced in its SER Volumes are publicly available prior to SER issuance, consistent with the guidance in NUREG-0650, *Preparing NUREG-Series Publications*, Rev. 2 (Jan. 1999) (ML041050294).

4. Assuming that DOE does not change its decision to not prepare an EIS supplement, the NRC would need to prepare the supplement, which could be accomplished approximately twelve months after start of work to prepare a draft and final EIS supplement, provided that A) primary technical analysis can be drawn from the technical document and supporting information provided by DOE in 2009; B) the scope of the supplement is defined in the Staff's 2008 Adoption Determination Report and an additional scoping process will not be needed; and C) no significant interagency consultation will be needed. This twelve month estimate includes time to A) compile a review team for the issues addressed in the supplement, and B) develop a draft supplement, issue the draft for public comment, hold public meetings on the draft, and issue a final supplement that addresses public comments. Completion of the EIS supplement could be accomplished concurrent with SER completion.

5. Completion of SER Volumes 2-5 would likely expend a substantial amount of the agency's unobligated Nuclear Waste Policy Act carryover funding derived from the Nuclear Waste Fund resources, and the estimated amount is greater than previous estimates. Completion of SER Volumes 2-5 and the EIS supplement, assuming the Staff prepares the supplement, would likely expend most of these funds.

6. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the forgoing statements are true and correct to the best of my knowledge and belief.

/Executed in accord with 10 C.F.R. § 2.304(d)/

Josephine Piccone, Director
Division of Spent Fuel Alternative Strategies
Office of Nuclear Material Safety and Safeguards
U.S. Nuclear Regulatory Commission

Executed in Rockville, Maryland
this 30th day of September, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC Staff Response to August 30 Commission Order" have been served on the following persons this 30th day of September, 2013, by Electronic Information Exchange in the above-captioned proceeding.

CAB 04

Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: tsm2@nrc.gov
psr1@nrc.gov
rew@nrc.gov

Office of the Secretary
ATTN: Docketing and Service
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555
E-mail: HEARINGDOCKET@nrc.gov

Office of Commission Appellate
Adjudication
E-mail: ocaamail@nrc.gov

Charles J. Fitzpatrick, Esq.
John W. Lawrence, Esq.
Egan, Fitzpatrick, Malsch & Lawrence PLLC
1777 N.E. Loop 410, Suite 600
San Antonio, TX 78217
E-mail: cfitzpatrick@nuclearlawyer.com
jlawrence@nuclearlawyer.com

Martin G. Malsch, Esq.
Egan, Fitzpatrick & Malsch, PLLC
1750 K Street, N.W. Suite 350
Washington, DC 20006
E-mail: mmalsch@nuclearlawyer.com

Brian W. Hembacher, Esq.
Deputy Attorney General
California Attorney General's Office
300 South Spring Street
Los Angeles, CA 90013
E-mail: brian.hembacher@doj.ca.gov

Timothy E. Sullivan, Esq.
Deputy Attorney General
California Department of Justice
1515 Clay Street. 20th Flr.
P.O. Box 70550
Oakland, CA 94612-0550
E-mail: timothy.sullivan@doj.ca.gov

Kevin W. Bell, Esq.
Senior Staff Counsel
California Energy Commission
1516 9th Street
Sacramento, CA 95814
E-mail: kwbell@energy.state.ca.us

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@morganlewis.com
apolonsky@morganlewis.com
lcsedrik@morganlewis.com
rkuyler@morganlewis.com

Susan L. Durbin, Esq.
Deputy Attorney General
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
E-mail: susan.durbin@doj.ca.gov

Ross D. Colburn
2020 L Street, Suite 250
Sacramento, CA 95811
E-mail: rcolburn@ndnlaw.com

Shane Thin Elk
Fredericks Peebles & Morgan, LLP
3610 North 163rd Plaza
Omaha, Nebraska 68116
E-mail: sthinelk@ndnlaw.com

Martha S. Crosland, Esq.
Angela M. Kordyak, Esq.
Nicholas P. DiNunzio
James Bennett McRae, Esq.
Sean A. Lev
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
Sean.Lev@hq.doe.gov

Malachy R. Murphy, Esq.
18160 Cottonwood Rd. #265
Sunriver, OR 97707
E-mail: mrmurphy@chamberscable.com

George W. Hellstrom
U.S. Department of Energy
Office of General Counsel
1551 Hillshire Drive
Las Vegas, NV 89134-6321
E-Mail: george.hellstrom@ymp.gov

Robert M. Andersen
Akerman Senterfitt LLP
750 9th N.W., Suite 750
Washington, DC 20001
E-mail: robert.andersen@akerman.com

