

August 30, 2013

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:)
) Docket No. 63-001-HLW
U.S. Department of Energy)
(High Level Waste Repository))
)

**NUCLEAR ENERGY INSTITUTE’S ANSWER TO MOTIONS CONCERNING
RESUMPTION OF YUCCA MOUNTAIN LICENSING ACTIVITIES**

Pursuant to 10 C.F.R. § 2.323(c), the Nuclear Energy Institute (“NEI”) hereby answers the August 23, 2013 motions filed by Nye County, Nevada¹ and the State of Nevada² concerning the possible resumption of Yucca Mountain licensing activities in light of the August 13, 2013 decision by the United States Court of Appeals for the District of Columbia Circuit (the “Court” or the “D.C. Circuit”) to issue a writ of mandamus.³ In *Aiken*, the Court (1) found that the Nuclear Regulatory Commission (“NRC” or “Commission”) “has at least \$11.1 million in appropriated funds to continue consideration of the [Yucca Mountain repository] license application,” and (2) held that “unless and until Congress authoritatively says otherwise or there are no appropriated funds remaining, the [NRC] must promptly continue with the legally

¹ Nye County’s Motion for Lifting of Suspension of Yucca Mountain Licensing Proceeding, Scheduling of Immediate Case Management Conference, and Issuance of Related Administrative Orders (Aug. 23, 2013) (“Nye County Motion”). Nye County filed two essentially identical motions, one before the Commission and one before the Atomic Safety and Licensing Board. References herein to the Nye County Motion refer to the one pending before the Commission.

² State of Nevada Motion for Commission Action Related to a Possible Restart of the Yucca Mountain Licensing Proceeding (Aug. 23, 2013) (“Nevada Motion”).

³ *In re Aiken County*, No. 11-271, 2013 WL 4054877 (D.C. Cir. Aug. 13, 2013) (“*Aiken*”).

mandated [Yucca Mountain] licensing process.”⁴ The Court, however, did not specify how the remaining appropriated funds should be spent, nor would a court be expected to do so.

NEI respectfully submits that the \$11.1 million in appropriated funds should be directed first toward the expeditious and efficient completion and publication of the unfinished volumes of the NRC Staff’s Safety Evaluation Report (“SER”) for the proposed high-level waste repository at Yucca Mountain, including conclusions as to whether the proposed Yucca Mountain repository satisfies the applicable Commission regulations. This is the most judicious use of the limited funds available. And, without knowing the Staff’s conclusions as to whether the proposed Yucca Mountain repository satisfies applicable regulatory requirements, it is premature to consider resumption of other Yucca Mountain licensing activities. Assuming that the Staff’s conclusions are positive, if funds remain after the SER volumes are completed and published (or if any new funding is appropriated), then it would be appropriate for the Commission to consider resumption of other Yucca Mountain licensing activities.

I. RELEVANT BACKGROUND ON YUCCA MOUNTAIN SERS

The NRC Staff published the completed Yucca Mountain SER Volume 1 concerning General Information in August 2010.⁵ SER Volume 1 “documents the NRC staff’s review and evaluation of general information” provided in the Department of Energy’s (“DOE’s”) license application for a high-level waste repository at Yucca Mountain and concludes that “DOE has provided information that satisfies the requirements” of applicable NRC regulations.⁶

⁴ *Aiken*, 2013 WL 4054877 at *1, *7.

⁵ NUREG-1949, Vol. 1, Safety Evaluation Report Related to Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada; Volume 1: General Information (Aug. 2010).

⁶ *Id.* at v.

