

**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))	August 30, 2013

**STATE OF NEVADA’S ANSWER TO NYE COUNTY’S
MOTION FOR LIFTING SUSPENSION
OF YUCCA MOUNTAIN LICENSING PROCEEDING**

Petitioner Nye County filed with the Commission a “Motion for Lifting of Suspension of Yucca Mountain Licensing Proceeding, Scheduling of Immediate Case Management Conference, and Issuance of Related Administrative Orders” (hereinafter referred to as “Restart Motion”) on August 23, 2013. The Restart Motion was filed in light of the recently issued decision by the U.S. Court of Appeals for the D.C. Circuit in the case styled *In re: Aiken County, et. al.*, Case No. 11-1271 (D.C. Cir. Aug. 13, 2013). Nye County represents that four other parties admitted to this proceeding concur in the filing of the Restart Motion: State of South Carolina; State of Washington; Aiken County, South Carolina; and the National Association of Utility Commissioners (Restart Motion at 1). A parallel copy of the Restart Motion was also filed before the Construction Authorization Board (CAB) on August 23, 2013.

Petitioner Nye County also filed with the Commission a “Motion for Recusal/Disqualification of NRC Commissioner Allison M. Macfarlane” (hereinafter referred to as “Recusal Motion”) on August 23, 2013. Nye County represents that three other parties admitted to this proceeding concur in the filing of the Recusal Motion: State of South Carolina; Aiken County, South Carolina; and the National Association of Utility Commissioners (Recusal

Motion at 1). The State of Washington took no position on the Recusal Motion and reserved the right to respond. *Id.* at 1, n.1.

The State of Nevada (Nevada) reserved its right to respond to both the Restart Motion and the Recusal Motion. *See* Restart Motion at 1, n.1, and Recusal Motion at 1, n.1. In accordance with 10 C.F.R. § 2.323(c), Nevada hereby files this Answer to the Restart Motion within 10 days of electronic service of the Restart Motion and for the reasons set forth below requests the Commission to deny the Restart Motion in its entirety. Separately Nevada is answering the Recusal Motion.

1. The Commission and not the CAB Should Decide Petitioner’s Restart Motion

The jurisdiction of and adjudicatory functions to be performed by an Atomic Safety and Licensing Board (ASLB) are established and controlled by the Commission. *See* 10 C.F.R. § 2.321(a). The scope of the authority for the ASLB constituted for the Yucca Mountain licensing proceeding (referred to as a Construction Authorization Board) was set forth by several orders of the Commission in 2008 and 2009. *See In the Matter of U.S. Dept. of Energy (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board)*, Commission Memorandum and Order CLI-08-14, dated June 17, 2008; *see also In the Matter of U.S. Dept. of Energy (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board)*, ASLB Memorandum and Order LBP-08-11, dated June 20, 2008; *see also* Order of the Chief Adm. Judge (at direction of Commission), "Establishment of Construction Authorization Board 04," ASLBP No. 09-892-HLW-CAB04, Docket No. 63-001-HLW, dated June 19, 2009.

Petitioner acknowledges that “[a]djudication of the [Yucca Mountain] license [application] in the first instance was assigned by NRC to [the CAB]” (Restart Motion at 3, n.1 and 5). Petitioner further acknowledges that, as its final direction to the CAB, the Commission

“directed the ASLB to, ‘by the close of the current fiscal year [*i.e.*, September 30, 2011], complete all necessary and appropriate case management activities, including disposal of all matters pending before it. . . .’” *Id.* at 8 (quoting from CLI-11-07 issued on September 9, 2011). Then when the CAB issued its last order suspending the licensing proceeding for Yucca Mountain it did so “consistent with the Commission’s Memorandum and Order of September 9, 2011.” *In re U.S. Dep’t of Energy*, LBP-11-24, 74 NRC 368 at 370 (Sept. 30, 2011).

