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)

NRC STAFF RESPONSE TO STATE OF NEVADA PETITION FOR RELIEF
WITH RESPECT TO POSSIBLE ISSUANCE OF PARTIAL SAFETY EVALUATION REPORT

INTRODUCTION

The staff of the U.S. Nuclear Regulatory Commission (Staff) hereby responds to the “State of Nevada Petition for Relief with Respect to Possible Issuance of a Partial Safety Evaluation report for Yucca Mountain,” dated June 14, 2010 (Petition).1 The State of Nevada requests that the Commission direct the Staff to suspend all efforts to complete and issue Volume 3 of its Safety Evaluation Report (SER) on the Department of Energy (DOE) License Application (LA) seeking authorization to construct a geologic repository at Yucca Mountain, Nevada, pending a final Commission decision on DOE’s motion to withdraw its LA. Petition at 3. Nevada also requests that, if the DOE motion is finally granted, the Commission direct the Staff to permanently cease all SER efforts. Id. In the alternative, Nevada requests that, if the SER efforts are not suspended or terminated, the Commission direct the Licensing Board to issue opinions on briefed legal issues and issue a declaratory order contemporaneous with the Staff’s issuance of each SER volume stating that the SER does not necessarily reflect the opinions and conclusions of the Commission. Id. at 12. As explained below, the Staff is of the

1 Although Nevada did not file its Petition pursuant to the procedural rules in 10 C.F.R. Part 2, the Staff is treating Nevada’s Petition as a motion for Commission relief and is providing its views in accordance with the timeframe provided in 10 C.F.R. § 2.323(c).
view that, although the requested suspension is not warranted and the requests for permanent
termination and alternative relief are not necessary, the Staff will comply with Commission
direction regarding issuance of SER volumes.

BACKGROUND


Following oral arguments on March 31 through April 2, 2009, the Construction Authorization Boards (Boards) designated to rule on intervention petitions, granted petitions filed by Nevada and a number of other petitioners and admitted nearly 300 contentions, including contentions identified as legal issues. U.S. Dep’t of Energy (High-Level Waste Repository), LBP-09-6, 69 NRC 367, 381, 422, 455, 485-500 (2009), rev’d in part, aff’d in part, CLI-09-14, 69 NRC 580 (2009). The Boards held that some contentions were inadmissible because they violated 10 C.F.R. § 2.335 and involved the subject matter of a pending Commission rulemaking. Id. at 482. The Boards stated that petitions for waiver would be addressed in subsequent order(s) along with the admitted legal contentions. Id.

On June 19, 2009, Construction Authorization Board 04 (CAB 04) was established “to preside over matters concerning discovery, Licensing Support Network [LSN] compliance, new

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2 NEV-SAFETY-197 and NEV-SAFETY-198, which assert that certain DOE programs based on regulations subject to a pending rulemaking are inadequate, were among such contentions. See U.S. Dep’t of Energy, LBP-09-6, 69 NRC at 482; State of Nevada’s Petition to Intervene as a Full Party, dated December 19, 2008, at 1025, 1028. See also Petition at 1-2 n.1. The Board also construed one late-filed contention, NEV-SAFETY-203 Erosion FEP Screening After 10,000 Years, as a petition for waiver. See U.S. Dep’t of Energy (High-Level Waste Repository), LBP-09-29, 70 NRC ___ (Dec. 9, 2009) (slip op. at 14).
or amended contentions, grouping or consolidation of contentions, scheduling, [and] case
management matters relating to any of the foregoing . . . .” Establishment of Atomic Safety and

Based on Staff responses as to whether the SER would be issued in accordance with
the 10 C.F.R. Part 2, Appendix D schedule and, if not, could be issued serially, the Board issued
a case management order pacing Phase I discovery with the planned SER schedule. See CAB
Case Management Order #2, dated September 30, 2009 (unpublished), at 3. Phase I
discovery, which includes all safety, environmental or legal contentions related to the subject
matter reviewed in SER Volume 1 (Review of General Information) or SER Volume 3 (Review of
Repository Safety After Permanent Closure), began with initial witness disclosures on or before
October 10, 2009. Id. at 3, 5. The Board required briefing of Phase I legal issues in
December 2009 and January 2010, and held oral argument on January 26 and 27, 2010. See
Order (Identifying Phase I Legal Issues for Briefing), dated October 23, 2009 (unpublished),
at 2; Order (Scheduling Oral Argument), dated January 7, 2010 (unpublished). The Board has
not yet ruled on the briefed legal contentions or the petitions for waiver.

