May 17, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

RESPONSE OF CLARK COUNTY, NEVADA TO THE
DEPARTMENT OF ENERGY’S MOTION TO WITHDRAW

Clark County, Nevada (“Clark County”) respectfully submits this Response to the
Department of Energy’s (“the DOE”) Motion to Withdraw, filed on March 3, 2010, which is
submitted in accordance with CAB04’s April 27, 2010 Order (Setting Briefing Schedule). Clark
County fully supports the DOE’s Motion to Withdraw its License Application with prejudice.

I. INTRODUCTION

Clark County recognizes that there are parties (such as the Nuclear Energy Institute
(“NEI”)) and non-parties (such as Petitioners State of Washington, State of South Carolina,
Aiken County, South Carolina, and others) (jointly, the “Opponents”) that disagree with the
Administration’s and the Secretary of Energy’s (“Secretary”) decision to terminate efforts to
develop and operate a high-level waste geologic repository at Yucca Mountain. Clark County
likewise is quite aware that the debate over a national solution to high-level waste disposal will
necessarily continue.

However, this Commission is not the appropriate forum in which to conduct that debate.
The DOE has the lawful authority to withdraw the License Application and has elected to
exercise that authority. This Board must honor that decision; it does not have a role beyond
determining the conditions, if any, that should attach to the DOE’s withdrawal. The political
debates and policy decisions regarding the nuclear waste issue must be aired and decided
elsewhere.

The DOE’s Motion to Withdraw should be granted, with prejudice. The Board has no
need to attach any additional conditions to the withdrawal if it is with prejudice. However,
should the Board issue an Order rendering the DOE withdrawal to be without prejudice, then the
Board must impose clear and comprehensive Licensing Support Network (“LSN”) -related
conditions on the DOE’s withdrawal to avoid any possibility that the DOE would later pursue a
similar licensing proceeding relative to Yucca Mountain without affording interested parties
reasonable means to access the voluminous records currently accessible via the LSN.

II. DISCUSSION

A. The DOE has Authority to Withdraw the License Application and the Board
   Must Honor the DOE’s Decision

   1. The DOE has authority to withdraw the License Application

   The Opponents argue that the DOE does not have authority to withdraw the License
   This is not correct. Clark County respects the fact that the Opponents disagree with the DOE’s
decision, but that disagreement is political and should be debated and resolved with the
Administration, Congress or both. The DOE’s decision to withdraw does not violate the NWPA
and is not a decision that this Board can review, much less reverse.
As the DOE explains in its Motion, the NWPA provides that this license proceeding is to be conducted “in accordance with the laws applicable to such applications . . . .”¹ This Commission’s regulations for licensing proceedings are among the “laws applicable to such applications” and include 10 C.F.R. § 2.107(a), which provides for withdrawal of license applications. The NWPA contains no other express mandate requiring prosecution of a license application regardless of developments, and likewise contains no express prohibition against withdrawal of a license application.

Petitioner Aiken County, South Carolina (“Aiken”) filed its Response in Opposition to DOE’s Motion to Withdraw on May 6, 2010 (“Aiken’s Response”). Careful review of Aiken’s Response confirms that the NWPA does not prohibit withdrawal. For example, Aiken restates the DOE’s position from its Motion to Withdraw that the NWPA neither directs nor circumscribes the Secretary’s action on the license application after it is submitted.² Aiken then argues that this position “is patently inconsistent with the purpose and plain language of the NWPA and cannot stand.”³ Notably, Aiken neither quotes nor cites to the non-existent “plain language of the NWPA” on which its allegation is premised.

