

**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>September 30, 2013</b>

**STATE OF NEVADA COMMENTS IN RESPONSE  
TO THE SECRETARY’S AUGUST 30, 2013 ORDER**

**I. INTRODUCTION**

By order dated August 30, 2013, the Secretary of the Commission invited all participants in the currently suspended Yucca Mountain licensing proceeding to provide their views as to how the agency should continue with the licensing process in light of the August 13, 2013 opinion of the U.S. Court of Appeals for the District of Columbia Circuit in *In Re: Aiken County, et al.*, No. 11-1271 (“*Aiken County*”).

As a preliminary matter, Nevada notes that a petition for rehearing *en banc* was timely filed by Nevada in the *Aiken County* case on September 26, 2013, and is still pending. If rehearing is granted, and the Court’s August 13, 2013 decision is overturned, no restart of the licensing process would be required. To avoid certain confusion and potentially unnecessary burden and expense, Nevada suggests the Commission should postpone any decision regarding how the licensing process should be continued (and the licensing proceeding should remain fully suspended) until either rehearing is denied, or if rehearing is granted, until the case is reheard and decided.

Nevada agrees with Chief Judge Garland that a resumption of the Yucca Mountain licensing process would be “a useless thing.” Dissenting Slip Op. at 2. Nevertheless, if the

licensing process must be continued in accordance with the Court's August 13, 2013 opinion, Nevada's views on how this should be accomplished are set forth below. Nevada does not have up-to-date information on the NRC resources required to accomplish the individual tasks described below. However, Nevada's views are based on the Court's decision, fundamental concepts of fairness, statutory law, the Commission's rules, and the premise that there are right and wrong ways to proceed even on something useless.

The following parties to the Yucca Mountain licensing proceeding join the State of Nevada in this filing: Inyo County, Clark County, Timbisha Shoshone Tribe, and Native Community Action Council.

## **II. SUMMARY**

As explained further below, Nevada believes:

- (1) Steps must be taken with the objective of reconstituting the Licensing Support Network (LSN) so that the text of relevant documents is electronically accessible and searchable by parties in the proceeding and interested members of the public;
- (2) Steps must be taken with the objective of completing the Safety Evaluation Report (SER), but this task should be done in parallel with reconstitution of the LSN, and the objective should be to complete all remaining SER volumes;
- (3) Pending completion of the SER and the reconstitution of the LSN, the Commission should (a) decide the pending Timbisha Shoshone Tribal Council petition for review (postponed in CLI-11-15), and (b) entertain petitions for review of the licensing board's decisions on post-closure legal issues and the rule waiver petition (LBP-12-22); and
- (4) The presiding Licensing Board (CAB04) should be directed to convene a case management conference in the Las Vegas area to consult with the parties with a view to making

recommendations to the Commission regarding whether additional progress may be possible in the licensing proceeding pending completion of the SER and reconstitution of the LSN.

### **III. VIEWS**

#### **A. Fundamental Legal Principles Require Progress on Both Tracks of the Licensing Process**

The Court's decision in *Aiken County* requires the Commission to "promptly continue with the legally mandated licensing process." Slip Op. at 22. The legally mandated licensing process comprises **two** tracks – (1) preparation of the SER and, if necessary, preparation of a Supplemental Environmental Impact Statement (addressing deficiencies identified by the NRC Staff in its September 5, 2008 Adoption Determination), **and** (2) the conduct of a trial-type adjudicatory hearing in accordance with Subparts C, G, and J of 10 C.F.R. Part 2.

