

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of :)	April 15, 2010
)	
U.S. Department of Energy))	Docket No. 63-001
(High Level Waste Repository Construction)	Docket No. 63-001-HLW
Authorization Application))	ASLBP No. 09-892-HLW-CAB04
)	

**NYE COUNTY NEVADA'S PETITION FOR INTERLOCUTORY
REVIEW OF CAB04 APRIL 6, 2010 ORDER**

I. INTRODUCTION

Nye County, Nevada ("Nye County" or "County"), the host County for the proposed Yucca Mountain repository, requests that the Commission exercise its authority to conduct an immediate interlocutory review of the Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) ("M&O"), issued by the Atomic Safety and Licensing Board ("CAB04") on April 6, 2010, in the Yucca Mountain repository licensing proceeding. The M&O was issued without notice or opportunity for Nye County or any other party to respond to the suspension of the briefings and disposition of the Department of Energy's ("DOE") Motion to Withdraw. While Nye County does not support DOE's Motion to Withdraw with prejudice in this case, the County joins DOE in its Petition for Interlocutory Review filed on April 12, 2010, on procedural grounds and supports DOE's request that the Nuclear Regulatory Commission ("Commission" or "NRC") expeditiously review the M&O, and reverse it, for the reasons stated herein. In the alternative, Nye County asks that the Commission exercise its authority, *sua sponte*, to act upon the remaining

Petitions to Intervene and to decide DOE's Motion to Withdraw after appropriate briefing by the parties, since those issues will undoubtedly require full Commission review in any event.

II. BACKGROUND

A. The Proceedings Below

On June 3, 2008, DOE submitted the "Yucca Mountain Repository License Application," ("LA") with the NRC seeking authorization to begin construction of a permanent high-level waste repository at Yucca Mountain pursuant to the Nuclear Waste Policy Act ("NWPA").¹ On October 17, 2008, the Commission issued a "Notice of Hearing and Opportunity to Petition for Leave to Intervene," which provided that intervention petitions had to be filed within 60 days.²

Timely petitions to intervene, contentions, and requests for a hearing were submitted by Nye County and several other petitioners: the State of Nevada; the Nuclear Energy Institute; the Nevada Counties of Churchill, Esmeralda, Lander and Mineral; the State of California; Clark County, Nevada; the County of Inyo, California; White Pine County, Nevada; the Timbisha Shoshone Tribe; the Native Community Action Council ("NCAC"); the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation; and Caliente Hot Springs Resort, LLC. Two petitioners filed requests to participate as interested government participants: Eureka County, Nevada and Lincoln County, Nevada.³ *See U.S. Dept. of Energy* (High-Level Waste Repository), LBP-09-6, 69 NRC 367, 377-378 nn. 5-19 (2009).

¹ *See* Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008); corrected 73 Fed. Reg. 40,883 (July 16, 2008).

² *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-08-25, 68 NRC 497 (2008); *see also In the Matter of U.S. Department of Energy* (High Level Waste Repository); 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 (October 22, 2008).

³ DOE filed answers to the intervention petitions on or before January 16, 2009. *See id.* at 379 n. 20. The NRC Staff responded to the intervention petitions on February 9, 2009. NRC Staff Answer to Intervention Petitions, filed February 9, 2009 ("Staff Answer"). On or before February 24, 2009, ten petitioners, including Nye County filed timely replies to the DOE and Staff answers. *See* 69 NRC at 379 n. 24. Stay Motion at 1.

The three Construction Authorization Boards ("CABs") designated to rule on the petitions granted ten petitions to intervene; granted the interested governmental requests under § 2.315(c); and admitted over 300 of the proposed contentions. *See Id.* at 499-500. Later, CAB-04 granted NCAC and the Joint Timbisha Tribal Group party status after both parties satisfied LSN certification requirements.⁴ Pursuant to "CAB Case Management Order #2," dated September 30, 2009 (unpublished), formal discovery began in the proceeding with the submission of initial witness disclosures by the parties on or before October 10, 2009. Discovery was limited to "Phase I" issues: contentions that related to the subject-matter of the first two volumes of the Staff's Safety Evaluation Report scheduled to be completed. Depositions were scheduled to begin on February 16, 2010. *Id.* at 7.

