

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

_____)	Docket No. 63-001-HLW
In the Matter of)	
U.S. DEPARTMENT OF ENERGY)	ASLBP NO. 09-892-HLW-CAB04
)	
(License Application for Geologic)	August 23, 2013
Repository at Yucca Mountain))	
_____)	

**NYE COUNTY'S MOTION FOR LIFTING OF SUSPENSION OF YUCCA MOUNTAIN
LICENSING PROCEEDING, SCHEDULING OF IMMEDIATE CASE MANAGEMENT
CONFERENCE, AND ISSUANCE OF RELATED ADMINISTRATIVE ORDERS**

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Nye County, Nevada, in accordance with the recent decision by the United States Court of Appeals for the District of Columbia Circuit, *In re: Aiken County, et al.*, Case No. 11-1271 (D.C. Cir. Aug. 13, 2013) hereby moves the Nuclear Regulatory Commission ("NRC") and/or the Atomic Safety and Licensing Board ("ASLB") assigned to hear the above-captioned licensing proceeding to: (1) immediately lift the suspension of the Yucca Mountain licensing proceeding; (2) schedule an ASLB case management conference to revise and reinstitute the discovery schedule suspended by the NRC on September 9, 2011; and (3) issue an ASLB order directing the immediate release of NRC Staff Safety Evaluation Reports ("SERs") with safety conclusions intact. The States of South Carolina and Washington, Aiken County, South Carolina, and the National Association of Utility Commissioners concur in the filing of this Motion.¹

¹ Counsel has in good faith attempted to contact all of the parties to the Yucca Mountain proceeding in accordance with 10 C.F.R. § 2.323(2)(b). As a result of those consultations, the Staff of the Nuclear Regulatory Commission, the Department of Energy, Clark County, Nevada, Inyo County, California, the Nuclear Energy Institute, and the State of Nevada took no position on the Motion and reserved the right to respond to the Motion until they have had an opportunity to review the Motion. Counsel did not receive responses from any other parties.

Respectfully submitted,

/Signed (electronically) by/

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POINTS AND AUTHORITIES IN SUPPORT OF MOTION

I. INTRODUCTION

Through a series of illegal actions, described in greater detail below, the NRC² delayed, and then terminated, adjudication of the U.S. Department of Energy's ("DOE") license application for the Nation's first nuclear waste repository at Yucca Mountain, Nevada. After exhausting all available administrative means to stop these illegal actions, Petitioners, including Nye County, filed an action under the Nuclear Waste Policy Act, Pub L. 95-91, 91 Stat. 570, 42 U.S.C. § 7101 *et seq.* ("NWPA"), in the United States Court of Appeals for the District of Columbia Circuit on July 29, 2011, seeking a mandamus ordering the NRC to resume the licensing adjudication. On August 13, 2013, the Court ruled that the NRC "has continued to violate the law governing the Yucca Mountain licensing process" over the last several years, and therefore the Court issued the requested writ of mandamus. *In re: Aiken County, et al.*, Case No. 11-1271, at *2-3 (D.C. Cir. Aug. 13, 2013) (Kavanaugh, Circuit Judge, writing for the

² Adjudication of the license in the first instance is assigned to this ASLB. This submittal distinguishes between the NRC and the ASLB. "NRC" will refer only to actions by the Commissioners serving on the NRC during the period addressed by the Court in *In re: Aiken County, et al.*, Case No. 11-1271 (D.C. Cir. Aug. 13, 2013). Nye County notes that it has not challenged any actions taken by the ASLB, which has acted properly throughout the license proceeding.

majority).³ In doing so, the Court ordered the NRC to move forward with the licensing process and substantively approve or disapprove the DOE licensing application for the Yucca Mountain nuclear waste repository as required by the NWPA.

Nye County files this Motion with both the NRC and the assigned ASLB to lift their respective suspensions of the licensing proceeding and immediately schedule a case management conference for the purpose of restarting the licensing process.⁴ Nye County believes a full and open adjudication process is in the Nation's best interest, and hopes that "the Commission's next chapter [in the Yucca Mountain licensing] begins with adherence to the law." *In re: Aiken County, et al.*, Case No. 11-1271, at *2 (D.C. Cir. Aug. 13, 2013) (Randolph, Senior Circuit Judge, concurring).