Under section 114(d) of the Nuclear Waste Policy Act of 1982, as amended (NWPA), NRC is required to "consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications. . . ." The Commission's "laws applicable to such applications" include the Commission's Rules of Practice for the Yucca Mountain licensing proceeding, and these Rules of Practice specifically require both an SER (10 CFR Part 2, Appendix D) and a trial-type adjudicatory proceeding (10 C.F.R. § 2.1000). A Licensing Board presides over and manages the day-to-day conduct of the adjudicatory proceeding (10 C.F.R. § 2.321(a)), and interested parties such as Nevada are guaranteed a reasonable opportunity to participate in the adjudicatory hearing through discovery, presentation of evidence, cross-examination of witnesses, proposed findings, and appeals (*see* generally 10 C.F.R. Part 2, Subparts C, G, and J). These requirements and the rights they afford Nevada (and all the other intervenors) cannot be abridged.

On August 30, 2013, the Nuclear Energy Institute (NEI) filed before the Commission its Answer to Motions Concerning Resumption of Yucca Mountain Licensing Activities (hereinafter “NEI Answer”). Almost the entirety of NEI’s Answer focuses on a single “suggestion” – namely that the only activity that should move forward at this time before the NRC is the “completion and publication of the unfinished volumes of the NRC Staff’s Safety Evaluation Report” because “it is premature to consider resumption of other Yucca Mountain licensing activities.” NEI Answer at 2. NEI states that it opposes “reconstituting the [Licensing] Board to address this and related motions or to resume adjudicatory proceedings” because to do so “is premature and would imprudently expend limited resources on secondary activities.” *Id.* at 6.

NEI’s position advances the following self-serving interest: convince the Commission to do nothing but complete the remaining SER volumes, gambling that the SER will contain favorable conclusions regarding the adequacy of the Yucca Mountain License Application (LA), while simultaneously ignoring other Commission regulations requiring the conduct of a trial-type licensing hearing. NEI apparently does not want the Commission to do what the Court ordered – promptly continue with the legally mandated licensing process. Instead, NEI wants the Commission to disregard the Court’s order by promptly continuing with only one-half of the legally mandated licensing process.

In the very same pleading, NEI correctly acknowledges (NEI Answer at 6) that contested license applications “proceed in parallel” before NRC – *i.e.*, an NRC Staff review of an application that culminates in an SER coupled with a Licensing Board adjudication that considers contentions challenge the application and culminates in a final decision. But NEI’s suggestion to effectively freeze one-half of the licensing process adversely and prejudicially impacts every intervenor in the Yucca Mountain licensing proceeding and runs counter to

decades of legal precedent at the NRC and the Commission's regulations. Fundamental due process rights require the Commission to wholly reject NEI's suggestion and, instead, require some progress to be made on both tracks of the licensing process – the SER and the adjudicatory hearing process.

Finally, there is NEI's apparent concern for "the most judicious use of the limited funds available" (NEI Answer at 4). The Court's decision in *Aiken County* criticized the Commission for letting funding constraints interfere with a duty to comply with a part of the NWPA requiring the Commission to decide the application within three years. It would be astonishing, to say the least, if the Commission's response to that decision included another decision allowing those same funding constraints to interfere with another Commission duty under the same subsection of the NWPA (section 114(d)), namely the duty to consider the application "in accordance with the laws applicable to such applications," which laws (the Commission's regulations) provide for two licensing tracks, not one.

#### **B. The Licensing Support Network Should Be Reconstituted**

As indicated above, the Court's decision requires the Commission to "promptly continue with the legally mandated licensing process" which includes the conduct of a trial-type adjudicatory hearing in accordance with Subparts C, G, and J of 10 C.F.R. Part 2. Prompt continuance of the adjudicatory hearing track requires prompt reconstitution of the LSN.

Nevada's views on this subject were set forth in detail in its August 23, 2013 Motion for Commission Action Related to a Possible Restart of the Yucca Mountain Licensing Proceeding. To summarize, the LSN is critical to the proper conduct of any restarted Yucca Mountain licensing proceeding. As the Commission held in 1989, when the LSN's predecessor was first established:

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, 14929 (Apr. 14, 1989). What was true then is still true today: an adequate review of the relevant documents, which is necessary both to complete discovery and to prepare for and participate in the hearing, requires electronic full text search capability of all of the relevant documents.