DOE filed a "Motion to Stay the Proceeding," on February 1, 2010 ("Stay Motion") which stated 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 . . .'" The Stay Motion also stated that DOE funding for Yucca Mountain would be eliminated in 2011.⁵ *Id.* Therefore, DOE indicated its intent to withdraw the license application by March 3, 2010, and requested a stay of discovery in order to avoid unnecessary expenditure of resources by the Board and parties. *See Stay Motion* at 2. That Motion was not opposed by any party, and CAB-04 granted a stay of the discovery proceeding on February 16, 2010.

On March 3, 2010, DOE filed a Motion to Withdraw its license application for a permanent geological repository at Yucca Mountain, and asked that the withdrawal be granted

⁴ Order (Granting Party Status to the Native Community Action Council), dated August 27, 2009 (unpublished) at 2; Order (Granting Party Status to the Joint Timbisha Shoshone Tribal Group), August 27, 2009 (unpublished) at 2.

⁵ The Stay Motion referenced statements in the proposed budget prepared by the Office of Management and Budget for Fiscal Year 2011. Budget of the U.S. Government, Fiscal Year 2011, Appendix at 437.

with prejudice and no other conditions. DOE Motion to Withdraw at 1. The Motion states that DOE sought dismissal with prejudice "because it does not intend ever to refile an application to construct a permanent repository for spent fuel and high-level radioactive waste at Yucca Mountain." DOE Motion to Withdraw at 3, note 3. In its only other attempt to actually address the NRC requirements for a withdrawal with prejudice under NRC regulations, the Department further asserted that NRC "should defer to the Secretary's judgment that dismissal of the pending application with prejudice is appropriate..." DOE Motion to Withdraw at 4 & n. 4. DOE further requested that no other conditions be placed on the dismissal, including preservation of the scientific evidence, data and licensing record beyond those related to the LSN.

Five Petitions to Intervene⁶ were filed by the State of South Carolina, the State of Washington, Aiken County, South Carolina, The National Association of Regulatory Utility Commissioners, and the Prairie Island Indian Community ("Five Additional Petitioners") specifically to challenge DOE's alleged right to withdraw the license application under the NWPA, the National Environmental Policy Act, and NRC regulations. CAB04 issued scheduling orders for briefing on the petitions to intervene. The parties completed briefing on the first three petitions on April 5, 2010. Nye County supported the petitions to intervene. DOE did not oppose intervention by those three parties, but sought certain conditions assuring the prompt briefing and resolution of the contentions related to its Motion to Withdraw.

B. The April 6, 2010, Order that is the Subject of this Petition

CAB04 could have simply exercised its discretion and allowed intervention pursuant to 10 C.F.R. § 2.309(e), since DOE, the applicant, and several other parties did not oppose

⁶ Petition of the State of South Carolina to Intervene (February 26, 2010); State of Washington's Petition For Leave To Intervene and Request for Hearing (March 3, 2010); Petition of Aiken County, South Carolina (March 4, 2010); National Association of Regulatory Utility Commissioners Petition to Intervene (March 15, 2010), and the Petition to Intervene of the Prairie Island Indian Community (March 16, 2010).

intervention. However, CAB04 chose a more circuitous path. Instead of ruling on the Five Additional Petitions, CAB04, on April 6, 2010, withheld decisions on the pending petitions to intervene and on DOE's Motion to Withdraw pending decisions from the United States Court of Appeals for the District of Columbia Circuit on similar claims filed by three of the five petitioners in that Court.⁷ CAB04 did so without notice or opportunity for the parties to be heard, and before completion of the briefing on the remaining two petitions. After reviewing the recent procedural maneuvers in the licensing case, as summarized above, and the statutory and regulatory arguments raised by the Five Additional Petitioner before NRC and in the Circuit Court of Appeals, the CAB04 stated its reasons for withholding a decision on the petitions to intervene and DOE's motion to withdraw. The Petitions advance what the CAB04 characterized as purely legal contentions in opposition to DOE's Motion. The M&O observed that the petitions for judicial review are based on "many of the same grounds asserted in the petitions before this Board" and then opined, without benefit of briefing or argument by the parties that: (1) the claims "appear to be properly before the Court"; (2) the Court of Appeals "would not likely benefit from the development of an administrative record"; (3) "the pending actions in the Court of Appeals do not seem to the Board to be premature"; (4) the Board might not be permitted "to overrule DOE's own judgment on whether DOE has discretion to withdraw the Application"; and (5) any decision by the Board and then the Commission on DOE's motion to withdraw is likely to be appealed to the Court of Appeals. M&O at 9-12.

