INTRODUCTION

The U.S. Nuclear Regulatory Commission staff (Staff) files this answer in response to
the Construction Authorization Board 04 (Board) “Order (Addressing Nevada’s Motion and
Discovery Status),” dated December 8, 2010 (unpublished) (Order). The Board directed the
Staff to provide a full explanation for (1) the timing of its November 29, 2010, notification
regarding the schedule for issuance of Volume 3 of the Safety Evaluation Report (SER) related
to Yucca Mountain,¹ and (2) why it cannot establish a date for issuance. Id. at 2. The Staff’s
explanation is provided below.

BACKGROUND

On September 30, 2009, the Board issued a case management order pacing Phase I
discovery in the above-captioned proceeding with the planned SER schedule. See CAB Case
Management Order #2, dated September 30, 2009 (unpublished), at 3. This schedule was
based on Staff responses to Board inquiries as to whether the SER would be issued in
accordance with the 10 C.F.R. Part 2, Appendix D schedule or serially, and the Staff’s

¹ NRC Staff Notification Regarding SER Schedule, dated November 29, 2010 (Notification).
anticipated schedule for SER issuance. *See id.* at 1, 3.² Phase 1 discovery, which includes all safety, environmental and legal contentions related to the subject matters in SER Volume 1 or 3 began in the fall of 2009, and was initially scheduled to end on November 30, 2010 (or two months after issuance of Volume 3, whichever is later). *Id.* at 3.

In February, after DOE stated its intent to withdraw its license application (LA), the Board granted a suspension of discovery and stay of the proceeding, pending disposition of DOE’s expected motion to withdraw. *See Order (Granting Interim Suspension of Discovery), dated February 2, 2010 (unpublished); Order (Granting Stay of Proceeding), dated February 16, 2010 (unpublished).* On March 3, 2010, DOE filed its motion to withdraw. U.S. Department of Energy’s Motion to Withdraw, dated March 3, 2010 (Motion to Withdraw). In June, the Board denied the Motion to Withdraw³ and the Secretary of the Commission invited briefs “as to whether the Commission should review, and reverse or uphold, the Board’s decision.” *See Order, dated June 30, 2010 (unpublished).* Petitions for review were filed in July 2010.⁴

Also during this period, the State of Nevada filed a motion requesting, among other

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² The Staff informed the Board that SER Volumes 1 and 3 would be issued in March 2010 and September 2010, respectively, and that the Board’s assumption that remaining SER volumes would be issued in December 2010 (Volume 4), October 2011 (Volume 2), and February 2012 (Volume 5) was not unrealistic. *See NRC Staff Answer to the CAB’s July 2, 2009 Order Concerning Scheduling, Dated July 10, 2009 (Staff July 10 Answer); NRC Staff Answer to the CAB’s July 21, 2009 Order Concerning Serial Case Management, dated July 28, 2009.* However, the Staff noted that Volumes 2, 4, and 5 may not be completed according to the Board’s estimated schedule. *See Differing Views of the NRC Staff to the Response of the State of Nevada to Memorandum and Order dated August 25, 2009, dated September 10, 2009, at 3 n.3.* At oral arguments in January and June 2010, the Staff stated that target dates for SER Volumes 1 and 3 were August 2010 and November 2010, respectively. *Transcript at 398 (Jan. 27, 2010); Transcript at 328-29 (June 4, 2010).* The Staff issued SER Volume 1 in August 2010. *See Letter from Daniel W. Lenehan to Administrative Judges, dated August 23, 2010; NUREG-1949, Safety Evaluation Report Related to Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada (Aug. 2010) (ML102350193)._

³ *U.S. Dep’t of Energy (High-Level Waste Repository), LBP-10-11, 71 NRC __ (June 29, 2010) (slip op.) (LBP-10-11)._*