Further, a critical attribute of the LSN is access of every interested member of the public to the documentary backdrop to the Yucca Mountain LA and the (now-to-be restarted) licensing proceeding. The LSN was a stand-alone internet page fully available for public access and search. This facilitated all potential users' access to the documents supporting the proceeding by providing access through direct and customary internet protocols. In the interest of transparency, this user-friendly approach served all interested members of the public and had no detrimental effect on the day-to-day use of the document library by the parties to the proceeding.

Indeed, the Commission appears to have recognized very recently that NRC-sponsored electronic search capability of documentary material must be reestablished because, on December 3, 2012, the Commission renewed the charter of the Licensing Support Network Advisory Review Panel (LSNARP). *See* ML12339A028.

An even more fundamental consideration is that an operational LSN is required by the Commission's rules. *See, e.g.*, 10 C.F.R. §§ 2.1003, 2.1007, 2.1011, 2.1018, and 2.1019. In fact, the Commission's Final Brief (February 13, 2012) in the *Aiken* case states (at 6) that the Commission's hearing process for the Yucca Mountain application "includes, *inter alia*, (1) a 'Licensing Support Network' . . . ." The Commission cannot comply fully with the Court's

decision without conducting an adjudicatory proceeding “in accordance with the laws applicable to such applications” (NWPA section 114(d)), and those laws include a functioning LSN. If the concept of electronic full-text search capability of all the relevant documents is to be abandoned, or if another method of full-text search capability (for example, ADAMS) is to be substituted, then the LSNARP should be convened, their members’ views considered, and a rulemaking proceeding must be initiated and completed to amend 10 C.F.R. Part 2. The creation of the LSN (and its predecessor, the LSS) entailed several rounds of rulemaking, including special outreach efforts to interested parties and a negotiated rulemaking (*see, e.g.*, 52 Fed. Reg. 29024 (Aug. 5, 1987); 53 Fed. Reg. 44411 (Nov. 3, 1988); 54 Fed. Reg. 14925 (Apr. 14, 1989); and 63 Fed. Reg. 71729 (Dec. 30, 1998)). It would not only be unlawful, but also tragic, if the effort required to produce the LSN were to be relegated to the dustbin of history by a preemptory Commission decision that included no rulemaking and no special outreach efforts to interested citizens.

NEI comments that reconstitution of the LSN would be a “fruitless task” (NEI Answer at 6). This should not be surprising – the nuclear industry was opposed to the LSN from its very beginning as the LSS (*see* 54 Fed. Reg. 14925, 14927-14928 (Apr. 14 1989)). But an effort to reconstitute the LSN would hardly be a fruitless task. Nevada’s interest in reconstituting the LSN is based on its recognized value and use in the adjudication as well as its ability to keep the public informed of ongoing activities and important written materials regarding the Yucca Mountain licensing proceeding, if it is to continue. For example, the NRC Staff’s three Technical Evaluation Reports (TERs) include numerous citations to DOE and DOE contractor technical studies that cannot be found on ADAMS (*see e.g.*, Smith, D. 2003aa. “Weld Flaw Evaluation and Nondestructive Examination Process Comparison Results for High-Level Radioactive Waste Package Manufacturing Program,” TDR–EBS–ND–000007. Rev. 01. ACC:

ENG.20030515.0003. Las Vegas, Nevada, referenced in NUREG-2107 at 4-67). An SER with references like this will be inscrutable. Identifiers such as ENG.20030515.0003 were readily searchable accession numbers on the LSN, and without an LSN (or similar system), important technical documents will be unavailable.