⁷ Currently pending before the U.S. Court of Appeals for the District of Columbia Circuit are four cases challenging the ability of DOE to file its motion to withdraw its pending Yucca Mountain license application. Three of those cases have been consolidated: *In re Aiken County*, No. 10-1050 (D.C. Cir. filed Feb. 19, 2010); *State of South Carolina v. U.S. Dept. of Energy, et al.* (D.C. Cir., docketed Mar. 26, 2010) (filed in the 4th Cir. on Feb. 26, 2010 and transferred to the D.C. Cir. on Mar. 25, 2010); and *Ferguson, et al., v. U.S. Dept. of Energy, et al.* (D.C. Cir. filed Feb. 25, 2010). A fourth case was filed after DOE petitioned the Commission for interlocutory review: *State of Washington v. U.S. Dept. of Energy, et al.* (D.C. Cir. filed April 13, 2010).

III. JUSTIFICATION FOR THE REQUESTED INTERLOCUTORY REVIEW

A. Overview of the Basis for Interlocutory Review

As DOE pointed out in its Petition for Interlocutory Review, none of CAB04's stated reasons justify its ignoring settled justiciability principles. Those principles were developed in large part by the very Court of Appeals that CAB04 would like to defer to, and that Court is likely to simply refuse to adjudicate the issues and remand them back to NRC for final agency action.

The Department of Justice, which speaks for the Executive Branch in litigation, has in essence requested the Court to do just that in its response filed with the Court of Appeals. Moreover, the CAB04 had not yet asked for party responses to DOE's Motion to Withdraw. Therefore, NRC does not have in its possession all the arguments that the parties admitted to the license proceedings were prepared to make regarding DOE's Motion to Withdraw. If it did, CAB04 would at least have a complete record before it of all the arguments regarding the Motion to Withdraw from all the current parties, and perhaps would have learned that many of those arguments overlap those raised by the Five Additional Petitioners. Instead, CAB04 has now placed NRC in the awkward position of knowing, in detail, the legal positions of DOE and the five as yet un-admitted petitioners on the Motion to Withdraw, but not the legal positions of many admitted parties. Based upon these facts alone, and the official position of the United States filed with the Court of Appeals on justiciability issues, the Commission should exercise its interlocutory review authority. *See, e.g., Private Fuel Storage (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77 (2000).*

The NWPA called for disposition of the Yucca Mountain LA by NRC within three years, (or four with an extension of time). 42 U.S.C. § 1034(d). Numerous opportunities have already

been missed to expedite the proceeding and conduct timely discovery, even though the LA was filed in June of 2008, and timely petitions and contentions were filed in December of that same year. It is now 2010, and depositions have yet to be taken on any contentions. CAB04 ironically stated in its M&O that it would "suspend further briefing of the new petitions" and withhold consideration of DOE's motion to withdraw pending further developments in the related actions before the Court of Appeals "in the interests of judicial efficiency." The Board additionally "encouraged" the parties "to seek expedited resolution of their claims in that Court." M&O at 3, 12-13. CAB04's action has simply spawned even more filings before the Court of Appeals and the NRC, and is likely to cause even further delay and additional costs to the parties, not less.

Regardless of the substantive outcome, the parties to this proceeding, the nuclear industry, the nuclear defense complex, and the Nation deserve an expeditious ruling on DOE's Motion to Withdraw. For the reasons stated below, Nye Court believes that the M&O's suspension of the proceeding is unwarranted and contrary to law, and will likely lead to more delay and litigation, not less, as postulated by the CAB04. Therefore, Nye County seeks a reversal of the M&O and the immediate scheduling of expedited resolution of the pending petitions to intervene and the underlying DOE Motion to Withdraw.

B. Legal Basis for NRC Interlocutory Review in This Case

There are two categories of issues at the heart of both the petitions to intervene and DOE's Motion to Withdraw. The first group is statutory and essentially presents the question of whether the NWPA and NEPA allow DOE to withdraw its LA without further administrative or Congressional action, or, alternatively, whether NWPA mandates that the LA be prosecuted by DOE until NRC reaches a final decision on the merits. The second set of issues is regulatory and presents the question whether NRC regulations at 10 CFR § 2.107 allow DOE to withdraw its

application, with or without prejudice, and with or without imposition of conditions by NRC.