On February 1, 2010, DOE filed a "Motion to Stay the Proceeding" (Stay Motion), which
stated that the President, in the proposed budget for fiscal year 2011, "directed that the
Department of Energy ‘discontinue its application to the U.S. Nuclear Regulatory Commission

3 The Board opined that if the SER were issued serially, discovery could also proceed serially.
Order (Concerning Scheduling), dated July 2, 2009 (unpublished), at 1-2. In response to CAB 04
inquiries, the Staff stated that it would issue SER Volumes 1 and 3 in March 2010 and September 2010,
respectively, and that the Board’s assumption that the remaining SER volumes would be issued through
February 2012 was not unrealistic. See NRC Staff Answer to the CAB’s July 2, 2009 Order Concerning
Scheduling, dated July 10, 2009, at 1-2 (Staff July 10 Answer); NRC Staff Answer to the CAB’s July 21,
2009 Order Concerning Serial Case Management, dated July 28, 2009; Tr. at 11 (Sept. 14, 2009). The
SER schedule could, however, change due to, inter alia, future budgets and emergent work. See Staff
July 10 Answer at 2. At recent oral arguments, the Staff stated that target dates for SER Volumes 1
and 3 were August 2010 and November 2010, respectively. Tr. at 398 (Jan. 27, 2010); Tr. at 328-29
(June 4, 2010) (Volumes 1 and 3 would be issued on or before August 2010 and November 2010,
respectively).
for a license to construct a high-level waste geologic repository at Yucca Mountain in 2010 . . . .” Stay Motion at 1 (internal citation omitted). DOE stated its intent to withdraw the license application by March 3, 2010, and requested a stay of the proceeding in order to avoid unnecessary expenditure of resources. See Stay Motion at 2. CAB 04 granted DOE’s stay request. Order (Granting Stay of Proceeding), dated February 16, 2010 (unpublished).


On June 14, 2010, Nevada filed the instant Petition. The Staff’s response to Nevada’s Petition is set forth below.

DISCUSSION

Nevada argues that the Staff’s SER work should be suspended until there is a final Commission decision on the DOE Motion. Petition at 3, 11. Nevada reasons that, if a suspension is not granted, there could be a waste of taxpayer and ratepayer money and Nevada and others could be prejudiced since the SER would be tentative, incomplete, and possibly misleading or wrong. Id. at 5-11. Nevada claims that issuance of the SER after the LA
is finally withdrawn and the adjudicatory hearing proceeding terminated,4 “would demonstrate
great disrespect for the public hearing process . . . .”  Id. at 3. Nevada requests that, if the DOE
Motion is finally granted, there should be a permanent cessation of all SER efforts.  Id. at 3. If
the Commission does not suspend or terminate SER efforts, Nevada alternatively requests that
the Commission (1) order the Board to issue rulings on the briefed legal issues and (2) issue a
declaratory order contemporaneous with each SER volume stating that the Staff’s opinions and
conclusions do not necessarily reflect those of the Commission.  Id. at 12.

Nevada’s claims regarding the adequacy of the SER and the Staff’s plans to issue an
SER subsequent to a final Commission decision terminating the proceeding are speculative.
The Staff’s review of the DOE LA is ongoing, subject to resource constraints.  If there is a final
Commission decision granting the DOE Motion, the Staff will not issue any pending SER
volumes.  Therefore, Nevada’s request that the Commission direct the Staff to permanently
cease SER efforts in the event DOE’s Motion is finally granted is not necessary.  Further, the
adequacy of the Staff’s review is not at issue in a licensing adjudication.  Amergen, Energy Co.,
LLC et al. (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 476 (2008)
(“The purpose and scope of a licensing proceeding is to allow interested persons the right to
challenge the sufficiency of the application.  The NRC has not, and will not, litigate claims about
the adequacy of the Staff’s safety review in licensing adjudications.”) (internal citation omitted).5

4 Nevada does not define what it means by “application is finally withdrawn and the adjudicatory
hearing proceeding is terminated.”  See Petition at 3. In a joint filing submitted by Nevada’s counsel,
“final termination of this proceeding” is defined as the time when “a final Order granting or denying DOE’s
Motion to Withdraw its Yucca Mountain License Application (LA) is no longer appealable at any level
through petitions for certiorari to the U.S. Supreme Court.” Joint Report Concerning Conditions

5 In addition, Nevada’s suggestion that the SER may not meaningfully address contentions
presumes that all admissible contentions have technical and/or legal merit.  See Petition at 4-5. A
determination that a contention is admissible, however, does not address whether a contention has merit.
See, e.g., U.S. Dep’t of Energy, LBP-09-6, 69 NRC at 454.
Similarly, Nevada’s assertions that the Staff’s regulatory interpretations may be wrong or misleading without a ruling on the legal issues or may constitute a waste of funds in the absence of suspension, are not persuasive. See Petition at 5-8. If completed, the SER would represent the Staff’s views as to whether DOE satisfies regulatory requirements based on information available at the time of issuance.\(^6\) That determination would be subject to review by the Board and Commission, and would not be binding on either entity. Even if the Licensing Board, an independent decision maker, was to resolve all contested issues (\(i.e.,\) contentions) in favor of issuance of an authorization to construct a high-level radioactive waste repository, that decision would not be effective until the Commission completed its review of all contested issues in the adjudicatory proceeding and uncontested issues. See 10 C.F.R. § 2.1023.