### **C. SER Completion**

Both the LSN and the SER are regulatory prerequisites to completion of the licensing review process. If steps are to be taken now to complete the SER, presumably these steps would build upon the information now contained in the TERs (which were created to preserve the knowledge gained in the NRC Staff's application review either for use in completing the SER or other use by future parties). Nevada believes that any steps that may now be taken to complete the SER should be directed at completing the SER in its entirety, not just one or more particular volumes, and that these steps should be taken in parallel with steps to reconstitute the LSN (or completion and full implementation of a rulemaking process to replace the LSN with another electronic full text search capability of the relevant documents). The complete SER would contain the content and findings originally planned for all five volumes of the SER. Volume 1 of the SER has been issued, and the remaining volumes were in various stages of completion at the time the proceeding was suspended. Volumes 3 and 2, containing respectively the Staff evaluation of DOE's Post-Closure and Pre-Closure Safety Analyses, were the most advanced at the time, but the TERs captured all the Staff evaluations available at the time for a complete SER.

### **D. Other Steps To Be Taken in the Adjudicatory Hearing Process**

As indicated above, the Court's decision in *Aiken County* requires the Commission to "promptly continue with the legally mandated licensing process" and that legally mandated

licensing process includes two tracks – (1) preparation of the SER and, if necessary, preparation of a Supplemental Environmental Impact Statement, and (2) the conduct of a trial-type adjudicatory hearing in accordance with Subparts C, G, and J of 10 C.F.R. Part 2.

When the Commission and Licensing Board (CAB04) suspended the adjudicatory proceeding in September 2011, deposition discovery was just beginning. Nevada (as well as other parties) preserved the LSN document collection on CDs. However, millions of documents are on the CDs, and full text search capability by attorneys and experts working together, like that provided by the LSN, is essential for deposition discovery to proceed in a useful, orderly, and expeditious fashion. Moreover, it will be impractical, if not impossible, to depose NRC Staff experts prior to completion of the SER. Accordingly, pending reconstitution of the LSN and completion of the SER, deposition discovery must remain largely or completely suspended. However, several steps besides deposition discovery can be taken in the proceeding without an LSN or SER – steps that would establish beyond doubt that the Commission is complying with the Court’s opinion.

Prior to the suspension of the proceeding, the parties conferred and 11 legal questions were drafted that were considered key to the resolution of a select group of post-closure contentions. After briefing and argument, the Licensing Board (CAB04) ruled on those issues (and on related rule waiver petitions) in LBP-10-22 (*U.S. Department of Energy (High-Level Waste Repository)*, 72 NRC 661, December 14, 2010). These issues include application of the defense-in-depth principle to a geologic repository and exclusion of erosion of Yucca Mountain from the safety evaluation and hearing. Immediate (interlocutory) appeals to the Commission from LBP-10-22 were not permitted by 10 C.F.R. § 2.1015, with the result that appeals must await the issuance of the relevant partial initial decision. However, it does not appear likely that

there will be sufficient funds to progress to the point of any initial decisions. At best, initial decisions will be rendered at some unknown point in the future. If the Commission were to entertain interlocutory appeals from LBP-10-22 as soon as possible, parties' "down time" pending completion of the SERs and reconstitution of the LSN could be utilized.

In addition, a Commission decision on the Timbisha Shoshone Tribal Council's petition for review is still pending (*see* CLI-11-15, December 22, 2011). This matter should be decided promptly.

Finally, it may be possible to make very modest progress on a number of other fronts in the adjudicatory hearing process prior to reconstitution of the LSN and completion of the SER. Nevada suggests that the Licensing Board (CAB04) be directed to convene a case management conference in the Las Vegas area to consult with the parties and make recommendations to the Commission regarding what further steps may be undertaken in this interim period.