The rule states, in pertinent part:

10 CFR Sec. 2.107 Withdrawal of Application.

(a) The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. If the application is withdrawn prior to issuance of a notice of hearing, the Commission shall dismiss the proceeding. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe. 10 CFR § 2.107 (a).

However NRC views its jurisdictional reach deciding the statutory issues,⁸ CAB04 can not avoid its duty to apply NRC regulations regarding withdrawal of license applications to the facts of this case and reach a final agency decision before that issue is ripe for judicial review.

See Section B. 2. *infra*

1. The M&O Ignores Well-Settled Requirements of Finality and Exhaustion of Administrative Remedies

In seeking a premature Court of Appeals ruling on the issues before the CAB, the M&O turns the principle of "exhaustion of administrative remedies" on its head, and ignores long-standing justiciability principles, such as the need for final agency action prior to invoking judicial review. In the Court of Appeals for the District Of Columbia Circuit, a final agency action is a jurisdictional prerequisite to filing an action pursuant to Section 10139(a)(1)(A) of the Nuclear Waste Policy Act, 42 U.S.C. § 101399(a)(1)(A), and a prerequisite to obtaining relief

⁸ Nye County at present takes no position on the statutory issues, but reserves the right to address them in any further briefing on DOE's Motion to Withdraw scheduled by the Commission. Regardless of NRC's ultimate position on whether it has jurisdiction over such issues or not, NRC should make its position clear as part of its final action in reviewing DOE's Motion to Withdraw. Those issues will then be ripe for judicial review. Certainly, the President's recent issuance of a budget request that would zero out the Yucca Mountain appropriations for FY 2011, transfer DOE's Yucca Mountain program offices to other elements within DOE, and fund a blue ribbon panel to explore alternatives, standing alone, does not accomplish an amendment to the NWPA. Congress has yet to act upon the President's budget request.

under Section 706(2) of the APA, 5 U.S.C. § 706(2). *See generally Public Citizen v. Office of U.S. Trade Representatives*, 970 F.2d 916, 921 (D.C. Cir. 1992).

A federal agency action is final if it marks the consummation of the agency's decision-making process and is not merely tentative or interlocutory in nature. In addition, the action must determine rights or obligations, or cause legal consequences to flow. *Bennett v. Spear*, 520 U.S. 154, 178 (1997). In determining whether agency conduct is "final agency action," the "core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Mass.*, 505 U.S. 788, 797 (1992). In this licensing proceeding, there has been no agency action that completes the relevant decision-making process on the Motion to Dismiss under 10 CFR § 2.107. Hence, there is no action or decision that is sufficiently ripe and final to permit Court review of that issue. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 894 (1990)("[courts] intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect"). To paraphrase the M&O, since the Court is not likely to resolve regulatory issues relative to DOE's Motion to Withdraw before NRC takes final action, the Commission should expeditiously proceed to a final agency decision "in the interests of judicial efficiency."

Ordinarily, a party also must first raise and resolve an issue with an agency before seeking judicial review. *Hettinga v. United States*, 560 F.3d 498, 503 (D.C. Cir. 2009); *Tesoro Refining and Marketing Co. v. FERC*, 552 F.3d 868, 872 (D.C. Cir. 2009)(quoting *Exxon Mobil Oil Corp. v. FERC*, 487 F.3d 945, 962 (D.C. Cir. 2007)). The requirement that administrative remedies be exhausted before court intervention affords an administrative agency "an opportunity to consider the matter, make its ruling, and state the reasons for its action" before a

federal court decides the issue without the benefit of the implementing agency's expertise on the matter. *See Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946); *Ass'n of Flight Attendants-CWA v. Chao*, 493 F.3d 155, 158-59 (D.C. Cir. 2007) ("Typically, exhaustion ensures that imminent or ongoing administrative proceedings are seen through to completion."). Exhaustion of administrative remedies promotes overall efficiency; provides the courts with the benefit of an agency's expertise; and serves judicial economy by avoiding the necessity for judicial involvement in some instances and by having the administrative agency compile the record. *See Andrade v. Lauer*, 729 F.2d 1475, 1484 (D.C. Cir. 1984).

The regulatory question of whether DOE can withdraw its application, with or without prejudice, is a question that requires the CAB04 to apply the NRC's regulation on license withdrawals, 10 CFR §2.107, to facts in the record. *Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3)*, LBP-82-81, 16 NRC 1128, 1134, 1982 WL 31593, *2+ (NRC Sep 20, 1982), citing *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976); 5 Moore's Federal Practice §41.05(1) at 41-58. NRC is uniquely qualified to undertake such a determination since it has been consistently interpreting the rule on license withdrawal for nearly thirty years. Contrary to the intimation of CAB04, NRC owes no deference to DOE in interpreting NRC's own regulation such as 10 CFR § 2.107. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). NRC alone is authorized to impose conditions on such a withdrawal based upon the facts in the record.

