

December 9, 2013

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 ANSWER TO PETITION FOR CLARIFICATION
AND RESPONSE TO MOTION FOR RECONSIDERATION

INTRODUCTION

The U.S. Nuclear Regulatory Commission (NRC) staff (Staff) hereby (1) answers the State of Nevada's petition¹ seeking clarification of one aspect of the Commission's November 18, 2013, Memorandum and Order (Order)² and one sentence in the related November 18, 2013, Staff Requirements Memorandum (SRM),³ and (2) responds to Nye County, Nevada, the State of South Carolina, the State of Washington, Aiken County, South Carolina, and the National Association of Regulatory Utility Commissioners' (the Five Parties) motion seeking reconsideration of the Order.⁴ As explained below, Staff is of the view that

¹ State of Nevada Petition for Clarification of November 18, 2013 Restart Order and Related Staff Requirements Memorandum, dated November 27, 2013 (Petition for Clarification). Although Nevada did not file its Petition pursuant to the procedural rules in 10 C.F.R. Part 2, stating that the rules of practice in 10 C.F.R. Part 2 do not apply to this request because the adjudication remains in abeyance, *id.* at 1 n.1, 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).

² *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-13-08, 78 NRC __ (slip op.) (Nov. 18, 2013).

³ Staff Requirements—SECY-13-0113—Memorandum and Order Concerning Resumption of Yucca Mountain Licensing Process (Nov. 18, 2013) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13322A007).

⁴ Motion for Reconsideration of Memorandum and Order, dated November 27, 2013 (Motion for Reconsideration). The Five Parties also filed a request for leave to file its Motion for Reconsideration. See Request for Leave to File Motion for Reconsideration of Memorandum and Order, dated November 27, 2013 (Request for Leave). Staff is providing its views on the Motion for Reconsideration in

(continued . . .)

Nevada's request for SRM clarification is misplaced and the Five Parties have not demonstrated that the relief requested in the Motion for Reconsideration is warranted.

BACKGROUND

This proceeding involves the Department of Energy's (DOE) application for authorization to construct a high-level waste repository at Yucca Mountain, Nevada. The licensing process for this application was suspended on September 30, 2011.⁵ On August 13, 2013, the U.S. Court of Appeals for the District of Columbia Circuit granted a writ of mandamus, and directed the NRC to resume the Yucca Mountain licensing process.⁶ On August 30, 2013, the Commission invited participants in the above-captioned proceeding to provide their views as to how the agency should continue with the licensing process.⁷

After analyzing views received from multiple participants and cost estimate information, the Commission concurrently issued a Memorandum and Order and an SRM. *U.S. Dep't of Energy*, CLI-13-08, 78 NRC __ (slip op. at 6-7, 21). In the Order, the Commission directed Staff to complete the remaining Safety Evaluation Report (SER) volumes and directed the Secretary of the Commission and appropriate staff to load the LSN document collections into non-public ADAMS. *Id.* at __ (slip op. at 11-13). The Commission also requested that DOE complete the Environmental Impact Statement supplement for Staff consideration and potential adoption. *Id.* at __ (slip op. at 15). Finally, the Commission decided that the adjudicatory proceeding will remain suspended. *Id.* at __ (slip op. at 16).

In a separate SRM, the Commission provided Staff additional direction for completing the directed tasks. See SRM at 1-2. The SRM also directs Staff to provide monthly reports to

accordance with the timeframe provided in 10 C.F.R. § 2.323(e).

⁵ *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-11-24, 74 NRC 368, 370 (2011).

⁶ See generally *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013), *reh'g en banc denied* (Oct. 28, 2013).

⁷ See Order (Soliciting Views from Participants) (Aug. 30, 2013) (unpublished).

the Commission regarding the status of activities in the Order and SRM. See *id.* at 2.

On November 27, 2013, Nevada filed its motion seeking clarification of one aspect of the Order and one sentence in the SRM. See Petition for Clarification at 1. On the same date, the Five Parties filed a Motion for Reconsideration arguing that the Commission failed to address issues raised by the Five Parties and suspended the proceeding without providing adequate justification. See Motion for Reconsideration at 1-2, 6. Accordingly, the Five Parties request additional information and modification to the Order. *Id.* at 1-5.

DISCUSSION

As described below, Nevada's request for clarification of the SRM is misplaced and the Five Parties have not shown that the relief requested in the Motion for Reconsideration is warranted.

A. Answer to Petition for Clarification

Nevada seeks clarification of the SRM statement regarding "work previously completed." See Petition for Clarification at 3-4.⁸ Nevada argues that, to protect public health and safety and "to preserve the questioning attitude that must be a part of the Commission's safety culture," such work should be limited to "work done specifically to complete the SER . . . and that such work is not considered 'completed' unless the Staff management and OGC review required by internal Staff practice and procedure was completed." Petition for Clarification at 3-4. Nevada suggests that absent such clarification, the SRM "could lead inadvertently to an SER that Staff itself could not fully support." *Id.* at 4.