With respect to Nevada’s assertion that continuing SER work may constitute waste, Staff determinations regarding appropriate expenditure of funds are based on two considerations. First, expenditures must be consistent with the purpose for which funds were appropriated by Congress. Second, expenditures must be consistent with Commission budget decisions and directions. With respect to the first consideration, the Staff’s SER work is consistent with Congressional appropriations to the Nuclear Regulatory Commission from the Nuclear Waste Fund, established by the Nuclear Waste Policy Act, 42 U.S.C. § 10101 \(et seq\). See Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. 111-85, 123 Stat. 2845 (2009); Nuclear Waste Policy Act, § 302, 42 U.S.C. § 10222. Second, Staff expenditures are consistent with the Commission’s decision to allocate resources to support the Staff’s ongoing technical review of the LA in FY2010. See, \(e.g.,\) NUREG-1100, Vol. 25,

\(^6\) See 73 Fed. Reg. at 63,029 (findings of the Staff’s detailed technical review of the LA will be documented in the Staff’s SER); Oyster Creek, CLI-08-23, 68 NRC at 468 (in the context of license renewal proceedings, the Commission stated “[t]he Staff produces a Safety Evaluation Report (SER) . . . summarizing its findings with respect to the licensees’ programs for aging management.”) (emphasis added); New England Power Co. (NEP Units 1 & 2), LBP-78-9, 7 NRC 271, 279 (1978) (stating that the SER, which is subject to review and amendment by the Board in an adjudicatory setting, represents the staff’s independent review).
Should the Commission provide alternative instructions to the Staff regarding expenditure of resources for its technical review, the Staff will comply with those instructions.

Therefore, because (1) the adequacy of the Staff’s review is not at issue in this proceeding, (2) the SER represents only the Staff’s findings and are subject to review by the Board and the Commission, and (3) the Staff’s ongoing review is consistent with current Congressional appropriations and prior Commission budget decisions, Nevada’s claims of prejudice and waste if the Commission does not suspend the Staff’s SER work pending a final Commission decision are not persuasive. Accordingly, Nevada’s request for a suspension pending a final Commission decision on the DOE Motion is not warranted. In addition, as previously noted, Nevada’s request that the Staff be directed to cease all SER efforts is not necessary because the Staff will not issue pending SER volumes if the DOE Motion is granted by a final Commission decision.

Although the Staff does not believe that Nevada’s alternative relief is necessary in the event the Commission does not suspend or terminate SER efforts, the Staff does not object to Nevada’s alternative requests for issuance of a Board order on briefed legal issues and a Commission statement that any volumes issued do not necessarily reflect the Commission’s views. See Petition at 3, 12.

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7 Even if the application is withdrawn, informational purposes may be served by the Staff’s SER work. See, e.g., Dept’ of Energy Project Mgmt. Corp. Tenn. Valley Auth. (Clinch River Breeder Reactor Plant), LBP-84-4, 19 NRC 288, 291-92 (1984) (even though a project had been terminated prior to completion of the adjudicatory process, the Board issued an order to memorialize its assessment of the issues because failing to “make a comprehensive critique and analysis of the extensive record” would disservce the public), vacated in part on other grounds, ALAB-761, 19 NRC 487 (1984).
CONCLUSION

Although the Staff is of the view that Nevada’s request for suspension is not warranted and request for permanent cessation and alternative relief is not necessary, the Staff will comply with any direction it receives from the Commission regarding issuance of SER volumes. The Staff will keep the Board and Commission informed regarding its SER schedule.

Respectfully submitted,

/signed (electronically) by/

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Dated at Rockville, Maryland
this 24th day of June, 2010
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CERTIFICATE OF SERVICE

I hereby certify that copies of the “NRC STAFF RESPONSE TO STATE OF NEVADA PETITION FOR RELIEF WITH RESPECT TO POSSIBLE ISSUANCE OF PARTIAL SAFETY EVALUATION REPORT” in the above-captioned proceeding have been served on the following persons this 24th day of June, 2010, by Electronic Information Exchange.

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