Aiken further argues that the spirit of the NWPA would be frustrated by the DOE’s withdrawal, contending that withdrawal “renders impossible the fulfillment of the NWPA mandate that NRC approve or disapprove the construction authorization within three years.”⁴ This allegation ignores the fact that the DOE filed the License Application in 2008, even though it was originally to have filed its application in time for the repository to be open in 1998. It also ignores the fact that Congress funded a license application effort, but not a construction effort, in

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¹ DOE Motion, at 2 (citing NWPA § 114(d)) (codified as 42 U.S.C. § 10134(d)).
² Aiken’s Response, at 5.
³ Id.
⁴ Id. at 4.
the 2002 amendments to the NWPA after the Secretary recommended the site as suitable to the
President, and the President recommended the site as suitable to Congress, in 2002. At that time,
Congress recognized that its Joint Resolution on site selection did not authorize construction, but
only “would allow DOE to take the next step in the process laid out by the Nuclear Waste Policy
Act and apply to the NRC for authorization to construct the repository at Yucca Mountain.”

Thus, Aiken’s argument that this licensing proceeding cannot be terminated as a result of
the DOE’s Motion to Withdraw is unsupportable. It presumes, incorrectly, that this proceeding
has been, and will continue to be, little more than a ceremonial exercise with a pre-determined
outcome. The argument ignores the plain language of the NWPA, and relies on alleged “plain
language” that does not exist. The argument is then buttressed by arguments of spirit and intent
that also are belied by actual history, Senate and House Committee reports, and the realities of
federal budgeting and Congressional appropriations.

2. The statutory scheme authorizes withdrawal

Opponents to the DOE’s Motion to Withdraw argue in essence that withdrawal is
contrary to the spirit of the NWPA, as if the site selection of Yucca Mountain under the NWPA
was itself virtually tantamount to licensing, funding, constructing and operating a high-level
waste repository at Yucca Mountain. This of course is not the case.

First, the NWPA itself sought to reduce cost and attempted to reach more of a direction
by way of the site selection process. Even there, Congressional amendments to the NWPA
afforded the Governor of Nevada an opportunity to formally advise Congress of his disapproval
of Yucca Mountain as a candidate site by submitting an official notice of disapproval. That
notice of disapproval would have terminated all work at Yucca Mountain if Congress had not
adopted a joint resolution approving Yucca Mountain as the candidate site to override the

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Governor’s disapproval. Passage of the Joint Resolution “permitted” the DOE to seek authority to develop the repository at Yucca Mountain.\textsuperscript{6} The NWPA provides that the licensing proceeding shall be conducted “in accordance with the laws applicable to such applications . . .”\textsuperscript{7} The legislation includes no prohibition against withdrawal.

There also has always existed the uncertainty of Congressional funding and authorizations. In approving the Yucca Mountain site, the House recognized that:

Based on information from DOE, we estimate that implementing H.J. Res. 87 would require the appropriation of about $12 billion over the 2003–2012 period, to pay for licensing, construction, and waste transportation activities over that period. \textit{All such spending is subject to appropriation.}\textsuperscript{8}

There is no credible basis for contending that an undertaking dependent on future appropriations of some $12 billion is as good as a “done deal.”

One would not only expect but also hope that, as years go by, as technology develops, as new discoveries are made, and as the political and economic environment change, that Administrations and Congresses would re-evaluate and alter their thinking. That is what has happened here. As the DOE recounts in its Motion to Withdraw, the President and Secretary have determined that a geologic repository at Yucca Mountain is not a workable long-term option\textsuperscript{9} and “it does not intend ever to refile an application to construct a permanent geologic repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain.”\textsuperscript{10} In addition, the Secretary has established, \textit{and Congress has funded}, the Blue Ribbon Commission on America’s Nuclear Future to conduct a comprehensive review of alternatives to Yucca

\textsuperscript{6} Nuclear Energy Institute, Inc. v. EPA, 373 F.3d 1251, 1309 (D.C. Cir. 2004).
\textsuperscript{7} NWPA § 114(d), (codified as 42 U.S.C. § 10134(d)).
\textsuperscript{10} Id. at 3 n.3.
Mountain.\textsuperscript{11} Thus, there is neither a statutory nor a logical basis for contending that the DOE must continue to pursue its License Application for development of a repository, when the DOE no longer considers Yucca Mountain a “workable option.” The NWPA does not so provide and the DOE has not so interpreted it. Instead, the Administration and the Secretary have established, and Congress has funded, the Blue Ribbon Commission -- the focus of which is to identify alternatives to Yucca Mountain.