**E. Proceedings Before the Licensing Board Must Be in the Las Vegas Area**

As Nevada argued in its August 23, 2013 Motion, it has long been the NRC's policy to conduct adjudicatory proceedings within close proximity to where the licensed activity will occur so that affected members of the public can participate more easily in the proceeding. And in fact, for many years, the NRC had a dedicated hearing facility in Las Vegas, specifically designed and operated to provide a suitable venue to conduct the Yucca Mountain licensing proceeding. This facilitated the effective participation of the States of Nevada and California, among others. It also facilitated public attendance in the licensing proceeding in the host state. In an era of limited resources, the need to facilitate this continued participation by selecting a geographically convenient venue for the proceeding still exists.

Moreover, it is not practicable to use the NRC's hearing facility at its headquarters in Rockville, Maryland, to conduct a restarted Yucca Mountain licensing proceeding. NRC's headquarter facility is not designed to easily handle (or possibly at all) a formal proceeding with seventeen parties (counting Lander, Esmeralda, Churchill, and Mineral counties as one consolidated party). In addition, given the concentration of effort that will be required to conduct any restarted proceeding that is reasonably expedited, the use of the NRC's facilities in Rockville would preclude their regular and continual use for other NRC proceedings or activities. Finally, using other facilities in the greater Washington, D.C. Metropolitan Area would not only impose a prohibitive burden on many of the parties and interested members of the public living in Nevada seeking to observe and participate in the proceeding, but it would engender a level of distrust in the licensing process and its outcome and aggravate the perception that the distant federal government in Washington, D.C., is seeking to impose the burden of nuclear waste disposal upon a populace via a distant and non-transparent process.

NEI comments that Nevada's request to conduct the adjudicatory proceeding in Las Vegas is a "waste of limited funds" (NEI Answer at 7). It is not a waste of funds to allow interested members of the public most affected by the Yucca Mountain licensing proceeding an opportunity to view first-hand what is happening in that proceeding.

Accordingly, Nevada respectfully requests that the Commission persist in its original policy and select or establish a new facility in the Las Vegas area to host any restarted licensing proceeding.

#### **F. Use of CAB04**

The continued use of CAB04 is also discussed in Nevada's August 23 Motion. In brief, from the time of its appointment until September 30, 2011, when it entered a Memorandum and

Order suspending the proceeding, *U.S. Department of Energy (High Level Waste Repository)*, LBP-11-24, 74 NRC 368 (2011), ML11273A041, CAB04 handled this proceeding in an effective and expeditious manner. Through the course of numerous conferences, its review of filings and its decisions thereon, CAB04 achieved a high level of comprehension of the many issues associated with the Yucca Mountain licensing proceeding, one in which an unprecedented number of nearly 300 contested contentions have been admitted for hearing and decision. The enormous learning curve enjoyed by the Judges comprising CAB04 is an indispensable and irreplaceable advantage going forward. The body of knowledge attained by CAB04 could not be replicated without an inordinate expenditure of time and effort by other administrative judges.

Accordingly, Nevada respectfully requests that the Commission continue in force the assignment of CAB04 (Judges Moore [Chair], Ryerson and Wardwell) for the conduct of the restarted Yucca Mountain licensing proceeding.

**G. State of Nevada’s Position on Course of Action Suggested by Nye County**

On August 23, 2013, Nye County, Nevada (Nye County) filed before the Commission its “Motion for Lifting Suspension of the Yucca Mountain Licensing Proceeding, Scheduling of Immediate Case Management Conference, and Issuance of Related Administrative Orders” (hereinafter “Nye County Motion”), and on August 30, 2013, the State of Nevada filed its Answer in opposition (hereinafter “Nevada Answer”). Nevada summarizes below its positions.

**1. Jurisdictional Issues**

Nevada’s Answer articulates its position that the matters requested in the Nye County Motion must be addressed by the Commission and not CAB04 (*see* Nevada Answer at 2-3). This point was made necessary because Nye County also filed its requests by motion before CAB04 on August 23, 2013 (to which Nevada separately answered and urged CAB04 to decline

to entertain Nye County's requests). It appears that the Commission (and not CAB04) agrees with Nevada since the August 30<sup>th</sup> Order requests the parties to file their views on restart with the Commission. Nonetheless, to ensure its position is well understood, Nevada again requests the Commission, and not CAB04, to decide (in the first instance) all matters involving the restart of the Yucca Mountain licensing proceeding.