⁴ *See, e.g., Brief of the State of Nevada in Support of Review and Reversal of the Licensing Board’s Decision Denying the Department of Energy’s Motion to Withdraw its License Application with Prejudice, dated July 9, 2010; U.S. Department of Energy’s Brief in Support of Review and Reversal of the Board’s Ruling on the Motion to Withdraw, dated July 9, 2010; NRC Staff Brief in Response to the Secretary of the Commission’s June 30, 2010 Order, dated July 9, 2010.*
things, that the Commission direct the Staff to suspend all efforts to complete and issue
Volume 3 pending a final Commission decision on DOE’s Motion to Withdraw. State of Nevada
Petition for Relief with Respect to Possible Issuance of a Partial Safety Evaluation Report for
Yucca Mountain, dated June 14, 2010, at 3 (Nevada Petition). The Staff responded, stating, in
part, that it would comply with any direction it receives from the Commission regarding issuance
of SER volumes. NRC Staff Response to State of Nevada Petition for Relief with Respect to
Possible Issuance of Partial Safety Evaluation Report, dated June 24, 2010, at 2 (June 24
Response). In addition, in response to a July 2, 2010, motion by the NRC and Department of
Justice, the Federal Court issued an order holding the related proceedings challenging the
authority to withdraw the LA in abeyance pending further proceedings before the Nuclear

On October 1, 2010, the Commission began operating under a Continuing Resolution (CR). See Pub. L. 111-242, 124 Stat. 2607 (Sept. 30, 2010).6 In response to an October 7, 2010, motion by Aiken County, joined by the States of Washington and South Carolina requesting, in part, that the Commission direct the Staff to resume its review of the LA,7 the Staff informed the Commission that it had been directed to “continue its activities on the Yucca Mountain license application in accordance with the Commission’s decisions on the FY 2011 budget . . . during the period of the” CR. See NRC Staff Answer to Motion for an Order Restoring Technical Review of the Yucca Mountain License Application, dated October 18, 2010, at 3 (October 18 Answer) (quoting Memorandum from J.E. Dyer, Chief Financial Officer, and R.W. Borchardt, Executive Director of Operations, to the Office Directors and Regional


7 Motion for a Commission Order Resorting the Technical Review of the Yucca Mountain License Application, dated October 7, 2010, at 2, 7 (Aiken County Motion).
Administrators, Guidance Under a Fiscal Year 2011 Continuing Resolution, dated October 4, 2010 (ML102770484) (October 4 Memorandum)).

The Commission has received Congressional inquiries regarding the Yucca Mountain proceeding and LA review activities. On August 18, 2010, the Secretary of the Commission stated that the Commission was “moving with all due haste in arriving at a decision relative to review” of LBP-10-11. See Letter from Annette L. Vietti-Cook to Congressman Hastings, dated August 18, 2010 (ML102310231) (August 18 Letter). By October 29, 2010, Chairman Jaczko and Commissioners Ostendorff, Svinicki and Magwood had voted on petitions related to the Motion to Withdraw. On November 19, 2010, the Commission received a Congressional inquiry requesting release of a Commission decision on DOE’s Motion to Withdraw.

On November 29, 2010, the Staff filed its Notification indicating that it would not be issuing SER Volume 3 in November and that a revised schedule is “indeterminate.” On December 8, 2010, the Board directed the Staff to provide a full explanation for (1) the timing of its November 29, 2010, Notification regarding the schedule for issuance of Volume 3 of the SER related to Yucca Mountain, and (2) why it cannot establish a date for issuance. Order at 2.

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8 See, e.g., Letter from Congressmen Sensenbrenner, Hastings, Hall, & Barton to Chairman Jaczko, dated October 13, 2010 (ML102880534); Letter from Congressman Hastings to Chairman Jaczko, dated August 17, 2010 (ML102310519); Letter from Annette L. Vietti-Cook to Congressman Sensenbrenner, dated July 30, 2010 (ML102160118); Letters from Annette L. Vietti-Cook to Senators Hewitt & Honeyford, dated July 30, 2010 (ML102160121); Letter from Annette L. Vietti-Cook to Senator Delvin, dated July 30, 2010 (ML102160120).


