

**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>July 19, 2010</b>

**STATE OF NEVADA RESPONSE BRIEF SUPPORTING COMMISSION  
REVIEW AND REVERSAL OF THE LICENSING BOARD'S DECISION  
DENYING DOE'S MOTION TO WITHDRAW ITS LICENSE  
APPLICATION WITH PREJUDICE**

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In accordance with the Secretary's June 30, 2010 Order, the State of Nevada (Nevada) submits the following brief in response to the briefs of those parties who oppose Commission review and reversal of the Construction Authorization Board's (CAB) June 29, 2010 Memorandum and Order (M&O) denying the Department of Energy's (DOE) motion to withdraw its license application with prejudice. In addition, the following parties to this proceeding support and join in Nevada's response brief: Joint Timbisha Shoshone Tribal Group, Native Community Action Council, and Clark County.

## **I. NEED FOR COMMISSION REVIEW.**

### **A. Introduction.**

The CAB's M&O presents novel legal issues of great public interest and even national importance. It also imposes huge expenses on Nevada and others who must now continue to participate in a licensing proceeding that should be discontinued. These considerations clearly warrant Commission review. *See* 10 C.F.R. §§ 2.1015(d) and 2.323(f). The Commission itself, as opposed to a subordinate tribunal, should always address issues of this kind. In fact, the commissioners are "Officers of the United States" within the meaning of Article II, Section 2 of the Constitution of the United States, and the Constitution's Framers intended that very important and fundamental matters be addressed by such

Officers, as opposed to the decision being delegated to other "inferior officers" or agency employees.<sup>1</sup>

Because these factors strongly favoring review cannot be disputed, the opponents of review sidestep them completely, and instead resort to other arguments that are completely specious or even outrageous. These arguments are addressed below.

### **B. Threatened Disqualification.**

Some of the parties opposing review accuse the three newest NRC commissioners of prejudgment and caving in to political interference, hoping that this will intimidate them into recusing themselves, deprive the Commission of the quorum it needs to take review, and prevent the collegial Commission from performing its statutory duty to decide important legal questions. This outrageous tactic should be seen for what it is – an utterly baseless effort that confuses mudslinging with proper legal argument. Nevada answers and opposes the related Motion for Recusal/Disqualification filed by the States of Washington and South Carolina, Aiken County, South Carolina, and White Pine County, Nevada, and apparently supported by Nye County, Nevada, in a separate filing today. Suffice it to say, for now, for the purposes of this response brief, that these commissioners have done nothing to deserve this disrespectful treatment. They have not

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<sup>1</sup> "Inferior officers" are "inferior" only in the sense that they are subordinate to the other officers.

improperly prejudged any factual or other material issue, and there is no basis to assume that they will perform their adjudicatory functions in anything other than a completely fair and objective manner.

The motion also suffers from procedural defects that, by themselves, are sufficient to warrant peremptory denial. It is inexcusably late and was filed without the good-faith consultation with the parties required by 10 C.F.R. § 2.323(b).

**C. Opponents Seek a Litigation Advantage.**

Many of the opponents of Commission review are also participating in the related judicial review proceedings now pending in the U.S. Court of Appeals for the D.C. Circuit, where they no doubt hope to be able to tout an unreviewed M&O as the final word of the Commission, entitled to just as much deference as a decision of the collegial Commission. Therefore, these parties' arguments against review are clearly a self-serving litigation tactic.

**D. The Commission Should Not Stay Its Hand.**

Several review opponents also request the Commission to stay its hand pending a decision by the U.S. Court of Appeals for the D.C. Circuit on the question whether the Nuclear Waste Policy Act, as amended ("NWPA"), 42 U.S.C. §§ 10101, *et seq.*, allows DOE to withdraw its license application. Nevada believes that the Commission addressed and denied this request when it issued

CLI-10-13, reversing the CAB's suspension of this licensing proceeding for the same reason. The review opponents offer no convincing reason why the Commission should reverse its prior course and now stay its hand. The case review opponents cite, *Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2)*, ALAB-350, 4 NRC 365 (1976), is readily distinguishable. In *Seabrook* the Appeal Board stayed its reconsideration of a decision already the subject of judicial review; here, there is no Commission decision on DOE's motion that is the subject of judicial review.