Nye County further requests that the Case Management Conference be scheduled at NRC's Washington, D.C. Offices and that the assigned ASLB take further measures it sees fit to preserve NRC funds for the licensing process itself. Nye County further requests that the ASLB use the Case Management Conference to expedite the reinstatement of Phase I discovery previously scheduled. Finally, as discussed in detail below, we ask that the ASLB order the issuance of previously completed Staff SERs with the safety conclusions intact. All these actions can be and should be taken without reinstating the Licensing Support Network ("LSN").

II. BACKGROUND

A. DOE'S YUCCA MOUNTAIN LICENSE APPLICATION AND NRC'S ILLEGAL ACTIONS IN STOPPING THE LICENSING PROCEEDINGS BEFORE THE ASLB

On July 23, 2002, Congress designated Yucca Mountain, Nevada as the site of the nation's first geologic repository. See Pub. L. No. 107-200, 116 Stat. 735 (2002) (*codified at 42*

³ The writ of mandamus was issued on August 13, 2013, and automatically becomes effective in accordance with D.C. Cir. R. 41(a)(3), twenty-one (21) days later.

⁴ Nye County asserts that the ASLB should review this Motion in the first instance, but is filing an identical Motion with the Commission itself based upon the unusual procedural context of this case and Nye County's understanding that other parties may be filing similar or related Motions directly with the NRC. All such Motions should be referred to the ASLB for disposition in the first instance.

U.S.C. § 10135, note). Under the NWPA, this Congressional designation required the DOE to submit an application for authorization to construct a high-level waste geologic repository at Yucca Mountain to the NRC,⁵ which DOE did on June 3, 2008. 73 Fed. Reg. 34,348 (June 17, 2008) (corrected in 73 Fed. Reg. 40,883 (July 16, 2008)). The NWPA requires NRC to “consider” an application for authorization to construct the Yucca Mountain geologic repository for high-level radioactive waste, and directs that NRC “shall issue a final decision approving or disapproving the issuance” of such authorization within three years of the application’s submission. 42 U.S.C. § 10134(d).

Adjudication of the license in the first instance was assigned by NRC to this ASLB. On March 3, 2010, at the direction of the President, DOE filed with the ASLB a motion to withdraw its license application with prejudice. Department of Energy’s Motion to Withdraw, *In re U.S. Dep’t of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 (Mar. 3, 2010). On April 23, 2010, the NRC directed the ASLB to resolve DOE’s motion within 45 days, stating that “the prudent course of action is to resolve the matters pending before our agency as expeditiously and responsibly as possible.” Memorandum and Order, *In re U.S. Dep’t of Energy*, NRC No. 63-001 (Apr. 23, 2010). On June 29, 2010, following expedited briefing and oral argument, the ASLB issued a 47-page decision denying DOE’s motion to withdraw the Yucca Mountain license application. Order of ASLB, *In re U.S. Dep’t of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 (June 29, 2010). The decision held that DOE’s motion was contrary to the requirements of the NWPA and declared that “submission of [DOE’s] Application triggered a duty on the NRC’s part to “consider and to render a decision on the Application pursuant to section 114(d) of the NWPA.” *Id.* One day after the ASLB denied DOE’s motion to withdraw, the NRC *sua sponte* issued an order requesting that the parties file concurrent opening and responsive briefing in consecutive weeks on whether the NRC should review the ASLB’s

⁵ See 42 U.S.C. § 10134(b).

decision, and if so, whether to reverse or affirm it. Order, *In re U.S. Dep't of Energy*, NRC No. 63-001 (June 30, 2010). All participants' briefs were filed in a timely manner in July, 2010.

Despite its own admonishment that the decision should be expedited, NRC's former Chairman engaged in illegal actions designed to delay issuance of a decision regarding DOE's withdrawal motion. These actions resulted in the Yucca Mountain license adjudication coming to an effective standstill even though the ASLB denied DOE's motion to withdraw. Order of ASLB, *In re U.S. Dep't of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 (June 10, 2010). Despite having the budget authority to continue with license review, NRC's then Chairman issued an October 4, 2010 memorandum directing the NRC Staff to proceed "in accordance with the Commission's decisions on the [proposed] FY 2011 budget." See Nuclear Regulatory Commission, Office of the Inspector General, NRC Chairman's Unilateral Decision to Terminate NRC's Review of DOE Yucca Mountain Repository License Application, OIG Case No. 11-05, at 9 (2011).

