

inherent supervisory authority to overrule an interlocutory order of the Atomic Safety and Licensing Board (ASLB). DOE has made these two extraordinary requests in the face of clear Commission precedent that it is improper for a party to ask the Commission to exercise its inherent review authority.²

Ironically, DOE's previous appeal to the Commission's inherent authority sought the exact *opposite* relief of its current motion. DOE's previous request sought reversal of a ASLB Order which *stayed* this proceeding and *suspended* briefing on DOE's motion to withdraw and several intervention petitions.³ That ASLB Order was entered in order to await resolution of the same legal issues the Federal Court of Appeals of the District of Columbia Circuit, because the Court's ruling had the potential to "resolve or moot" issues before the ASLB.⁴

DOE now asks for a stay of this licensing proceeding because of, *inter alia*, legal uncertainties. DOE states that the Court of Appeals decision "could affect this proceeding in fundamental ways."⁵ As discussed below, DOE's requested suspension is unfounded and unnecessary. A suspension of this licensing proceeding would only give the appearance of official Commission sanction of DOE's seeming desire to abandon its NWPA duties.

STANDARD

"The Commission considers suspension of licensing proceedings a 'drastic' action that is

² See, e.g., *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), 69 NRC 128, 138 (2009).

³ See Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) (Apr. 6, 2010); U.S. Department of Energy's Petition for Interlocutory Review (Apr. 12, 2010).

⁴ See Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) (Apr. 6, 2010).

⁵ Suspension Motion at 5.

not warranted absent ‘immediate threats to public health and safety.’”⁶ Furthermore, the Commission “generally [has] declined to hold proceedings in abeyance pending the outcome of other Commission actions or adjudications.”⁷

ARGUMENT

DOE has failed to set forth a valid reason for the Commission to reverse the ASLB’s Order denying its motion to suspend this licensing proceeding. In fact, DOE seeks a suspension that would serve no practical purpose other than to give the appearance of this Commission’s approval of DOE’s seeming desire not to go forward with its NWPA duties, on the eve of oral argument on the issue before the Court of Appeals.

The stated rationale for DOE’s Suspension Motion is belied by the actual circumstances of this licensing proceeding. DOE admits that there is “no looming discovery deadline”⁸ which might necessitate a suspension to conserve scarce resources. In its almost-identical motion to the ASLB, DOE went on to explain that the non-issuance of Safety Evaluation Report Volume 3 (SER-3)⁹ by the NRC Staff means there is no imminent deadline for discovery because “the discovery period extends until two months after the Staff’s issuance [of SER-3].”¹⁰ As DOE noted in its motion to the ASLB, “[n]o party has requested to take any depositions in the six

⁶ *In re AmerGen Energy Co., LLC*, 68 N.R.C. 461, 484 (2008) (quoting *Vermont Yankee Nuclear Power Corp. & AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station) 52 NRC 151, 173-74 (2000)).

⁷ *Entergy Nuclear Vt. Yankee, L.L.C.*, 2010 NRC LEXIS 27 (N.R.C. July 8, 2010).

⁸ Suspension Motion at 4.

⁹ “*Review of Repository Safety After Permanent Closure.*”

¹⁰ DOE’s Motion to Renew Temporary Suspension of the Proceeding at 6 (Jan. 21, 2011).

months since [the denial of DOE’s Motion to Withdraw].”¹¹

In light of these facts, it is difficult to see how formally suspending this proceeding would “avoid large and potentially wasteful expenditures.”¹² DOE has identified no such expenditures, large or small, that it or any other party has incurred in the last eight months, or expects to incur in the imminent future (*e.g.*, before May 20th) in this proceeding. As the ASLB correctly pointed out, “DOE’s request is not so much a motion to stay discovery—given that reportedly none is threatened or underway—as a request for the Board’s unqualified approval of the parties continued ‘collective inaction.’”¹³ Indeed, the ASLB Order recognized that “[p]rudence and common sense may counsel careful allocation of resources” by the parties under the circumstances.¹⁴ DOE’s argument that a suspension of this licensing proceeding is necessary to avoid wasteful expenditures is simply illusory, and falls far short of the standard for suspension of a licensing proceeding at any rate.

Notably, DOE does not suggest that it would use the requested suspension period to re-constitute the Office of Civilian Radioactive Waste Management, which it admits it abandoned on September 30, 2010,¹⁵ notwithstanding the prior denial of its Motion to Withdraw. Whatever the underlying purpose of DOE’s request, it is clearly not in furtherance of its duties under the NWPA with regard to the license application.

Furthermore, DOE’s assertion that Congress has funded a Blue Ribbon Commission

¹¹ *Id.* at 2.