**E. Commission Review Would Be In Accord With Commission Practice.**

It would be in accord with prior Commission practice for the Commission to take review in the circumstances of this case, even where the Rules of Practice provide for neither petitions for review nor appeals as of right. The circumstances where this kind of Commission review can possibly occur are infrequent because novel and important legal issues are commonly presented in appeals as of right and petitions for Commission review or in referrals or certifications of presiding officers. *See* 10 C.F.R. §§ 2.311, 2.319(l), 2.323(f), 2.341. Nevertheless, putting the instant licensing proceeding aside, the Commission has exercised its inherent supervisory authority over adjudications and taken review in procedural circumstances similar to this case on at least 20 prior occasions, including once this

year.<sup>2</sup> Moreover, the Commission's "Statement of Policy on the Conduct of Adjudicatory Proceedings," CLI-98-12, 48 NRC 18 (1998), contemplates that the Commission would perform this kind of *sua sponte* review function whenever it is warranted, and it is certainly warranted here.

## II. THE NWPA DOES NOT PREVENT DOE FROM WITHDRAWING ITS APPLICATION.

### A. Introduction and Standard of Review.

Almost all of the opponents' arguments are addressed in Nevada's initial brief, and they do not need to be repeated here in detail. However, two aspects of the opponents' arguments stand out.

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<sup>2</sup> See *Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1)*, CLI-80-19, 11 NRC 700 (1980); *Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, CLI-81-05, 13 NRC 361 (1981); *Consolidated Edison Company of New York (Indian Point, Unit 2)*, CLI-82-15, 16 NRC 27 (1982); *Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1)*, CLI-84-18, 20 NRC 801 (1984); *Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1)*, CLI-88-09, 28 NRC 567 (1988); *Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, CLI-81-22, 14 NRC 598 (1981); *Ohio Edison Company (Perry Nuclear Power Plant, Unit 1)*, CLI-91-15, 34 NRC 269 (1991); *Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site)*, CLI-94-09, 40 NRC 1 (1994); *Hydro Resources, Inc. (2929 Coors Road Suite 101, Albuquerque, NM 87120)*, CLI-98-16, 48 NRC 119 (1998); *Yankee Atomic Electric Company (Yankee Nuclear Power Station)*, CLI-98-21, 48 NRC 185 (1998); *Hydro Resources, Inc. (2929 Coors Road Suite 101, Albuquerque, NM 87120)*, CLI-99-01, 49 NRC 1 (1999); *Hydro Resources, Inc. (2929 Coors Road Suite 101, Albuquerque, NM 87120)*, CLI-99-18, 49 NRC 129 (1999); *Duke, Cogema, Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility)*, CLI-01-13, 53 NRC 478 (2001); *Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-02-11, 55 NRC 260 (2002); *Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-03-05, 57 NRC 279 (2003); *Duke Energy Corporation (Catawba Nuclear Station, Units 1 and 2)*, CLI-04-06, 59 NRC 62 (2004); *Duke Energy Corporation (Catawba Nuclear Station, Units 1 and 2)*, CLI-04-21, 60 NRC 21 (2004); *Exelon Generation Company, LLC (Early Site Permit for Clinton ESP Site)*, CLI-06-20, 64 NRC 15 (2006); *Entergy Nuclear Vermont Yankee, LLC. (Vermont Yankee Nuclear Power Station)*, CLI-07-01, 65 NRC 1 (2007); *Pa'ina Hawaii, LLC (Materials License Application)*, CLI-08-04, 67 NRC 171 (2008); *Entergy Nuclear Vermont Yankee LLC (Vermont Yankee Nuclear Power Station)*, CLI-10-17, \_\_ NRC \_\_ (2010). In fact, approximately 33 percent of all Commission decisions result from the exercise of a discretionary review function, as opposed to an appeal as of right.

