CORRECTED ANSWER OF THE STATE OF NEVADA TO THE MOTION FOR A COMMISSION ORDER RESTORING THE TECHNICAL REVIEW OF THE YUCCA MOUNTAIN LICENSE APPLICATION

On October 7, 2010, Aiken County, South Carolina, joined by the states of South Carolina and Washington, moved for a Commission order allegedly necessary to restore the NRC Staff’s required review of the Yucca Mountain license application. The State of Nevada ("Nevada") opposes the motion. The Native Action Community Council ("NCAC") concurs and joins Nevada in this Answer.

The motion relies on “published news reports” that NRC Chairman Jaczko “has unilaterally directed NRC Staff to stop its review of DOE’s Yucca Mountain license application….” Motion at 2. That is it. The “published news reports” are not identified, quoted, or described in any further detail. Such a motion based on unidentified authority is impossible to evaluate on its face and must fail for the simple reason that the moving parties have failed to meet their burden of proof. 10 C.F.R. § 2.325 (“Unless the presiding officer otherwise orders, the applicant or the proponent of an order has the burden of proof”). In fact, the Commission has been unwilling to grant relief based on newspaper articles even when the articles are identified.

See Amergen Energy Co., LLC (License Renewal for Oyster Creek Nuclear Generating Station),
Moreover, a letter to Andrew A. Fitz, Senior Counsel for the State of Washington, from NRC Solicitor John Cordes, dated October 13, 2010, further undercuts the moving parties’ case for relief. This letter, responding to Mr. Fitz’s request for a copy of written communications to the NRC Staff from Chairman Jaczko (or from other NRC Commissioners) “concerning the cessation of [Yucca Mountain] license application review,” states simply that “I [Mr. Cordes] have inquired and identified no such documents” (Attachment A at 2).

The October 13, 2010 letter from Mr. Cordes does identify and supply a memorandum to NRC office directors and regional administrators, dated October 4, 2010, providing guidance on budget execution under the Continuing Resolution enacted into law on September 30, 2010. The memorandum is from the NRC’s Chief Financial Officer and Executive Director for Operations, not the NRC Chairman or any NRC Commissioner. This guidance does address, in a general fashion, NRC budget execution for the NRC High Level Waste Program. It says nothing specific about Staff’s Safety Evaluation Report for Yucca Mountain. Nevertheless, Nevada is aware that two NRC Commissioners have stated a disagreement with the guidance memorandum based on their understanding that it calls for a halt to Staff SER work under the Continuing Resolution. However, the memorandum is within the delegated authority of the Executive Director for Operations and the Chief Financial Officer. The memorandum is therefore effective as an instruction to NRC Staff working on the Yucca Mountain application unless the Commission itself overrides it by majority vote. It appears from an October 14, 2010

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1 The Commission’s OMB-approved regulation for the administrative control of federal funds, dated December 22, 1998, provides (in section 5.b.) that “[t]he Chief Financial Officer (CFO) of the NRC is authorized and directed to discharge all financial management activities and functions, which includes the responsibility for the administrative control of the NRC’s funds.”
memorandum from the Secretary to Commissioner Ostendorff, and from related memoranda from Commissioners Ostendorff and Svinicki to the Chairman and fellow Commissioners, that a proposal to override the memorandum did not garner the necessary three votes.

Finally, the moving parties have also failed to certify that they made a sincere effort to contact the other parties to resolve the issue. 10 C.F.R. § 2.323 (b) is quite clear that a motion “must be rejected” if it does not include this certification.

For the reasons given above, the motion should be denied.

Respectfully submitted,

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Dated:  October 19, 2010
ATTACHMENT A
Your letter of October 6, 2010, asked whether the Nuclear Regulatory Commission (NRC) staff, "apparently at the direction of Chairman Jazcko, has ceased (or is in the process of ceasing) work" on the Department of Energy's (DOE's) application for NRC approval of a high-level waste facility at Yucca Mountain, Nevada. Pointing to "media accounts," your follow-up letter on October 7 sought certain "written materials" "concerning cessation of license application review."