10 See Letter from Congressmen Hastings, Issa, & Sensenbrenner to Chairman Jaczko, dated November 19, 2010 (ML103400123). The Secretary of the Commission responded, stating that the Commission did not have a completion date for its decision. See Letters from Annette L. Vietti-Cook to Congressmen Hastings, Issa, & Sensenbrenner, dated December 6, 2010 (ML103410010).
DISCUSSION

As indicated by the events described in the preceding section, there has been interest in and uncertainty about the future of the Yucca Mountain proceeding. This uncertainty and the commencement of orderly closure activities explain the timing of the November 29, 2010, Notification and why the Staff is currently unable to provide a date for issuance of remaining SER volumes.

Petitions for review of LBP-10-11, the Nevada Petition seeking an order directing the Staff to suspend its work on Volume 3, and the Aiken County Motion seeking an order directing the Staff to resume its review of the LA are currently pending before the Commission. The Commission’s resolution of these matters will impact when, or if, the Staff will issue Volume 3 and remaining SER volumes. See, e.g., June 24 Response at 5 (stating that the Staff will not issue any pending SER volumes if the Commission decides to grant the Motion to Withdraw). Issuance of a Commission decision would enable the Staff to provide the Board with information regarding future issuance dates, if necessary. Accordingly, the Staff decided to await Commission action before filing its Notification on November 29, 2010.

The Staff also previously informed the Board and Commission that budget decisions could affect licensing activities. See October 18 Answer at 4-5; June 24 Response at 6-7; Staff July 10 Answer at 2. In October 2010, when the Commission began operating under a CR, the Staff indicated that it was commencing orderly closure activities that would not preclude future completion of an SER. See October 18 Answer at 4-5. As the Chairman explained in a letter to Congress, “the first step of this process is to preserve the staff’s work products, and complete and implement a detailed and comprehensive plan for this effort.” Letter from Chairman Jaczko to Congressman Sensenbrenner, dated October 27, 2010, encl. at 1 (ML102980673). Uncertainty regarding whether future appropriations will include funding for Yucca Mountain licensing activities impacts the Staff’s ability to provide SER issuance dates, if necessary. Accordingly, the Staff also decided to await Congressional action before filing its Notification.
The Staff is mindful of, and takes seriously, its commitment to inform the Board of its SER schedule. See, e.g., Transcript at 329 (June 4, 2010); Order (Concerning Serial Case Management), dated July 21, 2009, at 3 (unpublished) (July 21 Order); Staff July 28 Answer at 2; Staff July 10 Answer at 2. Consistent with its commitment to keep the Board informed of its SER schedule, the Staff hereby advises the Board that it is no longer realistic for the Board to assume for case management planning purposes that SER Volume 4 will be issued in December 2010. See July 21 Order at 1; July 28 Answer at 2. Due to commencement of orderly closure, and in the absence of Commission adjudicatory decisions and/or Congressional budget approvals, the Staff will not issue SER Volume 4 in December 2010 and the schedule for issuance of Volume 4 is also indeterminate.
CONCLUSION

The timing of the Notification was due to uncertainty regarding, and the decision to await, potential Commission action on the pending adjudicatory matters and Congressional action on the FY 2011 budget. In addition, due to these uncertainties and the commencement of orderly closure, the Staff will not be issuing SER Volume 4 in December 2010. The Staff will provide the Board information regarding the issuance of remaining SER volumes after Commission and Congressional actions.

Respectfully submitted,

/Signed (electronically) by/

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/Executed in accord with 10 C.F.R. § 2.304(d)/

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Dated at Rockville, Maryland
this 22nd day of December, 2010
UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE ATOMIC SAFETY LICENSING BOARD  

In the Matter of  

U. S. DEPARTMENT OF ENERGY  

Docket No. 63-001-HLW  

ASLBP No. 09-892-HLW-CAB04  

CERTIFICATE OF SERVICE  

I hereby certify that copies of the “NRC STAFF RESPONSE TO DECEMBER 8, 2010 BOARD ORDER AND NOTIFICATION REGARDING SER VOLUME 4 ISSUANCE” in the above-captioned proceeding have been served on the following persons this 22nd day of December, 2010, by Electronic Information Exchange.  

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