3. Denying the Motion to Withdraw would establish untenable precedent

An order denying the DOE’s Motion to Withdraw would set untenable precedent and have unworkable consequences. The Board must consider what such an order would actually mean.

First and foremost, such an order would usurp the DOE’s role as the applicant in this proceeding. It is not for the Board or the Commission to determine which, if any repository (or other approach to high-level waste disposal) the DOE should pursue. Rather, the role of the Board and the NRC is to conduct licensing proceedings and related reviews on applications brought before it. The Commission said as much last year in its Order reversing CAB-01’s ruling that admitted Contentions NEV-SAFETY-1 and NEV-SAFETY-2.\textsuperscript{12} In that Order, the Commission explained: “A petitioner may not challenge applicable statutory requirements as part of an administrative adjudication” and “collateral attacks on the NWPA [] are beyond the scope of this proceeding.”\textsuperscript{13} The Opponents’ arguments against the DOE’s Motion to Withdraw

\textsuperscript{12} See U.S. Dep’t of Energy (High-Level Waste Repository), Memorandum and Order, CLI-09-14, Nuclear Reg. Rep. P 31594, 2009 WL 1883741, 18 (NRC) (June 30, 2009) (The Commission’s “responsibility does not require us to go beyond the application itself”).
\textsuperscript{13} Id. at 17.
are just that, “attacks on the NWPA,” and are, accordingly, “beyond the scope of this proceeding.”14

Assuming, *arguendo*, that the NRC has authority to deny a motion to withdraw, at least under the circumstances presented here, this Board’s denial of the DOE’s motion would effectively veto the President’s and the Secretary’s determination that Yucca Mountain is not a workable solution. This Board should not insist that the DOE continue to seek a license for the very project that its Secretary finds unworkable.

Denial of the Motion to Withdraw is not practical either. The NRC cannot force the DOE to spend money that it does not have and the NRC cannot force Congress to appropriate money that it has not appropriated. Such funds would be required not only for the direct costs of prosecuting this proceeding, but also for the costs of all other permits, permissions, water rights, transportation easements, rights-of-way, facilities and numerous other tangible and intangible rights and properties necessary for the DOE to proceed beyond the licensing phase.

4. **The legislative history of the NWPA confirms that the DOE’s application was never a “sure thing.”**

When nuclear waste storage legislation was debated and passed by Congress in the early 1980s, no one believed that the DOE had sufficient information to complete a License Application or dispose of high-level nuclear waste on the spot. Rather, the process outlined in the NWPA and similar legislation debated and passed at that time provided a careful “step-by-step” manner in which “[e]xperience and information gained at each phase [would] be reviewed and evaluated to determine if there [was] sufficient knowledge to proceed with the next stage of

\[14\] *Id.*
development.”15 As one Senator put it, the very purpose of congressional nuclear waste legislation was to “provide the Congressional support which [would] force the executive branch to place before Congress and the public real solutions to our nuclear waste management problems.”16

The House Committee on Science and Technology similarly explained in a Report attached to H.R. 5016, (a bill nearly identical to the NWPA) that its purpose was to “establish a federal policy” and “program,” to allow for the disposal of high-level waste in a repository.17 However, nowhere did that Committee’s Report state that such a policy would necessarily lead to the licensing of a repository. Rather, it simply established the “legal and institutional mechanisms” that would “permit” the disposal of high-level waste “deep underground in stable geologic media.”18

Moreover, the NWPA has historically not been closely adhered to. As far back as 1981, the NRC itself was “unable to guarantee” that it could meet the deadlines established by congressional nuclear waste legislation for NRC review of a license application “given possibilities of delay.”19 The NRC further explained that such possibilities for delay “could conceivably include an incomplete DOE application, unanticipated technical difficulties, or other