2. NRC'S Consistent Interpretation of Its Withdrawal Regulation Allows the Commission to Expedite Its Consideration and Ruling on DOE's Motion To Withdraw

Because the law governing withdraw of an NRC under license application is so well-settled, the Commission could, in its discretion, schedule briefings and then expeditiously rule on the matter without remand to the CAB04. Contradicting NRC's entire body of decisions on license withdrawal, DOE has unjustifiably requested that NRC dismiss the LA **with prejudice** under 10 CFR § 2.107 (a). The ordinary meaning of “dismissal with prejudice” is “an adjudication on the merits, and a final disposition, barring the right to bring or maintain an action on the same claim or cause.” *Philadelphia Electric Co., (Fulton Generating Units 1 and 2)*, ALAB-657, 14 NRC 967, 969, 1981 WL 27754 (NRC) citing *Jamison v. Miracle Mile Rambler, Inc.*, 536 F.2d 560, 564 (3rd Cir. 1976); 5 Moore’s Federal Practice 41.05[2] at 41-75 (2d ed. 1981). It is well-settled law that a dismissal with prejudice under section 10 CFR § 2.107 is treated as a decision on the merits. *Id.* Dismissal with prejudice in the Yucca proceedings would amount to an unjustified adjudication on the merits of more than 300 admitted safety and environmental contentions—none of which has yet been adjudicated in favor of any petitioner. *See Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3)*, LBP-8281, 16 NRC 1128, 1135, 1982 WL 31593, *4+ (NRC Sept 20, 1982). *Yankee Atomic Electric Company (Yankee Nuclear Power Station)*, 50 NRC 45, 51, 1999 WL 595216 (NRC July 28, 1999).

In this proceeding, the legal test for a withdrawal with prejudice under the NRC rules has not been met. NRC decisions interpreting 10 CFR § 2.107, at most, would allow DOE to withdraw its license application **without** prejudice. *See, e.g., United States Department of Energy Project Management Corporation Tennessee Valley Authority (Clinch River Breeder Reactor Plant)*, 21 NRC 507, 509, 1985 WL 56925, *2 (NRC Mar 11, 1985). NRC has

uniformly held that dismissal with prejudice is a severe sanction that should be reserved for those unusual situations which involve substantial prejudice to the proposing party or to the public interest in general. *See, e.g., Energy Fuels Nuclear, Inc.*, 42 N.R.C. 197, 198, 1995 WL 808338, *1 (NRC Nov. 3, 1995); *Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1)*, ALAB-662, 14 NRC 1125, 1132-1133, 1981 WL 27768, *1+ (NRC Dec. 07, 1981); *Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1)*, LBP-84-33, 20 NRC 765, 767-768 (1984); *Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, LBP-99-27, 50 NRC 45, 51 (1999). Final adjudication of a contention is required before NRC will dismiss that contention with prejudice or impose issue preclusion conditions. *See Rochester Gas & Electric Corporation (Sterling Power Project, Nuclear Unit 1)*, ALAB-596, 11 NRC 867, 869 (1980); *United States Department of Energy (Clinch River Breeder Reactor Plant)*, ALAB-755, 18 NRC 1337, 1338-1339 (1983), vacating LBP-83-8, 17 NRC 158 (1983). The administrative hearing record itself must provide evidence that supports any findings concerning a dismissal with prejudice, any conditions imposed, and any harm alleged. *Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3)*, LBP-82-81, 16 NRC 1128, 1134, 1982 WL 31593, *2+ (NRC Sep 20, 1982), citing *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976); 5 Moore's Federal Practice §41.05(1) at 41-58.