¹² Suspension Motion at 8.

¹³ Memorandum and Order (Denying Motion to Renew Temporary Suspension of the Proceeding) at 2 (February 25, 2011).

¹⁴ Memorandum and Order (Denying Motion to Renew Temporary Suspension of the Proceeding) at 2 (February 25, 2011).

¹⁵ Suspension Motion at 4-5.

(BRC) to consider “alternatives to Yucca Mountain”¹⁶ is incorrect, irrelevant, and is a re-visitation of arguments already rejected by the ASLB in its denial of DOE’s Motion to Withdraw the license application in this proceeding.¹⁷ The existence of the BRC does not constitute a “legislative uncertainty.”¹⁸ While the BRC may one day make recommendations to be considered by Congress, “both DOE and the NRC are bound to follow the existing law.”¹⁹ Furthermore, the appropriations language for the BRC expressly states that it is to examine “all alternatives” for nuclear waste disposal.²⁰ Congress did not, as DOE suggests,²¹ preclude consideration of the Yucca Mountain repository.²² More to the point, the very appropriation which included funding for the BRC included funding for this licensing proceeding,²³ which funding has not at any time since been curtailed by Congress.

In light of the fact that Congress has not eliminated or even curtailed funding for this licensing proceeding, DOE cites budget *requests*²⁴ (and, in its motion before the ASLB, the *Senate* version of DOE’s FY2011 appropriations²⁵) as a source of “budgetary uncertainty.”²⁶

¹⁶ Suspension Motion at 5.

¹⁷ See Memorandum and Order (June 29, 2010) at 18 n.69.

¹⁸ Suspension Motion at 1.

¹⁹ Memorandum and Order (June 29, 2010) at 18-19; see also *McCready v. Nicholson*, 465 F.3d 1, 12 (D.C. Cir. 2006) (stating that the Veterans Administration is free to raise concerns regarding the Privacy Act to Congress, which can amend the law, but the Courts and Veterans Administration must follow its text).

²⁰ See Aiken County Response in Opposition to DOE Motion to Withdraw at 9-10 (May 6, 2010).

²¹ Suspension Motion at 6.

²² See Aiken County Response in Opposition to DOE Motion to Withdraw at 9-10 (May 6, 2010).

²³ See Aiken County Response in Opposition to DOE Motion to Withdraw at 10 (May 6, 2010) (quoting 111 P.L. 85; 123 Stat. 2845; 2009 Enacted H.R. 3183; 111 Enacted H.R. 3183).

²⁴ Suspension Motion at 5.

²⁵ DOE’s Motion to Renew Temporary Suspension of the Proceeding at 4 (Jan. 21, 2011).

DOE's citations to inchoate budget documents are misplaced and premature.²⁷ DOE does not assert that Congress has terminated or even reduced funding for this proceeding; a continuing budget resolution is still in effect.

At the end of the day, DOE's Suspension Motion is essentially a re-visitation of the very same grounds and circumstances DOE cited in moving to withdraw the Yucca Mountain license application in the first place. In its March 3, 2010 Motion to Withdraw, the DOE cited the existence of the BRC four times,²⁸ cited the Administrations' budget requests,²⁹ and argued against "expenditure of funds on a licensing proceeding for a project that is being terminated."³⁰ DOE also acknowledged that the issue was already being litigated in Federal Courts.³¹ The ASLB denied DOE's Motion to Withdraw, and this Commission has not yet acted on review of the ASLB's denial. If these issues are to be considered by the Commission, they properly should be considered in the context of the Commission's review, if any, of the ALSB's denial of DOE's Motion to Withdraw. The Commission should decline DOE's invitation to address the very same issues in the context of its improper Suspension Motion.

²⁶ Suspension Motion at 2.

²⁷ See, e.g., *In re Shaw Areva Mox Servs.*, 66 N.R.C. 169, 203 n.85 (N.R.C.) ("The Applicant makes much of the inclusion of project funding in the President's budget. But this is only the beginning of the budget process, with a host of Congressional overseers and appropriators involved in the final say as to funding levels.")

²⁸ DOE Motion to Withdraw at 1, 2, 3, 7 (Mar. 3, 2010).

²⁹ *Id.* at 2 n.2.

³⁰ *Id.* at 2.

³¹ *Id.* at 4.

CONCLUSION

The Commission should reject DOE's improper appeal to the Commission to reverse the ASLB's interlocutory order. If DOE's Suspension Motion is reviewed under the Commission's inherent authority, the motion should be denied. As the ASLB correctly noted, suspension of this proceeding is simply unnecessary under the circumstances, and would only serve to give formal justification for DOE's apparent desire not to go forward with its NWPA duties.

Respectfully submitted,

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