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15 H.R. Doc. No. 96-266, 96th Cong., 2d Sess., Message from the President of the United States, at 3 (Feb. 12, 1980); 19 Weekly Compilation of Presidential Documents 1, 19-20 (Jan. 7, 1983) (in signing the NWPA, President Reagan referred to it as an “important step,” a “commitment,” and a “milestone for progress.”)
16 S. Rep. No. 97-282, at 62 (Nov. 30, 1981) (Comments of Senator Johnston contained in Joint Report from the Senate Committee on Energy and Natural Resources to accompany S. 1662, a bill similar to the NWPA that was passed in the Senate on April 29, 1982).
19 See id. at 55 (correspondence from Nunzio J. Palladino from the NRC to Congressman Fish).
questions which may arise.” 20 Similarly, the DOE was originally supposed to have had a repository at Yucca Mountain available to begin receiving high-level waste by 1998. When that appeared unfeasible, the NWPA, as amended in 1987, required the DOE to file a license application within 90 days of the site recommendation, (which would have been October of 2002). Despite these NWPA deadlines, the DOE did not file the License Application until June of 2008.

In approving the NWPA, Senator Hart explained: “enactment of a law hardly guarantees that the technology contemplated under the law will work as promised. We all hope that we can dispose of nuclear waste safely, but we do not know for sure.” 21 The Secretary of Energy apparently has determined that “hope” for safe disposal at Yucca Mountain is not a viable strategy and that the public interest would best be served by eliminating Yucca Mountain as an option once and for all. 22 The Secretary contemporaneously established the Blue Ribbon Commission to seek alternatives to Yucca Mountain, which Congress funded shortly thereafter. 23 While such funding does not actually amend the NWPA, it certainly indicates that Congress is aware and supportive of the President’s and the Secretary’s decision to terminate this proceeding. To conclude otherwise is to presume that Congress would purposely fund unlawful DOE activities.

20 Id.
21 Cong. Rec. 33231 (Dec. 21, 1982).
22 See DOE Motion to Withdraw, at 3 n.3 (DOE “does not intent ever to refile an application to construct a permanent geologic repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain.”)
B. Withdrawal Must Be With Prejudice

1. The Board must permit the withdrawal to be with prejudice

There are no grounds present that permit the Board to deny the Applicant’s request that its withdrawal be with prejudice. The role of the Board and the Commission in this proceeding is to review the license application put before it, but not to mandate that it be prosecuted.\(^{24}\)

The Commission does have authority to determine the terms and conditions of withdrawal, but such terms and conditions must have a rational relationship to the conduct and potential legal harm involved, and be supported by the record.\(^{25}\) Withdrawal with prejudice does not present a circumstance redressable by the Board or the NRC.

Notably, many of the Opponents are late petitioners seeking untimely intervention. Since they are not parties to the case, they cannot claim to be harmed in any manner that falls within the conditioning authority of the Board. Likewise, those entities that oppose the withdrawal with prejudice and are parties to this proceeding also have no rights or allegeable harms protectable under the Commission’s conditioning authority. It is within the DOE’s discretion to withdraw with prejudice for the very same reasons that it is within the DOE’s discretion to withdraw the License Application. The Board would effectively substitute its judgment for that of the President and the Secretary if it issued an order purporting to deny the DOE’s withdrawal with prejudice. Those that disagree are free to do so, but must do so in other fora.

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\(^{24}\) Aiken quotes in re Sequoyah Fuels Corp., 41 N.R.C. 179 (1995) wherein the Commission indicated that it was not foreclosing the possibility that there may be “limited instances” where denial of a motion to withdraw may be appropriate, “as, for example, where a licensee seeks to withdraw a license renewal application but in fact continues to conduct some production activity.” Aiken’s Response, at 6. No such circumstances are present here. The DOE is not yet a licensee, and no production activity is involved. Because the applicant here is not yet engaged in any activity regulated by the Commission, the Commission has neither need nor basis for disallowing withdrawal or disallowing withdrawal with prejudice.