The Petitioner’s request “that the ASLB should review [the Restart] Motion in the first instance” (Restart Motion at 4, n.4), is procedurally flawed and administratively in error. The Yucca Mountain licensing proceeding, though suspended by CAB order dated September 30, 2011, was suspended at the specific direction of the Commission in its order dated September 9, 2011. *In re U.S. Dep’t of Energy (High Level Waste Repository)*, CLI-11-07, 74 NRC 212 (Sept. 9, 2011). There is now nothing pending before CAB and the CAB lacks any authority to consider any matter including Petitioner’s Restart Motion. Only the Commission and not the CAB can control whether and when the order suspending the licensing proceeding for Yucca Mountain can be lifted. This is particularly important given Petitioner’s request to order the immediate issuance of NRC Staff Safety Evaluation Reports (SERs), *see* Restart Motion at 16-17, because only the Commission can decide that issue. An ASLB lacks jurisdictional authority to direct the NRC Staff to perform any specific function outside of an adjudicatory proceeding including the development of, timing for completion and issuance of SERs.

2. NRC Should Refrain from Responding to Petitioner’s Restart Motion Until After NRC Chairman Macfarlane Issues a Decision on Petitioner’s Recusal Motion

Petitioner argues “the Yucca Mountain licensing proceeding should be resumed immediately following the effective date of the writ of mandamus, September 3, 2013.” Restart Motion at 17; *accord* Motion at 1 (“immediately lift the suspension of the Yucca Mountain

licensing proceeding”). However, Petitioner has separately requested NRC Chairman Macfarlane to “make a determination regard this [Recusal] [M]otion before considering any other pending matters related to the Yucca Mountain licensing proceeding.” Recusal Motion at 1 (emphasis added). Petitioner acknowledges that “Dr. Macfarlane will be called upon to make, or participate in making, administrative, budgetary, and substantive adjudicatory decisions regarding the ASLB licensing. . . .” (Recusal Motion at 13). Clearly the resolution of the Restart Motion by the Commission involves administrative, budgetary and substantive decisions. Therefore, it would be prudent for Chairman Macfarlane to first decide whether she will be participating in any decisions involving Yucca Mountain going forward (*i.e.*, the Recusal Motion) before participating in one of the first such decisions (*i.e.*, the Restart Motion).

By affording Chairman Macfarlane the opportunity to fully consider the Recusal Motion, along with the answer(s) filed by Nevada and possibly other parties, before the Commission decides the Restart Motion, the Commission will also have the necessary time to decide whether to seek rehearing of the decision by the U.S. Court of Appeals for the D.C. Circuit in the case styled *In re: Aiken County, et al.*, Case No. 11-1271 (D.C. Cir. Aug. 13, 2013). Petitioner is correct that the *In re: Aiken County* decision becomes effective September 3, 2013. *See* Restart Motion at 4, n.3 (citing D.C. Cir. R. 41(a)(3)) and at 17; *see also* Recusal Motion at 13. However, the Commission has 45 days from the date of the decision, *i.e.*, on or before September 27, 2013, in which to file a petition for rehearing and petition for rehearing en banc. *See* Fed. R. App. P. 35(c) and 40(a)(1). Typically, the D.C. Circuit addresses such petitions in a relatively quick time frame (a few weeks) and if granted would set briefing schedules to rehear the issues. For the Commission to be forced to “immediately” restart the Yucca Mountain licensing proceeding in light of the potential for such a rehearing does not appear to be a prudent

expenditure of resources. The time afforded Chairman Macfarlane to decide the Recusal Motion should be sufficient for the Commission to decide whether to file for rehearing and if filed for the D.C. Circuit to decide the motion.