No Commission deliberation or effective action was taken to reverse the October 4, 2010 memorandum. Although Commissioner Ostendorff issued a Commission action memorandum to reverse course and direct the NRC Staff to continue work on the SER, two commissioners elected not to participate in the voting, creating a lack of quorum that prevented any such action. *Id.* at 45. A later investigation by the NRC Inspector General determined that the Chairman "strategically provided three of the four other Commissioners with varying amounts of information about his intention to proceed to closure," and that the Chairman terminated NRC's review of the license application although "a majority of the Commissioners did not think the conditions to proceed to closure (i.e. withdrawal or suspension) had been met." *Id.*

As part of the NRC's "orderly closure," the Chairman blocked the release of the NRC Staff's SER Volume 3, "Review of Repository Safety After Permanent Closure" ("SER-3"), although a majority of NRC Commissioners disagreed with the Chairman's direction to stop work on SER-3. *Id.* The publication of SER-3 was and is essential to consideration of the

license application, and is thus key to the fulfillment of NRC's statutory obligation to issue a final decision approving or disapproving issuance of a construction authorization. Order of ASLB, *In re U.S. Dep't of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 at 2 (July 21, 2009) ("Few non-NEPA contentions can be adjudicated before relevant portions of the SER are issued."); Order of ASLB, *In re U.S. Dep't of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 at 3 (Feb. 25, 2011) ("[W]hen the Staff's SER becomes available, the Board intends to move this proceeding forward as expeditiously as circumstances permit"). In addition, the "orderly closure" resulted in the illegal termination of the NRC's web-based LSN, which served as a database for all documentation regarding the application, including discovery and the hearing process. See 69 Fed. Reg. 32,836-37 (June 14, 2004). 10 C.F.R. § 2.1007(a)(2) states that access to the LSN "shall be provided" by the NRC through its website. Despite this requirement, and opposition from Nye County and others, the LSN was shut down on September 9, 2011, as part of the NRC's termination of license review. See Memorandum and Order, *In re U.S. Dep't of Energy*, NRC No. 63-001, CLI-11-07 (Sept. 9, 2011).

Fortunately, the ASLB prepared for this NRC-ordered shutdown in a manner that allows discovery to proceed without the LSN by making all documents available to the parties in disk format. See Order, *In re U.S. Dep't of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 (April 11, 2011).

B. MANDAMUS ACTION IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND NRC'S SEPTEMBER 9, 2011 MEMORANDUM AND ORDER

Petitioners, including Nye County, seeing no other alternative, filed an action under the NWPA in the United States Court of Appeals for the District of Columbia Circuit on July 29, 2011, seeking a writ of mandamus ordering the NRC to resume the licensing adjudication. On Friday, September 9, 2011, the NRC finally issued a Memorandum and Order that addressed review of the ASLB Order denying DOE's Motion to Withdraw. Memorandum and Order, *In re U.S. Dep't of Energy*, NRC No. 63-001, CLI-11-07 (Sept. 9, 2011). On the merits of whether

DOE can withdraw its application, the Memorandum and Order stated that “the Commission finds itself evenly divided on whether to take the affirmative action of overturning or upholding the Board’s decision.” *Id.* Under the NRC’s internal procedures, the effect of a 2-2 Commission vote is to deny a request for Commission action.⁶ As the ASLB properly noted in a September 30, 2011, Memorandum and Order, the NRC’s Memorandum and Order thus left intact the ASLB decision denying DOE’s motion to withdraw the license application and undisturbed as the final decision of the NRC. Memorandum and Order, *In re U.S. Dep’t of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 at 2 (Sept. 30, 2011).

However, rather than moving forward to consider DOE’s application and issue a decision on its merits, the NRC did the opposite. The Memorandum and Order directed the ASLB to, “by the close of the current fiscal year [i.e., September 30, 2011], complete all necessary and appropriate case management activities, including disposal of all matters pending before it” Memorandum and Order, *In re U.S. Dep’t of Energy*, NRC No. 63-001, CLI-11-07 (Sept. 9, 2011).