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@navy.mil

John M. Peebles
Darcie L. Houck
Fredericks Peebles & Morgan LLP
1001 Second Street
Sacramento, CA 95814
E-mail: jpeebles@ndnlaw.com
dhouck@ndnlaw.com

Clark County, Nevada
500 S. Grand Central Parkway
Las Vegas, NV 98155
Elizabeth A. Vibert, Deputy District Attorney
E-mail: Elizabeth.Vibert@ccdnav.com

Ellen C. Ginsberg
Anne W. Cottingham
Jerry Bonanno
Nuclear Energy Institute, Inc.
1201 F Street, N.W., Suite 1100
Washington, DC 20004-1218
E-mail: ecg@nei.org
awc@nei.org
jxb@nei.org

Kelly Brown
District Attorney
White Pine County District Attorney's Office
801 Clark Street
Ely, NV 89301
E-mail: kbrown@mwpower.net

David A. Repka
William A. Horin
Rachel Miras-Wilson
Winston & Strawn LLP
1700 K Street N.W.
Washington, DC 20006
E-mail: drepka@winston.com
whorin@winston.com
rwilson@winston.com

Jay E. Silberg
Timothy J.V. Walsh
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, N.W.
Washington, DC 20037-1122
E-mail: jay.silberg@pillsburylaw.com
timothy.walsh@pillsburylaw.com

Gregory L. James
712 Owens Gorge Road
HC 79, Box 11
Mammoth Lakes, California 93546
Email: gljames@earthlink.net

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
jgores@armstrongteasdale.com

Diane Curran
Harmon, Curran, Spielberg, & Eisenberg,
L.L.P.
1726 M Street N.W., Suite 600
Washington, DC 20036
E-mail: dcurran@harmoncurran.com

Ian Zabarte, Board Member
Native Community Action Council
P.O. Box 140
Baker, NV 89311
E-mail: mrizabarte@gmail.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

Curtis G. Berkey
Scott W. Williams
Rovianne A. Leigh
Alexander, Berkey, Williams, & Weathers
LLP
2030 Addison Street, Suite 410
Berkley, CA 94704
E-mail: cberkey@abwwlaw.com
swilliams@abwwlaw.com
rleigh@abwwlaw.com

Bret O. Whipple
1100 South Tenth Street
Las Vegas, Nevada 89104
E-mail: bretwhipple@nomademail.com

Gregory Barlow
P.O. Box 60
Pioche, Nevada 89043
E-mail: lca@lcturbonet.com

Michael L. Dunning
Andrew A. Fitz
H. Lee Overton
Jonathan C. Thompson
Todd R. Bowers
State of Washington
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
E-mail: MichaelD@atq.wa.gov
AndyF@atq.wa.gov
LeeO1@atq.wa.gov
JonaT@atq.wa.gov
toddb@atq.wa.gov

Connie Simkins
P.O. Box 1068
Caliente, Nevada 89008
E-mail: jcciac@co.lincoln.nv.us

Kenneth P. Woodington
Davidson & Lindemann, P.A.
1611 Devonshire Drive
P.O. Box 8568
Columbia, SC 29202
E-mail: kwoodington@dml-law.com

Thomas R. Gottshall
S. Ross Shealy
Haynesworth Sinkler Boyd, PA
1201 Main Street, Suite 2200
Post Office Box 11889
Columbia, SC 29211-1889
E-mail: tgottshall@hsblawfirm.com
rshealy@hsblawfirm.com

Dr. Mike Baughman
Intertech Services Corporation
P.O. Box 2008
Carson City, Nevada 89702
E-mail: bigboff@aol.com

Michael Berger
Robert S. Hanna
Attorneys for the County of Inyo
233 East Carrillo Street Suite B
Santa Barbara, California 93101
E-mail: mberger@bsqlaw.net
rshanna@bsqlaw.net

Philip R. Mahowald
Prairie Island Indian Community
5636 Sturgeon Lake Road
Welch, MN 55089
E-mail: pmahowald@piic.org

James Bradford Ramsay
National Association of Regulatory Utility
Commissioners
1101 Vermont Avenue NW, Suite 200
Washington, DC 20005
E-mail: jramsay@naruc.org

Don L. Keskey
Public Law Resource Center PLLC
505 N. Capitol Avenue
Lansing, MI 48933
E-mail:
donkeskey@publiclawresourcecenter.com

Christopher B. Clare
Clark Hill PLC
601 Pennsylvania Ave., N.W.
North Building, Suite 1000
Washington, DC 20004
E-mail: cclare@clarkhill.com

/Signed (electronically) by/

Jessica A. Bielecki
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555-0001
(301) 415-1391
E-mail: Jessica.Bielecki@nrc.gov