3. NRC Should Direct the CAB to Plan for an Orderly Restart Which Should Include Scheduling a Case Management Conference in Las Vegas, NV not Washington, DC

Petitioner requests either the Commission or the CAB to “immediately schedule a case management conference for the purpose of restarting the licensing proceeding.” Restart Motion at 4; *accord* at 10 (“immediately schedule a case management conference after the effective date of the writ of mandamus, which is September 3, 2013 ...”). In addition, Petitioner “requests that the Case Management Conference be scheduled at NRC’s Washington, D.C. Offices” and that the Case Management Conference be used “to expedite the reinstatement of Phase I discovery previously scheduled.” *Ibid.*; *accord* at 10 (“focus the case management conference on the means to expedite release of unredacted NRC SERs and resumption of ‘Phase 1’ of discovery previously scheduled in this proceeding”). As noted above, Nevada believes the Commission and not the CAB should address Petitioner’s Restart Motion and in doing so the Commission could establish the general outline for the case management conference including where that conference (and all subsequent adjudicatory hearings) should be held.

Nevada is not opposed to the scheduling of a Case Management Conference; however, Nevada is of the opinion that specific decisions regarding the nature of and timing for a Case Management Conference are best left to the CAB after the Commission decides the Restart Motion. Previous case management conferences in this proceeding were preceded by CAB orders setting forth specific requests of the parties on numerous topics including those in which the parties could reach agreement prior to the conference. *See In the Matter of U.S. Dept. of Energy (High-Level Waste Repository)*, Docket No. 63-001-HLW, ASLB Order (Terms,

Logistics, and Questions for Oral Argument), dated March 18, 2009 and modified March 24, 2009; *see also In the Matter of U.S. Dept. of Energy (High-Level Waste Repository)*, Docket No. 63-001-HLW, ASLB Order (Concerning Serial Case Management), dated July 21, 2009; *see also In the Matter of U.S. Dept. of Energy (High-Level Waste Repository)*, Docket No. 63-001-HLW, ASLB Memorandum and Order (Concerning Further Prehearing Conference), dated August 25, 2009. More importantly, however, Nevada believes that any such Case Management Conference should be conducted at an appropriate venue in the Las Vegas, Nevada area as opposed to NRC Headquarters in Rockville, Maryland. Petitioner offers no justification for conducting the Case Management Conference in the Washington area.¹ By contrast, Nevada has articulated several reasons and rationales for conducting the Case Management Conference in the Las Vegas area:

- (i) long-standing policy to conduct adjudicatory proceedings within close proximity to where the licensed activity will occur;
- (ii) prior and lengthy use of Las Vegas, Nevada as the locale for all adjudicatory hearings in the Yucca Mountain licensing proceeding, which facilitated extensive participation by numerous affected parties; and
- (iii) various impracticalities associated with the use of NRC's hearing facility at its headquarters in Rockville, Maryland.

See Nevada's "Motion for Commission Action Related to a Possible Restart of the Yucca Mountain Licensing Proceeding," filed August 23, 2013, at 8-10.

¹ Petitioner states only that "Nevada by e-mail conferred with parties regarding its prospective Motion to reinstitute the LSN and conduct licensing proceedings in Las Vegas. These actions would only further deplete the \$11 Million dollars in NRC funds remaining to continue the licensing process and should be rejected." Restart Motion at 12, n.8. However, Petitioner fails to explain how and why Nevada's request to continue to conduct adjudicatory proceedings in Las Vegas would "further deplete" resources since CAB needs to conduct its adjudicatory proceedings at some location that will accommodate all the parties.

4. Nye County Demand for Issuance of Unfinished SERs

Nye County's demand that the ASLB (CAB04) immediately release NRC Staff's technical review of DOE's License Application (Safety Evaluation Report or SER) is inappropriate for several different reasons. Nye County seems to misunderstand the nature of the Yucca Mountain licensing proceeding, in general, and the purpose and procedure for the creation of the SER, in particular. The component parts of the licensing proceeding have been succinctly stated by NRC's Director of the Office of Nuclear Safety and Safeguards (Catherine Haney) in her testimony before Congress on June 24, 2011. *See* Statement of Catherine Haney, Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, before the Committee on Energy and Commerce Subcommittee on Environment and the Economy, U.S. House of Representatives, June 24, 2011. As Ms. Haney stated, NRC's review of DOE's License Application is "a two-pronged review process: (1) the technical review of the License Application (LA) by the NRC Staff, and (2) the hearing process before the Atomic Safety and Licensing Board" *id.* at 1 (ASLB, or CAB04, in this proceeding). She explained, "The results of the Staff's technical review are documented in a Safety Evaluation Report." *Id.*