On September 30, 2011, the ASLB issued an order suspending the Yucca Mountain License Application “**consistent with the Commission’s Memorandum and Order of September 9, 2011.**” Memorandum and Order, *In re U.S. Dep’t of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 at 3 (Sept. 30, 2011) (emphasis added). The order further stated in part:

Two hundred eighty-eight admitted contentions are pending. They would be ripe for adjudication at evidentiary hearings after deposition discovery, issuance by the NRC Staff of applicable Safety Evaluation Reports and (in the case of contentions arising under the National Environmental Policy Act) any necessary supplementation by the NRC Staff of DOE’s Environmental Impact Statement. *Id.*

⁶ See Internal Commission Procedures, Chapter III (“Voting”), available at <http://www.nrc.gov/about-nrc/policy-making/internal.html#Meetings> (last visited July 28, 2011).

Nye County requests that (1) the NRC's September 9, 2011 suspension order and the ASLB's September 30, 2011 suspension be lifted; and (2) that an immediate case management conference be scheduled for the purpose of reinstating discovery and ordering the expedited release of illegal withheld Staff SERs.

III. DECISION BY UNITED STATES COURT OF APPEALS AND ISSUANCE OF MANDAMUS

On August 13, 2013, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the NRC "has continued to violate the law governing the Yucca Mountain licensing process," and the Court granted the petitions for mandamus. *In re: Aiken County, et al.*, Case No. 11-1271, at *2-3 (D.C. Cir. Aug. 13, 2013). In doing so, the Court ordered the NRC to move forward with the licensing process and approve or disapprove the DOE licensing application for the Yucca Mountain nuclear repository. *Id.*

Writing for the majority, Judge Kavanaugh explained that regardless of any underlying policy debate, the NRC could not continue "flouting the law." *Id.* at *5. Of course, the NRC's actions (or failure to act) have largely been the product of the Obama administration, but the Court noted that "the President may not decline to follow a statutory mandate or prohibition simply because of policy objections." *Id.* at *6. Going further, the Court explained that "our constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law in the manner asserted in this case by the [NRC.]" *Id.* at *21-22.

The NRC argued several justifications for its failure to act, but the Court found none to be persuasive. With respect to funding, the Court noted that Congress did not need to appropriate the full amount necessary for the complete licensing proceeding, but could instead appropriate funds on a step-by-step basis. *Id.* at *6-7. Additionally, the Court found that any speculation as to what funding Congress might provide in the future is irrelevant and that allowing agencies to ignore Congressional statutes based on such speculation "would gravely

upset the balance of powers between the Branches [of government] and represent a major and unwarranted expansion of the Executive's power at the expense of Congress." *Id.* at *7.

Similarly, any argument that the amount of recent funding appropriated indicates Congressional intent to shut down the process is also irrelevant because the NRC has sufficient funding to move forward for the time being, and the Supreme Court has explained that such inferences should generally not be made "based simply on the amount of money Congress has appropriated." *Id.* at *8 (citations omitted). Adopting the position long advocated by the Petitioners, the majority cited the case of *City of Los Angeles v. Adams*, 556 F.2d 40,50 (D.C. Cir. 1977) which held that that an agency faced with less than full funding for a project "is required to effectuate the original statutory scheme as much as possible. . . ." Finally, the Court noted that NRC does not have the option of simply not pursuing Yucca Mountain as a policy matter because "Congress sets the policy, not the [NRC.]" *In re: Aiken County, et al.*, Case No. 11-1271, at *8 (D.C. Cir. Aug. 13, 2013).

A. NRC AND DOE SHOULD NOT BE ALLOWED TO USE PREVIOUS IMPROPER ACTIONS TO FURTHER DELAY THE LICENSING PROCEEDING.

The purpose of this filing is to notify the NRC and ASLB of the Court's order and request that the ASLB immediately schedule a case management conference after the effective date of the writ of mandamus, which is September 3, 2013, and order NRC Staff and DOE to resume their mandatory duties under NWPA using all legally available means. Nye County requests that ASLB focus the case management conference on the means to expedite release of the unredacted NRC SERs and resumption of "Phase I" of discovery previously scheduled in this proceeding. The Federal Government has conceded that there are approximately twenty-seven (27) million dollars in appropriated funds⁷ available to continue the Yucca Mountain repository licensing proceeding before the NRC. As described in greater detail below, meaningful

⁷ Before the U.S. Court of Appeals in *Aiken Co. et al v. NRC*, Civil Case No. 11-1271, DOJ and NRC admitted there are approximately ten (10) million dollars available for NRC licensing activities, and DOJ, arguing on behalf of the United States, admits there are about \$17 million dollars available for DOE licensing work. See DOJ Amicus Br. at 6.

activities can be accomplished with these and other available funds that would substantially advance the goal of the NWPA repository program.