First, no opponent has called the Commission's attention to anything in the text or the legislative history of the NWPA showing that Congress considered the precise question whether DOE may withdraw its application. Withdrawal of the application is simply not mentioned, let alone discussed, anywhere in the statute or in its voluminous legislative history. As a result, all of the opponents' arguments are based on inferences that they draw from other language in the statute and legislative history which are either unwarranted or counterbalanced by equally logical but opposite inferences.

Second, no opponent has offered any reason to believe that it would make any regulatory sense in this or in any other case to insist that an applicant prosecute an application it wants to withdraw.

The relatively few arguments not addressed in Nevada's initial brief are addressed below. There are no factual issues before the Commission. The issues are purely legal. In particular, the M&O expressly declined to review or second guess the policy and factual grounds DOE relied upon in choosing to seek withdrawal of its application. M&O at 11, n.36.

In taking review, the legal conclusions of the CAB are not entitled to any deference. The Commission's review of a presiding officers' legal conclusion is *de novo*. *Entergy Nuclear Vermont Yankee LLC (Vermont Yankee Nuclear Power Station)*, CLI-10-17, \_\_ NRC \_\_ (2010) (Slip Op. at 11).

**B. 10 C.F.R. § 2.107 Applies and Is Strong Evidence of Congressional Intent.**

In its initial brief, Nevada pointed to section 114(d) of the NWPA, 42 U.S.C. § 10134(d), which requires the Commission to consider DOE's application "in accordance with the laws applicable to such applications," as strong evidence that Congress must have contemplated that DOE could withdraw its application. This is because one of the "laws" section 114(d) makes applicable is 10 C.F.R. § 2.107, which contemplates that applications may be withdrawn and provides a procedure for doing so. But as the opponents of DOE's motion would have it, 10 C.F.R. § 2.107 does not apply to this Subpart J proceeding because that rule does not apply to a proceeding under Subpart J, or because the "except that" clause in section 114(d) makes § 2.107 inapplicable by requiring a merits decision, or because Congress cannot have known enough about the NRC's rules to have really intended § 2.107 to be one of the "laws applicable to such applications."

1. 10 C.F.R. § 2.107 applies on its face to any applicant seeking a withdrawal of any application, including the instant one. It does not on its face distinguish between applications submitted voluntarily and applications required to be submitted by law. 10 C.F.R. § 2.1000 does not make § 2.107 expressly applicable to a Subpart J proceeding simply because it does not need to. While 10 C.F.R. § 2.1000 does not refer expressly to § 2.107, this is because § 2.1000 only

purports to define the precedence of the rules in Subparts C and G, not the rules in Subpart A of which § 2.107 is a part.

2. The opponents of DOE's motion argue as if section 114(d) of the NWPA required the Commission to apply the laws applicable to such applications, "except that such applications may not be withdrawn." The subsection does not so read. It requires the Commission to apply the laws applicable to such applications, except that it shall render a final decision not later than specified time periods. There was no need for any "exception" requiring a "final decision" because the rules already provided for one as long as an application was under consideration. There was, however, a need for an exception that specified time periods for final Commission decisions because the NRC's comprehensive Rules of Practice gave the Commission a theoretically unlimited amount of time to render final decisions. The most natural reading of section 114(d) is that the "except that" clause merely added time periods for a final Commission decision.

3. There was nothing obscure or unknown about the NRC's rules in 10 C.F.R. Part 2. The Committee on Science and Technology considered, but ultimately rejected, provisions that would have amended NRC's rules in very particular respects, including requiring an informal evidentiary hearing to scope the issues, something that presumed a detailed Committee understanding of the NRC's

contention rules in (then) 10 C.F.R. § 2.714. H.R. Rep. 411 Part 1, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 47-48. If Congress was sufficiently aware of the details in 10 C.F.R. § 2.714 to consider whether that specific rule should be superseded, it must also have been sufficiently aware of 10 C.F.R. § 2.107 to consider whether that rule also should be superseded, but instead it referred to "the laws applicable to such applications" without excepting § 2.107 or expressly prohibiting DOE from withdrawing its application.