Stated in a different way, the licensing process is comprised of two separate tracks. One is the technical review of the LA by one branch of the NRC. The other is an evidentiary, adjudicatory proceeding conducted by the ASLB. It is the latter track over which CAB04 presides. It is this track which is participated in by 19 parties (DOE, NRC Staff, and 17 other intervening parties, including Nye County itself and the other parties who have concurred with it in this motion).

Nye County has nothing to do with the SER process. More importantly, the CAB04 has nothing to do with the SER process and possesses no authority to order the issuance of the SER,

the relief sought by the movants. That fact is sufficient to doom this part of Nye County's motion, but it suffers from other fatal frailties, as follows, even if the request had been made to the NRC:

The SER is not **finished**. It is a work in progress. The SER for the Yucca Mountain proceeding comprises five volumes—only one of which has been completed and issued. *Id.* at 2. As Ms. Haney testified, the other four volumes were not completed and were not issued. Until they are completed and issued, it is nonsensical to suggest that an incomplete SER be issued.

Nye County makes believe that its concern here is that the technical review of the LA by NRC Staff be preserved for future use (whether a Yucca repository is ever built) and that the public be able to enjoy the benefit of NRC Staff's work. Nye County either does not know, or ignores the fact, that NRC has previously acted to ensure that those exact benefits are realized. Thus, the NRC Staff has completed and publicly issued Technical Evaluation Reports (TERs) addressing all aspects of its review of the LA. Ms. Haney explained to Congress:

. . . the process of documenting and preserving the Staff's review, which included converting the remaining volumes of the draft SER into a Technical Evaluation Report (TER). The objective of the TER is to capture the knowledge gained during the last 30 years in preparing for and conducting the Yucca Mountain licensing review. This knowledge will be invaluable in future reviews of proposed repositories.

Id.

The TER was made publicly available, and so answers the precise concerns raised by Nye County. Nye County pays lip service to the schedule mandated for the licensing proceeding, but then moves to ignore it. Thus, Nye County admits (Restart Motion at 16) that the SER is essential to NRC's consideration of the DOE LA and quotes 10 C.F.R. Part 2 Appendix D for the proposition that issuance by the NRC Staff of a final SER (which does not yet exist) is prerequisite to the completion of discovery, the filing of summary disposition

motions, and the conduct of the evidentiary hearing—yet Nye County inexplicably asks for issuance of an unfinished SER, which would be of little or no value, could **not** be relied on to be the predicate for **any** of those subsequent required actions, and would accordingly generate **no** “public confidence” in the integrity of the licensing process, as suggested by Nye County.

Finally, NRC regulations pertaining to the Yucca Mountain licensing proceeding do not require production by the parties of draft documents, and accordingly, there is again no basis for Nye County’s demand concerning a draft SER. There is, likewise, no basis for Nye County’s cynical charge that completing the SER in the normal fashion would bring about “the taint of political manipulation” of Staff findings.

5. There is No Justification for Reallocating NRC Funds to Yucca Licensing

NRC has some \$11 million remaining in funds appropriated by Congress for the conduct of the Yucca Mountain licensing proceeding. Nye County would like NRC to somehow “fatten” that amount by “robbing Peter to pay Paul,” by transferring money from other funds appropriated by Congress to Yucca licensing. Nevada would show that not only is there no legal authorization for NRC to do so, but Nye County fails to show a logical basis for even trying.

First, it is necessary to correct a misrepresentation made by Nye County multiple times in its motion. It states that the CADC ordered NRC to move forward with the licensing process (true) and “substantively approve or disapprove” DOE’s License Application (Restart Motion at 4). The latter assertion is a bald falsehood. On the contrary, both the parties and the Court recognized that it would require more than NRC’s remaining \$11 million to **complete** the licensing proceeding. Coupled with its admonition against the parties’ attempting to speculate about what additional funding Congress might provide, the CADC only ordered NRC to continue the licensing proceeding until “there are no appropriated funds remaining” (Op. at 22). Nye

County concedes as much, stating that “the NRC has sufficient funding **for the time being**” (Restart Motion at 10) (emphasis added).