SER Volume 1 was to be the first of five SER volumes.⁷ SER Volume 2 was to address Repository Safety Before Permanent Closure; Volume 3 was to address Repository Safety After Permanent Closure; Volume 4 was to address Administrative and Programmatic Requirements; and Volume 5 was to address License Specifications.⁸ But the remaining SER volumes were not completed or published because, in October 2010, the NRC Staff began discontinuing its Yucca Mountain activities.⁹ Instead of completing and publishing the remaining SER volumes, the NRC prepared a technical evaluation report (“TER”) for each of three of the remaining four SER volumes.¹⁰ Each TER was intended to be a “knowledge management document” that “captures the NRC staff’s technical assessment of information presented in [the Department of Energy’s (“DOE’s”)] Safety Analysis Report (SAR), dated June 3, 2008, as amended, and supporting information.”¹¹ The TERs do not, however, “include conclusions as to whether or not [DOE’s Yucca Mountain SAR] satisfies the Commission’s regulations.”¹²

Since publication of the TERs, the NRC has represented to Congress that “an estimated 6-8 months was needed to complete all volumes of the SER at a cost of \$6.5 million.”¹³

⁷ See NUREG-1949, Vol. 1 iii-iv.

⁸ *Id.*

⁹ 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.

¹⁰ See *id.* See also NUREG-2108, Technical Evaluation Report on the Content of the U.S. Department of Energy’s Yucca Mountain Repository 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.

¹¹ NUREG-2107 at xvii; NUREG-2108 at xv; NUREG-2109 at ix.

¹² *Id.*

¹³ Letter from Fred Upton, Chairman, United States House of Representatives Committee on Energy and Commerce, and John Shimkus, Chairman, United States House of Representatives Energy and Commerce Subcommittee on Environment and the Economy, to Allison M. Macfarlane, Chairman, U.S. Nuclear Regulatory Commission (Aug. 23, 2013) at 1.

II. THE NRC'S REMAINING APPROPRIATIONS SHOULD BE USED FIRST TO COMPLETE AND PUBLISH THE UNFINISHED SER VOLUMES

NEI respectfully submits that the Commission should begin its compliance with the D.C. Circuit's mandamus order by directing that the remaining \$11.1 million in appropriated funds (or whatever necessary portion of those funds) be used first to complete and publish the unfinished volumes of the Yucca Mountain SERs, including conclusions as to whether the proposed Yucca Mountain repository satisfies the applicable Commission regulations.

Completion of the Yucca Mountain SERs is integral to the Yucca Mountain licensing process and an essential predicate to the licensing hearing. As succinctly stated in SER Volume 1,

[a]ny NRC decision on whether to authorize construction of a geologic repository for high-level radioactive waste (HLW) disposal at Yucca Mountain, Nevada, will be made only after the NRC staff has completed all volumes of the SER.¹⁴

It thus makes eminent sense for the Commission to direct that the \$11.1 million in remaining funds appropriated for Yucca Mountain first be used to complete the Staff's safety review. Absent a conclusion that the proposed Yucca Mountain repository satisfies the applicable regulations, construction cannot be authorized. All other potential uses for the limited remaining funds are therefore premature and secondary to completing the Staff's safety review. Prioritizing the Staff's safety review would be the most judicious use of the limited funds available.

Because it is unknown how much of the \$11.1 million will remain available after completion of the SER volumes, it is premature for the Commission to direct the expenditure of funds on any other licensing or hearing activity. Although the NRC has represented to Congress

¹⁴ NUREG-1949 at xi.

that \$6.5 million would be required to complete the remaining SER volumes, that amount is only an estimate. Until such time as the Commission knows with certainty how much, if any, of the \$11.1 million will remain after completion of the SERs, it should not direct the resumption of any other Yucca Mountain-related activity.¹⁵ Simultaneously pursuing multiple licensing or pre-hearing activities, given the limited funds available, could result in completing none of those activities. After the safety review is completed, the Commission can prioritize the use of any remaining funds, soliciting input from the parties to the proceeding as appropriate. In this respect, NEI believes that the Commission should identify its budget and prepare a prioritized plan for use of appropriated funds, including funds available after completion of the SERs, and make this information available to the parties and the public.