I have enclosed an October 4, 2010, memorandum signed by both the NRC's Chief Financial Officer, James E. Dyer, and the NRC's Executive Director for Operations, Richard W. Borchardt. The Dyer-Borchardt memorandum provides guidance to NRC staff offices on budget execution, given that Congress has not yet acted on NRC's Fiscal Year 2011 budget submission. The agency currently is operating under a Continuing Resolution (CR) that expires on December 3 (Pub. L. 111-242, 124 Stat. 2607 (Sept. 30, 2010)).

With respect to the high-level waste program, the Dyer-Borchardt memorandum states that the CR "does not include specific restrictions on spending funds." It then directs the NRC staff to "continue its activities on the Yucca Mountain license application in accordance with the Commission's decisions on the FY 2011 budget using available Nuclear Waste Fund resources during the CR."

The Commission's proposed FY 2011 budget – issued in early 2010 and available on NRC's website – pointed to DOE's possible filing of a motion to withdraw its Yucca Mountain application, and sought sufficient resources (ten million dollars) for "orderly closure" of NRC's effort. See NUREG-1100, Volume 26, Congressional Budget Justification for FY 2011 (Feb. 2010), at pp. 9-10, 55-57, 94-95. "This would involve archiving material, completion of some technical work, knowledge capture and management, and maintenance of certain electronic systems to support these efforts." Id. at 95.

I cannot provide further information on this subject in advance of Commission consideration of the "Motion for a Commission Order Restoring the Technical Review of
the Yucca Mountain License Application” that you, along with your colleagues representing South Carolina and Aiken County, filed late last week. In addition, related issues remain before the Commission on Nevada’s “Petition for Relief with Respect to Possible Issuance of a Partial Safety Evaluation Report for Yucca Mountain” (filed June 14, 2010).

As for your request for a copy of written communications to the NRC staff from Chairman Jazcko or from other NRC Commissioners “concerning the cessation of license application review,” I have inquired and identified no such documents. Your letter also seeks documents containing staff-to-staff communications. Other than the enclosed Dyer-Borchardt memorandum, I am aware of no such documents, but I hasten to add that I have not surveyed the entire NRC staff, which is quite large.

To avoid any future misunderstanding, please do not construe my response to your inquiry as agreement with the suggestion in your October 6 letter that information on NRC budget execution during the CR period relates to your pending litigation or falls under any mandatory-disclosure obligation. As you know, the Federal Rules of Appellate Procedure provide for no discovery in direct-review actions in the courts of appeals. The NRC maintains a public website, where many NRC documents are publicly available, as well as a Freedom of Information Act program enabling the public to seek additional agency records.

Sincerely,

[Signature]

John F. Cordes
Solicitor

cc: Service list in In re Aiken County, No. 10-1050 & consolidated cases (D.C. Cir.)
MEMORANDUM TO: Office Directors and Regional Administrators

FROM: J. E. Dyer
Chief Financial Officer

R. W. Borchardt
Executive Director for Operations

SUBJECT: GUIDANCE UNDER A FISCAL YEAR 2011 CONTINUING RESOLUTION

On September 30, 2010, a Continuing Resolution (CR) through December 3, 2010, was signed into law. The purpose of this memorandum is to review and augment the earlier guidance on budget execution. The amount of funding available under a CR is determined by the annual CR legislation enacted by Congress. Funding availability is based on the previous fiscal year appropriated level augmented by unobligated carryover, as in past years. The NRC's FY 2011 budget request sustains agency's programs at approximately the same level as FY 2010, with the exception of the High-Level Waste Program. Therefore, offices should proceed to commit, obligate, and expend funds for ongoing activities to effectively use available resources during the CR.

Although the staff made improvements, we continue to emphasize the importance of effectively executing the agency budget by incrementally funding activities, as well as, preparing and moving procurement packages through the acquisition process with "subject to availability of funds" language, when appropriate, to expedite the award process when sufficient funds become available. Additionally, to maintain maximum flexibility, priority for funds for existing contract support activities should be allocated only to those activities that do not have sufficient forward funding.

As highlighted in the earlier guidance provided by the Office of the Chief Financial Officer (OCFO), CR funding will be provided based on the offices' needs as identified in their Funds Utilization Plans (FUP) submitted on August 6, 2010. Based on the office's FUPs, agency funding needs exceeded the funds available in the first quarter. As a result, we plan to provide offices with 60 percent of the requested funding for the period of the CR. Offices should advise OCFO of any significant mission critical needs as a result of the constrained funding.