Accordingly, even Nye County does not claim NRC has enough funds to complete the proceeding. Instead, it makes the *non sequitur* argument that NRC should make up for its shortage in funds appropriated for Yucca licensing by simply snatching them from other appropriated funds. That is a stunning proposal where Nye County is asserting that NRC acted **wrongfully** in using funds appropriated for Yucca licensing in some other way. Assuming only for the sake of argument that NRC used funds appropriated for Yucca licensing for some other purpose and that this was “illegal” (Restart Motion at 11), Nye County then asks NRC to be ordered to do the very same thing of which it accuses NRC (redirecting appropriated funds from their intended purpose). Nye County fails to propose a single example when it suggests transfer of funds “from other appropriations that are proper funding sources . . .” (Restart Motion at 12), and Nevada is not aware of any.

There are at least two other fatal flaws. First, the supposed reallocation of other appropriated funds which Nye County seeks would necessarily be tax dollars, while monies appropriated for the Yucca licensing proceeding were drawn from the Nuclear Waste Fund (NWF) and were **not** taxpayer dollars, but funds whose source was a much smaller one—the ratepayers of utilities who operate nuclear power plants.

A second major flaw in Nye County’s formulation is its groundless accusation that NRC’s actions to abate the licensing proceeding (to **avoid** the waste of funds) were taken “at great expense to the taxpayer” (Restart Motion at 12). Not only does Nye County fail to quantify a single penny of this “great expense,” which it also characterizes as “wasteful,” but the specific

actions Nye County enumerates instead suggest the **preservation**, not the waste, of funds. Thus, Nye County lists the following as illegal, profligate and wasteful expenditures:

1. Closing down its Yucca Mountain offices and programs;
2. Halting the licensing process;
3. Dismantling the LSN;
4. Reassigning staff;
5. Selling computers and equipment; and
6. Closing the Las Vegas Hearing Facility.

While Nevada is not familiar with the specific amounts of money saved, it is apparent that **each** of the foregoing actions was a **saving**, an **avoided** cost, and not a wasteful expenditure, as Nye County argues.

Nye County sounds an oddly confrontational tone in its motion, stating that “the NRC cannot now be allowed to benefit from its own wrongdoing” (Restart Motion at 12) and rewarding the Executive Branch for such conduct “would be inequitable” (Restart Motion at 13). Nye County never explains what possible **benefit** or **reward** might accrue to the NRC—other than allowing the agency responsible for licensing nuclear facilities in a way which protects public health and safety the discretion to proceed to do so in accordance with its own best judgment (instead of a way that meets Nye County’s self-serving interest).

In its impulsive straining of credulity, Nye County’s argument is further self-contradicting within a single sentence (again, one asserted repeatedly apparently for effect), Nye County characterizes the funds available to NRC as “undeniably sufficient to **complete** critical portions of the licensing process, including the issuance of the unredacted NRC Staff SERs and **continuation** of ‘Phase I’ of discovery” (Restart Motion at 13-14). While the impropriety of

issuing unfinished SERs is discussed, *supra*, a mere “**continuation**” of discovery will **not** “complete critical portions of the licensing process.” The point is one which the CADC recognized: \$11 million is not sufficient funding for NRC to complete the Yucca Mountain licensing proceeding; it may be required to expend those funds, but it should exercise its own discretion as to **how** to do so.