In this proceeding, the Board has considered intervention petitions, admitted over three hundred contentions, and noticed and conducted hearings on Phase 1 legal contentions. But, there has been no NRC ruling on the merits of any admitted contention. In a waste storage facility case, the Board refused an intervenor's request for a dismissal with prejudice in a decision which is instructive for the Yucca Mountain proceeding, *Northern States Power Company (Independent Spent Fuel Storage Installation)*, 46 NRC. 227, 231, 1997 WL 687861,

*3 (NRC Oct 15, 1997). In that case, NRC noted that the merits of the intervenor's contentions had not been reached, and further held that the existence of other, more suitable nuclear storage sites, was not grounds for dismissal with prejudice. *Id.*

The President and DOE have similarly stated that Yucca Mountain is "not workable" and that DOE will seek more suitable alternatives to nuclear disposal at Yucca Mountain in the budget proposal. That alone should not be grounds for dismissal with prejudice⁹ of the instant action, either under the holding in *Northern States*, or under the NWPAA which clearly states that nuclear disposal alternatives to Yucca need not be considered in the licensing proceeding. 42 U.S.C. § 10134 (f)(6). Dismissal with prejudice on a single contention, let alone 300, is only justified where a party has prevailed or is about to prevail on a contention. *Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3)*, LBP-8281, 16 NRC 1128, 1135, 1982 WL 31593, *2+ (NRC Sep 20, 1982). In such cases, the NRC examines the status of the adjudication or appeal and determines whether it should impose a condition on the withdrawal—such as finding that an applicant is precluded from litigating certain issues in the event of a re-filing. Such action can be regarded as partial dismissal with prejudice. *Id.*

Similar reasoning to the NRC cases just cited should apply to DOE's withdrawal of the application for Yucca Mountain. No safety contentions have been adjudicated yet. No party can

⁹ It has been said that the filing of an application to construct a nuclear power plant is wholly voluntary. Therefore, the decision to withdraw such an application is a business judgment and therefore the law on **withdrawal without prejudice** does not require a determination of whether the business decision is sound. *Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1)*, LBP-83-2, 17 NRC 45, 51, 1983 WL 31390, *2 (NRC 1983). The reasoning in that power plant case, however, does not apply to the Yucca Mountain repository. Unlike power reactor license applications, the Yucca application was not voluntary, but was filed by DOE in accordance with Presidential directives and the mandates of the NWPAA. Yucca Mountain, unlike a nuclear power plant, was selected, and the license application developed, in the public interest by DOE, a Department in the Executive Branch, with federal dollars pursuant to Congressional mandate. Therefore, the decision to withdraw in this case, even without prejudice, requires heightened scrutiny by the NRC.

make the requisite showing of harm if the withdrawal is simply without prejudice.¹⁰ A dismissal with prejudice that is deemed an adjudication on the merits of over 300 safety and environmental contentions could make any future activity at Yucca Mountain, or the Nevada Test Site for that matter, problematic-- a result that perhaps even the Secretary of DOE has not fully considered. A stay or withdrawal without prejudice would prevent future harm to the public should the DOE or another Administration later decide that it must re-file the Yucca Mountain application for any reason.

Even if no party to the proceeding had opposed DOE's Motion, the CAB, or NRC itself should, on its own authority, *sua sponte*, raise the issue and decide that dismissal with prejudice is not in the public interest. See *Florida Power and Light Company (Turkey Point Plant Unit Nos. 3 and 4)* 32 N.R.C. 181, 185-86, 1990 WL 324437, *3 (NRC Sept. 25, 1990) (Board's *sua sponte* authority to be used to protect the public interest). An indefinite stay pending Congressional action on the President's budget request and/or amendment of the NWPAA is another alternative preferable to dismissal with prejudice. In *Washington Public Power Supply System (Nuclear Project No. 1)*, 52 NRC 9, 11-12; 2000 WL 1099897, *2 (NRC 2000), an operating license proceeding was deferred for seventeen years while applicant considered alternative facilities, budgetary issues, and other considerations.

¹⁰ NRC has often been called upon to examine the types of harm that an intervenor's request for dismissal with prejudice requires. It is well-settled that the prospect of the application being refiled and a second licensing proceeding and/or lawsuit does not provide the requisite "amount" of legal harm to warrant dismissal with prejudice. That kind of harm, the possibility of future litigation with its expenses and uncertainties, is the consequence of any dismissal without prejudice. It does not provide a basis for departing from the usual rule that a dismissal should be without prejudice. See *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), LBP-82-81, 16 NRC 1128, 1135, 1982 WL 31593, *2+ (NRC Sep 20, 1982), citing *Jones v. SEC*, 298 U.S. 1, 19 (1936); 5 Moore's Federal Practice 41.05(1) at 41-72 to 41-73 (2nd ed. 1981); *Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1)*, LBP-83-2, 17 NRC 45, 50, 1983 WL 31390, *3 (NRC Jan 19, 1983). Where intervenors raise allegations of harm to property values that have not been adjudicated in favor of the intervenor, such allegations do not provide a basis for dismissal of an application with prejudice. *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), LBP-84-43, 20 NRC 1333, 1337 (1984). Similarly, alleged psychological harm from the pendency of the application, even if supported by the facts, does not warrant the dismissal of an application with prejudice. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) cited in *Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2)*, LBP-84-43, 20 NRC 1333, 1337-1338 (1984).