Nevada's Answer also argues that the Commission should refrain from addressing Nye County's Motion until after Chairman Macfarlane considers and decides a separate motion that was filed by Nye County seeking to disqualify and requesting recusal of Chairman Macfarlane from considering any matter involving the Yucca Mountain licensing proceeding (*see* Nevada Answer at 3-5). This request is now moot because Chairman Macfarlane issued her decision declining to recuse or disqualify herself on September 9, 2013.

## **2. Plan for an Orderly Restart**

Nevada does not oppose the request in Nye County's Motion regarding the scheduling of a Case Management Conference, although Nevada suggests that such a conference be confined to the matter discussed above – *i.e.*, what additional steps may be undertaken in the interim period prior to the reconstitution of the LSN and the completion of the SER.

## **3. Issuance of Draft SERs**

Nevada's Answer opposed the request in Nye County's Motion that seeks the release of drafts of the SERs in the possession of NRC (*see* Nevada Answer at 7-9). To that point, Nevada explained that the TERs prepared by NRC have already been released publicly, and they satisfy the reasons for Nye County's request (*id.* at 8). Nevada also notes that the Yucca Mountain licensing proceeding does not require the parties to produce such draft documents (*id.* at 9).

#### **4. Funding Reallocation**

Nevada's Answer opposed the request by Nye County for NRC to reallocate its funding resources to provide additional amounts to conduct the Yucca Mountain licensing proceeding – *i.e.*, to “rob Peter to pay Paul” (*see* Nevada Answer at 9). Nevada identified two fatal flaws in Nye County's request: (1) only funds from the Nuclear Waste Fund can be used for the Yucca Mountain licensing proceeding; and (2) NRC's actions over the past few years to suspend the licensing proceeding actually avoided a waste of funds, contrary to Nye County's groundless accusation to the contrary (*id.* at 10).

#### **5. LSN Availability**

Nevada's Answer opposed the request by Nye County for NRC to restart the Yucca Mountain licensing proceeding, but without a reconfigured LSN (Nevada Answer at 12). As discussed elsewhere in this pleading, Nevada requests the Commission to take steps to revive the LSN as the predicate to restarting deposition discovery the adjudicatory proceeding.

#### **6. Discovery**

Nye County asks for the immediate resumption and completion of discovery. As Nevada explained above, this cannot be accomplished under the Commission's rules without reconstitution of the LSN and completion of the SER.

### **IV. CONCLUSION**

As explained above, Nevada suggests that the following actions be taken by the Commission if the licensing process must be resumed in accordance with the *Aiken County* opinion: (1) steps should be taken to reconstitute the LSN so that the texts of relevant documents are electronically accessible and searchable by parties in the proceeding and interested members of the public; (2) steps should be taken to complete all remaining volumes of the SER, but this

task should be done in parallel with reconstitution of the LSN; (3) pending completion of the SER and the reconstitution of the LSN, the Commission should (a) entertain petitions for review of the Licensing Board's decisions on post-closure legal issues and rule waiver petition (LBP-12-22), and (b) decide the pending Timbisha Shoshone Tribal Council petition for review (postponed in CLI-11-15); and (4) CAB04 should continue to preside, proceedings before CAB04 should continue to be held in the Las Vegas area, and CAB04 should be directed to convene a case management conference in the Las Vegas area to consult with the parties with a view to making recommendations to the Commission regarding whether additional modest progress may be possible in the licensing proceeding pending completion of the SER and reconstitution of the LSN.

Respectfully submitted,

*(signed electronically)*

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *State of Nevada Comments in Response to the Secretary's August 30, 2013 Order* has been served upon the following persons by the Electronic Information Exchange:

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