To the extent that Nye County requests that the Commission direct that the \$11.1 million in appropriations be spent on completing and publishing the unfinished SERs, including the conclusions as to whether the proposed Yucca Mountain repository meets applicable regulatory requirements (*see* Nye County Motion at 4, 16-17), NEI supports the request. At this time, NEI opposes the remainder of Nye County's requests. Nye County requests that the Atomic Safety and Licensing Board (the "Board") review its Motion, and any other motion filed on these matters, in the first instance. Nye County Motion at 4 n.4. It also requests that the Yucca Mountain adjudicatory proceedings be restarted, including reconvening the Board and scheduling a case management conference to reinstitute discovery. *Id.* at 4, 10, 14-15. Nye County also suggests that a reconvened Board should "take further measures it sees fit to

¹⁵ To assure that funds remain available to pursue additional licensing activities after completion and publication of the unfinished SER volumes, the Commission must ensure that the safety review is performed as efficiently and expeditiously as possible, including any reorganization and reassignment of NRC Staff members. NEI is confident that this can be accomplished, as evidenced by the Commission's successful efforts in managing the Waste Confidence proceedings

preserve NRC funds for the licensing process itself” and to “order” the NRC Staff to take certain actions, including resuming its “mandatory duties under the NWPA.” *Id.* at 4, 10. *See also id.* at 16-17. These requests are inappropriate for multiple reasons.

First, this proceeding is currently suspended.¹⁶ Accordingly, the Nye County Motion is properly before the Commission. Indeed, whether and how to “preserve” or expend NRC funds appropriated by Congress is squarely within the Commission’s purview, not that of the Commission’s licensing boards. The Commission has long held that “[l]icensing boards simply have no jurisdiction over nonadjudicatory activities of the Staff,” whose “reviews, which frequently proceed in parallel to adjudicatory proceedings, fall under the direction of Staff management and the Commission itself, not licensing boards.”¹⁷ In short, the Board does not possess the authority Nye County wishes it to exercise. Second, reconstituting the Board to address this and related motions, or to resume adjudicatory proceedings, is premature and would imprudently expend limited resources on secondary activities. Completion and publication of the unfinished SER volumes should be prioritized over all other potential uses for the remaining funds. Once the remaining SER volumes are finished, it may be appropriate to restart the adjudicatory proceedings, to the extent that funds remain available.

NEI similarly opposes the Nevada Motion because Nevada’s requests would result in the expenditure of the limited, appropriated funds on fruitless tasks and are otherwise premature. Nevada’s request that the Licensing Support Network (“LSN”) be reconstituted (Nevada Motion at 3-8) is nothing more than a transparent attempt to have the Commission waste “part of [its]

¹⁶ *See U.S. Department of Energy* (High Level Waste Repository), CLI-11-15, 74 N.R.C. 815, 815 & n.2 (2011) (citing *U.S. Department of Energy* (High Level Waste Repository), LBP-11-24, 74 N.R.C. 368 (2011)).

¹⁷ *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 N.R.C. 62, 74 (2004).

funds on unpacking its boxes, and the remainder packing them up again” “in order to preserve” the LSN documentary material for future use.¹⁸ The \$11.1 million in remaining appropriated funds should be judiciously expended on activities that would yield the most useful results, in this case the completion and publication of the unfinished Yucca Mountain SER volumes.¹⁹

Nevada’s request that any in-person adjudicatory proceedings be conducted in Las Vegas (Nevada Motion at 3, 8-10) is likewise a waste of limited funds at this time. Until the unfinished Yucca Mountain SER volumes are completed and published, it is pointless to consider the restart of adjudicatory proceedings or any other licensing activity. If sufficient funding remains available after publication of the unfinished SER volumes, then it might be appropriate to consider restart of other licensing activities.

III. CONCLUSION

For the reasons set forth above, NEI respectfully requests that the \$11.1 million in Yucca Mountain appropriated funds be used first towards completing and publishing the

¹⁸ *Aiken*, 2013 WL 4054877 at *9, *10 (Garland, C.J., dissenting).

¹⁹ If Nevada truly believes that reconstituting the LSN is “critical to the proper conduct of any restarted Yucca Mountain licensing proceeding” (Nevada Motion at 6), then Nevada should support, and request that its Congressional delegation support, sufficient funding for that purpose.

unfinished SER volumes. If funds remain available (or if new funds are appropriated) after that task is complete, it may then be appropriate to consider resumption of other licensing activities.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing “Nuclear Energy Institute’s Answer to Motions Concerning Resumption of Yucca Mountain Licensing Activities” has been served upon the following persons on this 30th day of August, 2013 by Electronic Information Exchange.

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