**C. The Standard Contract is Irrelevant.**

Several opponents of DOE's motion argue that granting it would be inconsistent with the Standard Contract between DOE and the owners and generators of spent commercial fuel. However, the Commission is not a party to this contract, and therefore, it cannot affect the Commission's consideration of DOE's motion. *See* NWPA section 302(a), 42 U.S.C. § 10222(a). Moreover, the D.C. Circuit held that the remedy for a breach of the Standard Contract is money damages and declined to force DOE to begin accepting spent fuel. *Northern States Power Company v. DOE*, 128 F.3d 754 (D.C. Cir. 1997). The principal holdings in the Standard Contract cases are merely that DOE cannot excuse its non-performance by citing the unavailability of DOE storage or disposal facilities and that DOE is liable for money damages. There is no suggestion in any Standard Contract case that NRC's licensing procedures or decisions are affected by the

Standard Contract, and the Standard Contract is therefore irrelevant and outside of the scope of this proceeding.

**D. NWPA Sections 114(c) and (e) Add Nothing.**

Several opponents cite to NWPA sections 114(c) and (e), 42 U.S.C. § 10134(c) and (e). These subsections add nothing to the debate.

Subsection 114(c) was repealed by section 3003 of the Federal Reports Elimination and Sunset Act of 1995, Public Law 104-66, 31 U.S.C. §1113, as amended by 42 U.S.C. 108 (Jan. 5, 2009) note.

Subsection 114(e) requires affected Federal agencies to cooperate with DOE in developing a "project decision schedule that portrays the optimum way to attain the operation of the repository" and to report to DOE and to Congress on their progress. This subsection cannot be read to require DOE and other agencies to march down an optimum path leading to repository operation, to the exclusion of all other paths, because this reading would conflict with other provisions of that same section, including subsection (a), which does not require DOE or the President to recommend the Yucca Mountain site; subsection (b), which does not require Nevada's site veto to be overturned; and subsection (d), which does not require NRC to grant the permit and license that would be necessary for repository operation. Section 114(e) merely requires DOE and the other agencies to develop and report on a hypothetical schedule that would apply if and only if the site

development and regulatory processes go forward. It says nothing about whether those processes must go forward or, in particular, whether DOE is compelled to prosecute an application after it is filed.

**E. Other Arguments Against Withdrawal Have No Merit.**

One opponent of DOE's motion argues that granting it would be inconsistent with the Commission's Waste Confidence decision. However, the Waste Confidence decision "has no legal effect in the . . . Yucca Mountain licensing proceeding." *Nevada v. NRC*, 2006 U.S. App. LEXIS 24196 (D.C. Cir. 2006) (Slip Op. at 1). Moreover, the Commission has amendments to Waste Confidence under consideration that would explicitly account for the failure of Yucca Mountain as a repository and that would find "waste confidence" without Yucca Mountain. *See e.g.*, 73 Fed. Reg. 59551 (Oct. 9, 2008).

In any event, if any party thinks that granting DOE's motion would affect "Waste Confidence," its sole avenue for relief would be participation in the Waste Confidence rulemaking. *Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating, Units 2 and 3)*, CLI-10-19, \_\_ NRC \_\_ (2010).