NRC admitted during the Court proceeding that it has failed to meet its duty to consider the Yucca Mountain license application and render a decision within three years as required by the NWPA. However, NRC and DOE have done much more than that. As properly noted by Judge Randolph in his concurring opinion, much of the blame lies with former Chairman Gregory Jaczko who “orchestrated a systematic campaign of noncompliance.” *In re: Aiken County, et al.*, Case No. 11-1271, at *1 of concurring opinion (D.C. Cir. Aug. 13, 2013) (Randolph, Senior Circuit Judge, concurring). Beginning with DOE’s Motion to Withdraw in 2010, both NRC and DOE have intentionally avoided fulfilling their statutory responsibilities to proceed expeditiously with the licensing at every turn. Nye County and other parties to the licensing proceeding consistently tried to stop DOE and NRC from dismantling key facilities and taking actions designed to halt the licensing process.

Despite these efforts, NRC and DOE improperly continued to divert funds from the statutorily mandated licensing process to instead erect as many impediments as they could to the licensing process. DOE and NRC illegally closed down Yucca Mountain offices and programs, halted the licensing process, dismantled the LSN, reassigned staff, sold computers and equipment, and closed the Las Vegas ASLB hearing facility. NRC’s use of funds appropriated for the licensing process to instead terminate the licensing process was manifestly illegal and violated what is commonly known as the “Purpose Statute,” 31 U.S.C. § 1301(a), which states that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise by law,” as well as the Antideficiency Act, 31 U.S.C. § 1341(a), which prohibits the “making or authorizing” of “an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available,” or “involv[ing] the government in any obligation to pay money before funds have been appropriated for that purpose.” Congress appropriated those funds for the specific

purpose of carrying out the licensing process, but NRC used them instead to try and shut down the process, which is not only an inappropriate purpose for which no funds had been appropriated, but is a purpose that is in direct contradiction of the fund's intended use. See *Local 2677, American Federation of Government Employees v. Phillips*, 358 F. Supp. 60, 77–78 (D.D.C. 1973) (holding that funds appropriated to carry out a program could not be used to terminate instead terminate that program). In this case, restoration or reimbursement should be made to the Yucca Mountain appropriation, where funds are available, from other appropriations that are proper funding sources. See 63 Comp. Gen. 422 (1984).

Other parties to this proceeding may try to now cite the results of these same wasteful, dilatory actions as reasons why the Federal Government cannot now immediately proceed with the licensing process.⁸ This is so even though the Federal Government assured the United States Court of Appeals for the D.C. Circuit in *Aiken*⁹ that the licensing process could be readily restarted if NRC and DOE were required to do so. Given the issuance of the mandamus, NRC and DOE should at long last be required to meet their statutory obligations under the NWPA and honor their commitment to the Court without delay.

All of NRC's and DOE's actions were against the public interest and were taken at great expense to the taxpayer, and both DOE and NRC were fully aware of their mandatory duties under the NWPA, as well as the ASLB's decision denying DOE's motion to withdraw, which meant that the licensing proceeding should have continued. Having intentionally violated the NWPA and its attendant regulations, even after repeated attempts by Petitioners to prevent these actions, the NRC cannot now be allowed to benefit from its own wrongdoing. See, e.g., *Chapman v. Santa Fe Pac. R. Co.*, 198 F.2d 498, 501 (D.C. Cir. 1951) (holding that the

⁸ The State of Nevada by e-mail conferred with parties regarding its prospective Motion to reinstitute the LSN and conduct licensing proceedings in Las Vegas. These actions would only further deplete the \$11 Million dollars in NRC funds remaining to continue the licensing process and should be rejected. See discussion of the LSN *infra* at Section B. Critical actions, including issuance of the SERs and resumption of discovery should be ordered immediately without waiting for the LSN to be reinstated. Reinstatement should not be funded by any funds specifically appropriated for the Yucca Mountain licensing proceeding.