3. NRC May Impose Conditions Even if the Commission Allows Withdrawal of the LA

Despite the fact that DOE's Motion to Withdraw asked that the case be dismissed without imposition of any further conditions¹¹, in responding to CAB04 questions at the last hearing, the parties to the Yucca Mountain proceedings appear to agree that terms and conditions for preservation of documents, the administrative record, and data are appropriate. *Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1)*, LBP-83-2, 17 NRC 45, 51, 1983 WL 31390, *2 (1983) (dismissal without prejudice granted with the condition that millions of discovery documents be preserved). The Administration has also acknowledged in its budget that some site restoration activities will have to be conducted as a part of any withdrawal. NRC has dismissed cases without prejudice and still imposed Site restoration conditions when an applicant abandons a license application after site activities or construction have taken place. *Gulf States Utility Company, (River Bend Station, Units 1 and 2)*, 20 N.R.C. 1478, 1483, 1984 WL 49886, *4 (N.R.C. Nov 20, 1984); *Public Service Company of Oklahoma Associated Electric Cooperative, Inc. (Black Fox Station, Units 1 and 2)*, 17 NRC 410, 410, 1983 WL 31420, *1 (NRC. Mar 07, 1983). Those issues are an integral part of NRC's ruling on DOE's Motion to Withdraw.

IV. CONCLUSION AND REQUEST FOR INTERLOCUTORY REVIEW

DOE has pointed out in its petition for interlocutory review that the Commission has inherent "supervisory power over adjudications to step in at any stage of a proceeding and decide a matter itself." *Safety Light Corp. (Bloomsburg Site Decontamination and License Renewal Denials)*, CLI-92-13, 36 NRC 79, 85 (1992); *see also Pa'ina Hawaii, LLC (Materials License Application)*, CLI-09-17, N.R.C., Docket No. 3036974-ML, 2009 WL 2486185 *1 (NRC) (Aug.

¹¹ Beyond those related to the LSN.

13, 2009) (slip op. at 2). That power extends to cases involving DOE and the Yucca Mountain licensing proceeding and other nationally significant energy projects. *See, e.g., U.S. Dept. of Energy (High Level Waste Repository)*, CLI-08-11, 67 N.R.C. 379, 383 (2008); *U.S. Energy Research & Develop. Admin. (Clinch River Reactor Plant)*, CLI-76-13, 4 N.R.C. 67, 75-76 (1976). The Commission has even exercised this authority, on its own initiative, where the Commission, *sua sponte*, reviewed an otherwise un-reviewable decision, in *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station)*, CLI-07-01, N.R.C., 2007 WL 96998 (NRC) (Jan. 11, 2007).

CAB04's M&O is misguided and turns on their heads core principles of administrative procedure. Certainly the significant issues involved in DOE's attempt to abandon, for all time and all circumstances, the Yucca Mountain licensing application that DOE developed and supported for decades is just such an occasion calling for the Commission's supervision and interlocutory review. The M&O could deprive the Commission of its rightful opportunity to apply its expertise and perspective on important national questions involving the interpretation of statutes and regulations within NRC's jurisdiction. For all of the above-stated reasons, Nye County asks that the M&O be reversed and that an expedited briefing scheduled be reinstated on all remaining issues. In the alternative, to avoid further delay and the need for serial reviews, the Commission itself should consider DOE's Motion to Withdraw on an expedited basis.

Respectfully Submitted,

Signed electronically

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April 15, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	Docket No.	63-001-HLW
)		
U.S. DEPARTMENT OF ENERGY)	ASLBP Nos.	09-892-HLW-CAB04
)		
(High-Level Waste Repository))		
)		

CERTIFICATE OF SERVICE

I hereby certify that copies of the Nye County Petition for Interlocutory Review CAB April 6, 2010 Order dated April 15, 2010, in the above-captioned proceeding have been served on the following persons by Electronic Information Exchange.

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