Finally, some opponents argue that DOE's motion must be rejected because the reasons DOE gave for filing it are not supported by a record and are arbitrary and capricious under the Administrative Procedure Act. These arguments are contrary to long-standing and well established NRC case law to the effect that the

Commission will not review or otherwise second guess the reasons applicants give for wanting to withdraw their applications. *Northern States Power Company (Tyronne Energy Park, Unit 1)*, CLI-80-36, 12 NRC 523 (1980); *Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1)*, CLI-90-08, 32 NRC 201 (1990), *affirmed on reconsideration*, CLI-91-02, 33 NRC 61 (1991), *petition for review denied*, *Shoreham-Wading River Central School District v. NRC*, 931 F.2d 102 (D.C. Cir. 1991); *Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, CLI-93-03, 37 NRC 135 (1993); *Pacific Gas & Electric Company (Stanislaus Nuclear Project, Unit 1)*, LBP-83-02, 17 NRC 45, \*16 (1983) ("The decision of PG&E to withdraw its application is a business judgment. The law on withdrawal does not require a determination of whether its decision is sound"). The Commission does not function as a reviewing court, judging whether DOE's reasons for wanting to withdraw are arbitrary and capricious or lack an adequate record under the Administrative Procedure Act.

It should be noted in this regard that the CAB expressly stated in the M&O that it did "not evaluate the grounds on which it [DOE] purports to rely" in choosing to seek withdrawal of its application. M&O at 11, n.36.

### **III. THE APPLICATION MUST BE WITHDRAWN WITH PREJUDICE.**

#### **A. Opponents Fail to Address Relevant Federal Case Law.**

The opponents' arguments that the application must be withdrawn without prejudice, if it is to be withdrawn at all, utterly fail to come to grips with any of Nevada's (and DOE's) key arguments. In particular, opponents fail to address (1) Nevada's argument that, like a plaintiff in a federal lawsuit, an applicant is entitled to a withdrawal with prejudice if it asks for one, unless some *other* party shows prejudice, and (2) Nevada's argument, also based on federal case law, that a withdrawal with prejudice would be required to avoid substantial prejudice to Nevada, even if DOE had not asked for one.

Instead, the opponents misread NRC case law and also rebut an argument that Nevada did not make – that future litigation costs require a dismissal with prejudice. As Nevada pointed out in its brief, a withdrawal without prejudice would prejudice Nevada not because of future litigation costs, but because of costs that Nevada has already incurred, the status of the proceeding, the potential unavailability of witnesses, and DOE's failure to diligently pursue the case to date.

#### **B. There is No Prior NRC Case Law but Federal Court Case Law Provides Guidance.**

The prior NRC case law on whether withdrawals should be with or without prejudice was developed to respond to parties' arguments for withdrawals with prejudice over applicants' objections. That case law does not apply here. The

venerable leading cases are *Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1)*, ALAB-662, 14 NRC 1125 (1981), and *Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2)*, ALAB-657, 14 NRC 967 (1981). These cases hold that a withdrawal with prejudice is "a particularly harsh and punitive term imposed upon withdrawal," the warrant for which must be found in a "harm of comparable magnitude." *Fulton*, at 974. But where, as here, the *applicant* wants to withdraw with prejudice, a withdrawal with prejudice is not a "harsh and punitive term imposed upon withdrawal" but the very outcome desired by the applicant itself. Moreover, the criterion developed in the two cited cases, that a withdrawal with prejudice requires a showing of some "harm of comparable magnitude," also cannot logically apply here. When an applicant asks for a withdrawal with prejudice, it makes no sense to ask whether there is any "harm [to other parties] of comparable magnitude" to that suffered by the applicant because the applicant is not harmed at all by an outcome it requested.

Therefore, the instant DOE motion presents a case of first impression for NRC. Case law in the federal courts offers clear guidance to the Commission in this circumstance, and as Nevada pointed out in its initial brief, that case law requires that DOE's motion to withdraw with prejudice be granted.

**IV. CONCLUSION.**

The Commission should take review of the M&O and reverse it insofar as it denies DOE's motion to withdraw its Yucca Mountain license application with prejudice.

Respectfully submitted,

*(signed electronically)*

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Dated: July 19, 2010

**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's Response Brief Supporting Commission Review and Reversal of the Licensing Board's Decision Denying DOE's Motion to Withdraw Its License Application with Prejudice has been served upon the following persons by the Electronic Information Exchange:

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