⁹ *In re Aiken County*, 645 F.3d 428, (D.C. Cir. 2011) (Transcript).

Secretary of Interior could not defeat a railroad's right of selection for indemnity lands by delaying the survey process because "[t]he government cannot take advantage of its own wrong or . . . its failure to act"). See also *Pardy v. U.S.*, 575 F. Supp. 1078, 1081 (S.D. Ill. 1983) (holding that the government could not take advantage of the relevant statute of limitations when its tortious actions rendered the plaintiff unable to timely file the lawsuit because "the government should not be allowed to benefit from its own wrong"); *Shermco Industries, Inc. v. Sec. of the Air Force*, 1976 U.S. Dist. LEXIS 12188, at *11 (N.D. Tex. 1976) (The Court determined the government could not move forward in its procurement process after finding a bidder to be not responsible without transmitting certain documentation in accordance with its regulations. The Court noted that "[t]he sovereign enjoys no immunity from its illegal acts. An administrative agency enjoys no discretion to violate its own regulations. Whatever the rights of the government . . . it may not proceed in contravention of its own regulations."); *Ayala v. Sec. of Health, Education and Welfare*, 342 F. Supp. 496 (D.P.R. 1972) (holding that the government could not take advantage of the relevant statute of limitations when a clerical error effectively shortened the plaintiff's window for filing the lawsuit because "the Government cannot now take advantage of its own wrong"); *Snyder v. U.S.*, 260 F.2d 826, 829 (9th Cir. 1958) (holding that the Internal Revenue Service was required to issue the appellant an additional refund because "[t]he Government cannot take advantage of its own wrong" in failing to originally issue the full amount due); *U.S. v. Southern Power Co.*, 31 F.2d 852, 857 (4th Cir. 1929) (holding that the government could not condemn a right of way where public power lines were located even though the lines were not formally permitted because "the government will not be allowed to take advantage of its own wrong" in delaying the permit and attempting to attach conditions to the permit which were not justified under a preexisting agreement).

Clearly, rewarding the Executive Branch for such conduct would be an inequitable plan for resuming the licensing proceeding. The funds presently available to DOE and NRC are undeniably sufficient to complete critical portions of the licensing process, including the

issuance of the unredacted NRC Staff SERs and continuation of “Phase I” of discovery previously ordered by the ASLB. Further, when funds are used for improper purposes (as was clearly the case with respect to the funds expended by NRC in attempting to stop the licensing process), reimbursement should be made to the applicable licensing appropriation, where funds are available, from other appropriations that are proper funding sources. 63 Comp. Gen. 422 (1984). Therefore, because of the NRC’s illegal actions and violations of the Purpose Statute, any restoration of facilities, offices, and equipment should be accomplished using NRC’s overall administrative budget and not the 11 million dollars available for the license adjudication.

B. THE ASLB SHOULD IMMEDIATELY CONVENE A CASE MANAGEMENT HEARING AND SCHEDULE RESUMPTION OF PHASE I DISCOVERY.

Existing DOE and NRC funds can be used to conduct Phase I discovery. See *In re: Aiken County, et al.*, Case No. 11-1271 (D.C. Cir. Aug. 13, 2013), Oral Argument Transcript at 49:12-18. Witnesses had already been identified and depositions scheduled in accordance with the ASLB case management orders when the process was illegally brought to a halt by NRC’s Chairman.¹⁰ On April 11, 2011, the Construction Authorization Board (“Board”) issued an Order directing (1) parties to preserve and submit all LSN documents in portable document format (“PDF”) along with associated bibliographic files to the NRC Office of the Secretary (“SECY”), and (2) SECY to “install the documents and associated bibliographic information into a separate LSN docket library of ADAMS for public access via www.nrc.gov.” Order, *In re U.S. Dep’t of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 (April 11, 2011). Although NRC reported at oral argument that re-establishing the LSN would cost approximately \$5 million, counsel for NRC also informed the Court that discovery could resume without the LSN, *In re: Aiken County, et al.*, Case No. 11-1271 (D.C. Cir. Aug. 13, 2013), Oral Argument Transcript at 49:12-14, presumably because the ASLB took the prudent steps just mentioned.