\(^{25}\) See Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 N.R.C. 967, 974 (1981).
2. Comprehensive LSN-related conditions would be required if the Board granted the DOE’s withdrawal without prejudice

If the Board were to issue an Order rendering the withdrawal without prejudice, it would have to impose clear and comprehensive Licensing Support Network (“LSN”) -related conditions on the DOE. Such conditions would be required in order to avoid any possibility that the DOE might later initiate a similar licensing proceeding at Yucca Mountain without another parties’ ability to access the voluminous records currently accessible via the LSN by reasonable methods.

It would be highly prejudicial to all interested parties to put them in a position of conducting a subsequent iteration of this proceeding without the documents currently on the LSN (originally the “Licensing Support System” or “LSS”). As the Commission explained in 1989 in support of the creation of the LSS:

Indian tribes, states, local governments and citizens’ organizations that might become intervenors in [a licensing proceeding] have a responsibility to their respective constituents to see that the resolution of those questions [questions regarding thoroughness of licensing review] is done as meaningfully and correctly as possible. In other words, these entities’ primary interest in this entire program—one which is manifestly consistent with the general public interest—is to make sure that the Commission’s final determinations in this matter are as nearly correct as possible.

To discharge this responsibility, . . . they must be intimately involved in the review of the program. To effectively participate in program reviews, the prospective intervenors must have excellent access to the information base the program is using. . . .

By 2010, the DOE had deposited over thirty million pages of documents on the LSN.27

The LSN eliminates the initial time-consuming discovery process, including the burdensome physical production and on-site review of documents by parties to the licensing proceeding, by

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27 See Department of Energy’s Answers to the Board’s Questions at the January 27, 2010 Case Management Conference, at 3 (Feb. 4, 2010).
providing for the identification and submission of these documents early on. Moreover, the LSN keeps these documents in an electronically searchable form, which “allow[s] for a thorough and comprehensive technical review of the license application by all parties and potential parties” to this proceeding as envisioned by the Commission back in 1989. Without the LSN, the millions of pages of documents cannot be searched, retrieved, or even viewed as individual documents.

This is a real and serious concern because the DOE has to date stopped short of committing to maintain the LSN or any functional substitute. The DOE’s most recent statement of its plans on this topic are set forth in its Motion to Withdraw. Therein the DOE contends that no LSN-related conditions are necessary because it intends to maintain the LSN throughout this proceeding, including appeals. Thereafter, it will “archive the LSN materials in accordance with the Federal Records Act and other relevant law.” The DOE’s proposed approach is not objectionable to Clark County as long as the withdrawal is made with prejudice.

Discontinuation of LSN maintenance is not acceptable as long as there is a possibility that the DOE might again seek a license for a high-level waste repository at or in the vicinity of Yucca Mountain. If the Board does not grant the withdrawal with prejudice, it must include in its order granting withdrawal clear and comprehensive conditions obligating the DOE to maintain the LSN until all possibilities of filing another license application relative to Yucca Mountain are irremovably foreclosed. To ensure impartiality, such a determination would have to be made or approved by the Commission, not the DOE unilaterally.

30 See DOE’s Motion, at 8-9.
31 See id.
32 Id. at 8; see also Department of Energy’s Answers to the Board’s Questions at the January 27, 2010 Case Management Conference, at 3-4 (Feb. 4, 2010).
III. CONCLUSION

For the foregoing reasons, Clark County respectfully requests that this Board grant the DOE’s Motion to Withdraw with prejudice. In the alternative, if the Board does not grant the DOE’s Motion with prejudice, Clark County urges the Board to include in its order granting withdrawal clear and comprehensive conditions obligating the DOE to maintain the LSN until all possibilities of filing another license application relative to Yucca Mountain are completely foreclosed.

Respectfully submitted,

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Dated: May 17, 2010
UNITED STATES OF AMERICA
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In the Matter of

U.S. DEPARTMENT OF ENERGY
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Docket No. 63-001-HLW
ASLBP No. 09-892-HLW-CAB04

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response of Clark County, Nevada to the Department of Energy’s Motion to Withdraw have been served on the following persons this 17th day of May, 2010, by Electronic Information Exchange.

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