6. Contrary to Nye County’s Position, NRC Should not Restart the Licensing Proceeding Without Reestablishing the Licensing Support Network

Based on an incorrect assumption that somehow its wish for a **completed** Yucca Mountain licensing proceeding will come about if only it can dictate how NRC will spend its available funds, Nye County argues that the proceeding should restart without a Licensing Support Network (LSN) in operation. Nye County accuses NRC of the “illegal termination” (Restart Motion at 7) of the LSN, choosing not to recognize the fact that NRC took the necessary step of allowing the LSN to “go dark” only when it faced the reality that it lacked sufficient funding to do otherwise. One could argue that NRC is **still** strapped for funds and that choosing to reestablish the LSN would necessarily impact **other** Yucca licensing expenditures it may wish to make. The fact is that, absent additional appropriations of funds by Congress, NRC lacks sufficient funds to **complete** the Yucca Mountain licensing proceeding. This was its reason for suspending the proceeding. This was its reason for terminating the operation of the LSN. Nye County faces insurmountable obstacles in seeking to exclude the LSN. These include:

1. Illegality; and
2. Universal accessibility and utility.

On the subject of legality, Nye County makes a decisive case for the denial of its own motion. Thus (Restart Motion at 7), Nye County states “10 C.F.R. § 2.1007(a)(2) states that access to the LSN ‘shall be provided’ by the NRC through its website.” In fact, Nye County

calls the absence of the LSN “illegal” (Restart Motion at 7) and opposed its termination on that basis.

Ignoring the fact that NRC’s suspension of the LSN was necessitated by financial constraints, Nye County now asks that NRC continue conduct which Nye County itself characterizes as illegal!

The critical matter of the need for and universal accessibility of LSN Documentary Material was addressed by the Commission in an order dated November 29, 2011, in which it observed: “The LSN was indeed intended to be primarily a discovery tool, enabling the parties to quickly view materials generated by the others without the time delays associated with traditional discovery” *U.S. Department of Energy (High-Level Waste Repository)*, CLI-11-13, 74 NRC 635, at 637 (Nov. 29, 2011); and the Commission praised the ability of the LSN “to allow full text search and retrieval access to the relevant documents for all parties . . . a readily available search and retrieval function is now lost since the LSN was been discontinued” (*id.*).

While the NRC, when it established the LSN (then the LSS) in 1989, may not have expected it to comprise over four million documents, it did realize the critical importance of its features of search and retrieval. Contrary to Nye County’s assertion that LSN is not needed because the parties have exchanged their document collections in pdf on CDs, the Commission said some 24 years ago:

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

54 Fed. Reg. 14925, 14919 (Apr. 14, 1989).

Meaningful and immediate search and retrieval capability is important to all the parties, both during depositions and in the adjudicatory proceeding. Prompt acquisition of relevant documents, out of a universe of millions, was the hallmark of the LSN. To say simply that all 19 parties were able to obtain CDs containing the document collections of the other 18 does not even approach the critical utility of the LSN. In addition, the LSN provided document access to interested members of the public across the country and around the world on NRC's website on the worldwide web. Mere possession on CDs of some parties' documents by other parties does **nothing** to ensure this public access.

Recreation of the LSN would provide user-friendly access to the public and the parties and ensure both the perception and the reality of a transparent and open proceeding. While Nye County may not see its own parochial interests advanced by such an open transparent proceeding, it should nonetheless be the goal of the Commission and its licensing board.

7. Conclusion and Prayer

For the reasons explained above, in Nevada's Answer to 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, Nevada prays that the Commission deny the motion in the following particulars:

1. The Commission and not the CAB should decide Nye County's motion;
2. The motion should not be decided, nor should NRC answer it until after a decision on NRC Chairman Macfarlane's recusal or disqualification is made;
3. Any case management conference should be scheduled in Las Vegas, Nevada, not Washington, D.C., and its scope should be decided by CAB;

4. NRC should not restart the Yucca Mountain licensing proceeding without reestablishing the LSN;
5. Nye County's request that unfinished SERs should be publicly disseminated should be denied; and
6. There is no justification for reallocating general NRC funds to the Yucca Mountain licensing proceeding.

Respectfully submitted,

(signed electronically)

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Dated: August 30, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

CERTIFICATE OF SERVICE

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

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