¹⁰ Order, *In re U.S. Dep’t of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 at 3 (April 11, 2011).

In a memorandum to the Board on February 18, 2011, the LSN Administrator indicated that (1) the LSN would need to be shut down by October 1, 2011, if the Administration's budget proposal for FY 2012 is approved, and (2) the Board could no longer presume that the LSN website would be operational or that the LSNA could take custody of documents. Memorandum from Daniel J. Graser, LSNA, to Administrative Judges, *In re U.S. Dep't of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 at *1-2, (February 18, 2011).¹¹ Pursuant to its authority under 10 C.F.R. § 2.319, and "to fulfill [its] responsibility to preserve the document discovery materials residing on the LSN," the Board issued an Order preserving the documents on the LSN in disk and other formats for use in the discovery process. Order, *In re U.S. Dep't of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 at 3 (April 11, 2011).

Therefore, because of the ASLB's foresight, Phase I discovery can be restarted by the ASLB panel and then overseen by a single ASLB Judge assigned to the task, even without the LSN. Further, as previously mentioned, in accordance with law and in light of the previous illegal use of funds appropriated for the licensing process, any administrative costs (such as restoring the LSN) should be handled through NRC's general administrative budget. The cost of discovery will be borne primarily by the parties, including DOE. Despite the Federal Government's previous vague assertions that \$14 million per month is required for DOE Yucca Mountain activities, discovery is but one of many activities that the federal government listed, and many of the other listed functions are discretionary, have been completed, or abandoned. What remains clear is that DOE has approximately \$17 million available to conduct the already planned Phase I discovery, and such discovery should immediately resume once counsel have rescheduled the depositions.

¹¹ The Staff noted in prior pleadings that the NRC was operating under a Continuing Resolution, and that the Staff commenced orderly closure of Yucca Mountain activities in accordance with Commission decisions on the FY 2011 budget. See, e.g., NRC Staff Response to December 8, 2010 Board Order and Notification Regarding SER Volume 4 Issuance, *In re U.S. Dep't of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 at 3, 5 (Dec. 22, 2010). On April 15, 2011, the FY2011 budget was approved. See Pub. L. 112-10, 125 Stat. 38 (2011).

C. THE ASLB SHOULD ORDER THE IMMEDIATE ISSUANCE OF THE ORIGINAL UNREDACTED STAFF SERs WITH SAFETY CONCLUSIONS INTACT.

As stated above, issuance of the NRC Staff's SERs with the Staff safety conclusions intact is at the heart of the NRC licensing process. It is essential to the NRC's "consideration" of the license application and fulfillment of NRC's statutory obligation to issue a final decision approving or disapproving issuance of a construction authorization. See 10 C.F.R. Part 2, Appendix D (calling for the NRC Staff to issue the SER before discovery is to be completed, any summary judgment motions are to be filed, and an evidentiary hearing is held, and a final Commission decision is issued); Order of ASLB, *In re U.S. Dep't of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 (July 21, 2009) ("Few non-NEPA contentions can be adjudicated before relevant portions of the SER are issued."); Order of ASLB, *In re U.S. Dep't of Energy*, NRC No. 63-001, ASLBP No. 09 892-HLW-CAB04 (Feb. 25, 2011) ("when the Staff's SER becomes available, the Board intends to move this proceeding forward as expeditiously as circumstances permit"); see also Nuclear Regulatory Commission, Office of Inspector General, NRC Chairman's Unilateral Decision to Terminate NRC's Review of DOE Yucca Mountain Repository License Application, OIG Case No. 11-05, at 45 (2011) (stating that decision to stop work on the SER is a factor "preventing the agency from meeting its statutory obligation").