During the CR period, new work that was not authorized and funded in FY 2010 should not be started in FY 2011. Offices should contact the OCFO prior to funding any questionable

CONTACT: Reginald W. Mitchell, OCFO
(301) 415-7549
Office Directors and RAs

activities under the CR. In addition, contract awards for FY 2011 should be reflected in your Advance Procurement Plan (APP). It is important that offices processing contract documents consistent with their APPs/FUPs continue to focus on improved budget execution during the CR.

With respect to the High-Level Waste Program, the CR legislation does not include specific restrictions on spending funds. Therefore, the staff should continue its activities on the Yucca Mountain license application in accordance with the Commission’s decisions on the FY 2011 budget using available Nuclear Waste Fund resources during the CR.

As we move forward, the OCFQ will refine the CR plan and issue allowances for every CR period thereafter, until such time the agency receives its full appropriation/apportionment. After the agency receives its full-year appropriation/apportionment, this guidance will be rescinded and all normal budget execution operations will be resumed.

cc: PMDA/DRMA Directors
MEMORANDUM TO THOSE ON THE ATTACHED LIST DATED: October 4, 2010

SUBJECT: GUIDANCE UNDER A FISCAL YEAR 2011 CONTINUING RESOLUTION

Edwin M. Hackett, Executive Director, Advisory Committee on Reactor Safeguards
E. Roy Hawkens, Chief Administrative Judge, Atomic Safety and Licensing Board Panel
Stephen G. Burns, General Counsel
Brooke D. Poole, Director, Office of Commission Appellate Adjudication
Hubert T. Bell, Inspector General
Margaret M. Doane, Director, Office of International Programs
Rebecca L. Schmidt, Director, Office of Congressional Affairs
Eliot B. Brenner, Director, Office of Public Affairs
Annette Vietti-Cook, Secretary of the Commission

Michael F. Weber, Deputy Executive Director for Materials, Waste, Research, State, Tribal, and Compliance Programs, OEDO
Darren B. Ash, Deputy Executive Director for Corporate Management, OEDO
Martin J. Virgilio, Deputy Executive Director for Reactor and Preparedness Programs, OEDO
Nader L. Mamish, Assistant for Operations, OEDO
Kathryn O. Greene, Director, Office of Administration
Patrick D. Howard, Director, Computer Security Office
Roy P. Zimmerman, Director, Office of Enforcement
Charles L. Miller, Director, Office of Federal and State Materials and Environmental Management Programs
Cheryl L. McCrary, Director, Office of Investigations
Thomas M. Boyce, Director, Office of Information Services
James F. McDermott, Director, Office of Human Resources
Michael R. Johnson, Director, Office of New Reactors
Catherine Haney, Director, Office of Nuclear Material Safety and Safeguards
Eric J. Leeds, Director, Office of Nuclear Reactor Regulation
Brian W. Sheron, Director, Office of Nuclear Regulatory Research
Corenthis B. Kelley, Director, Office of Small Business and Civil Rights
James T. Wiggins, Director, Office of Nuclear Security and Incident Response
Marc L. Dapas, Acting Regional Administrator, Region I
Luis A. Reyes, Regional Administrator, Region II
Mark A. Satoriis, Regional Administrator, Region III
Elmo E. Collins, Jr., Regional Administrator, Region IV

E-Mail Mail Stops
RidsAcrsAcnw_MailCTR Resource
RidsAslbpManagement Resource
RidsOgcMailCenter Resource
RidsOcaaMailCenter Resource
RidsOigMailCenter Resource
RidsOipMailCenter Resource
RidsOcaMailCenter Resource
RidsOpaMail Resource
RidsSecyMailCenter Resource
RidsSecyCorrespondenceMCTR Resource
RidsEdoMailCenter Resource
RidsEdoMailCenter Resource
RidsEdoMailCenter Resource
RidsEdoMailCenter Resource
RidsAdmMailCenter Resource
RidsCsoMailCenter Resource
RidsOeMailCenter Resource
RidsFsemeOd Resource
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CC: TO THOSE ON THE ATTACHED LIST DATED: October 4 2010

SUBJECT: GUIDANCE UNDER A FISCAL YEAR 2011 CONTINUING RESOLUTION

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