Issuance of the SERs with safety conclusions intact is also of great value to the public, which paid for their development. The SERs were delayed and improperly stripped of their safety conclusions at the direction of the former NRC Chairman and released as Technical Evaluation Reports ¹² Issuance of the unredacted SERs, far from a "fruitless" or a hollow "gesture," would substantially advance consideration of the license application on the merits. In

¹² See U.S. NUCLEAR REG. COMM'N, TECHNICAL EVALUATION REPORT ON THE CONTENT OF THE U.S. DEPARTMENT OF ENERGY'S YUCCA MOUNTAIN REPOSITORY LICENSE APPLICATION POSTCLOSURE VOLUME: REPOSITORY SAFETY AFTER PERMANENT CLOSURE, NUREG-2107, ML11223A273 (August 2011) (based on draft Safety Evaluation Report Volume 3); U.S. NUCLEAR REG. COMM'N, TECHNICAL EVALUATION REPORT ON THE CONTENT OF THE U.S. DEPARTMENT OF ENERGY'S YUCCA MOUNTAIN REPOSITORY LICENSE APPLICATION PRECLOSURE VOLUME: REPOSITORY SAFETY BEFORE PERMANENT CLOSURE, NUREG-2108, ML11250A093 (September 2011) (based on draft Safety Evaluation Report Volume 2); U.S. NUCLEAR REG. COMM'N, TECHNICAL EVALUATION REPORT ON THE CONTENT OF THE U.S. DEPARTMENT OF ENERGY'S YUCCA MOUNTAIN REPOSITORY LICENSE APPLICATION ADMINISTRATIVE AND PROGRAMMATIC VOLUME, NUREG-2109, ML11255A002 (September 2011) (based on draft Safety Evaluation Report Volume 4).

addition, issuance is a key element in restoring public confidence in the integrity of the licensing process. Issuance of SER-3 can and should be accomplished with little or no additional funds. Moreover, issuance of the other SER reports, which are public assets, and not the private property of the Chairman or the NRC, is also appropriate, as those SERs contain extremely valuable technical information. The SERs and the entire siting and licensing process, paid for by 15 billion dollars of public funds, will inform all future efforts to develop a geological repository for nuclear waste, regardless of whether Yucca Mountain is ever built. Even if transparent attempts are made to avoid issuance of the SERs by assertions of claims that the reports must be revised and reviewed again, Nye County urges the ASLB to order the immediate release of the original unredacted Staff SERs in the interest of fairness and transparency so that this phase of the licensing can restart without the taint of political manipulation of Staff findings.

While the federal government previously asserted there would be a “waste” of money caused by continuation of the licensing process, it should instead, as a representative of the United States, acknowledge that issuance of the SERs and continuation of the licensing process would capture the value of the Yucca Mountain program for the public.

CONCLUSION

As has now been made abundantly clear by the U.S. Court of Appeals for the District of Columbia Circuit, NRC and DOE’s efforts to stop this licensing proceeding were illegal. *In re: Aiken County, et al.*, Case No. 11-1271 (D.C. Cir. Aug. 13, 2013). In light of the Court’s August 13, 2011 order and in compliance with the requirements of the NWPA and other federal law, the Yucca Mountain licensing proceeding should be resumed immediately following the effective date of the writ of mandamus, September 3, 2013. An ASLB case management conference should be scheduled in NRC’s Washington, D.C. offices to revise and reinstitute the discovery schedule. Additionally, in accordance with the NWPA, the NRC Staff SERs should be released with their safety conclusions intact. There are unquestionably sufficient funds available to

complete critical portions of the licensing process, including the issuance of the NRC Staff SERs and continuation of discovery, and those funds should not instead be used on inappropriate purposes (such as recreating the LSN) in an effort to once again stop the licensing process by depleting the available funds. Further, in light of NRC's illegal actions and in accordance with law, any administrative actions (such as restoration of facilities, offices, and equipment) should be accomplished using NRC's overall administrative budget and not the funds appropriated for the license adjudication.

Respectfully submitted,

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August 23, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

_____)	Docket No. 63-001-HLW
In the Matter of)	
U.S. DEPARTMENT OF ENERGY)	ASLBP NO. 09-892-HLW-CAB04
)	
(License Application for Geologic)	August 23, 2013
Repository at Yucca Mountain))	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Nye County's Motion for Lifting of Suspension of Yucca Mountain Licensing Proceeding, Scheduling of Immediate Case Management Conference, and Issuance of Related Administrative Orders" in the above-captioned proceeding have been served on the following persons this 23rd day of August, 2013, by Electronic Information Exchange.

CAB 04

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