Nevada's request for SRM clarification is misplaced. An SRM is a vehicle available to

⁸ Nevada also seeks clarification regarding one aspect of the Order, *i.e.*, that discovery need not be completed sixty days after SER issuance. See Petition for Clarification at 2. The Order recognizes that the Commission's direction to issue the SER and continue suspension of the proceeding deviates from the Appendix D schedule. See *U.S. Dep't of Energy, CLI-13-08, 78 NRC __* (slip op. at 17). It is reasonable to anticipate that, if the Commission were to lift the suspension, further deviation from this Appendix D discovery schedule may be needed. Clarification of this and other scheduling issues could be addressed if and when the suspension is lifted and the adjudicatory proceeding resumes, but Staff does not oppose such clarification at this time.

the Commission to provide direction to Staff outside of the adjudicatory context.⁹ In this case, Nevada seeks to clarify SRM direction that the Commission chose to issue to Staff *separate* from its adjudicatory decision.¹⁰ The agency's procedures do not provide a process for outside entities to seek revisions to this direction.¹¹

Further, Staff understands the SRM's direction in the context of its usual processes to review license applications and keep the Commission informed of Staff activities, as well as in the specific context of this application review. Pursuant to the Commission's direction, Staff will keep the Commission fully informed of the status of its activities through monthly progress reports. See SRM at 2. The first report will include Staff's plan for implementing the Commission's decision. See *id.* Staff is also preparing review guidance that will address the Commission's direction that Staff "adopt work previously completed as a first principle, to the maximum extent possible, and should undertake original investigation or inquiry only as

⁹ See Internal Commission Procedures, dated July 5, 2011, at II-9 (explaining that an SRM includes "a clear statement of any additional requirements or tasks to be performed by the staff together with appropriate action due dates and designation of high priority, if appropriate"); see also *id.* at III-1 to III-11, IV-11. For examples where the Commission chose to provide staff direction in an SRM outside of an adjudicatory proceeding see *Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-13-04, 77 NRC 101, 105 (2013) ("We therefore are directing the Staff, outside the adjudicatory context, to review issues relating to foreign ownership and recommend whether the Commission should consider modifications to agency guidance or practice.") and Staff Requirements—SECY-12-0168—*Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), Docket No. 52-016-COL, Petition for Review of LBP-12-19 (Mar. 11, 2013) (ML13070A150); and *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-12-13, 75 NRC 681, 687 n.32 (2012) ("Apart from this adjudication, we will ask the staff to review generically an applicant's duty to supplement or correct its environmental report.") and Staff Requirements—SECY-12-0026—*Pacific Gas and Electric Company* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Referred Ruling in LBP-11-32 (Nov. 18, 2011); *San Luis Obispo Mothers for Peace's Petition for Partial Interlocutory Review of LBP-11-32* (Dec. 5, 2011) (June 7, 2012) (ML12159A229).

¹⁰ *U.S. Dep't of Energy*, CLI-13-08, 78 NRC ___ (slip op. at 21) ("Concurrent with our decision today, we also provide separate direction to the Staff regarding our overarching expectations for the efficient use of available funds, as well as direction for the preparation of plans and status reports.").

¹¹ See generally 10 C.F.R. Part 2 (the Rules of Practice and Procedure do not address SRMs); Internal Commission Procedures at III-11 (The Internal Commission Procedures provide limited review of draft SRMs, stating "[w]ith the exception of SRMs on Affirmation items . . . , draft SRMs are circulated to the Commission, OGC, EDO, CFO, and others as appropriate OGC, EDO, CFO, etc. are afforded an opportunity to review the draft SRM to ensure that the Commission decision is clear and understandable and that resource, scheduler, and legal constraints are properly considered.").

necessary to account or adjust for new information.” See SRM at 1-2. Consistent with existing agency requirements and guidance, during SER development, Staff will conduct the requisite analysis to support its regulatory findings.¹² The analysis on which the Staff relies to make its findings will be documented in the SER.

As the Commission monitors Staff progress, the Commission can provide further direction and clarification to Staff, to the extent the Commission deems necessary.¹³ Accordingly, for the reasons set forth above, the SRM clarification Nevada seeks is misplaced and, in Staff’s view, is not necessary for Staff to understand the Commission’s direction.

B. Response to Motion for Reconsideration

As a preliminary matter, while Staff acknowledges that this proceeding is in a unique procedural posture,¹⁴ it notes that the Five Parties frame their motion as a request for reconsideration, but do not address the standard of review for reconsideration of Commission decisions.¹⁵ Generally, requests for reconsideration of a Commission decision are governed by

¹² See NUREG-1804, Yucca Mountain Review Plan, Rev. 2 (July 2003) (ML032030389), at A-2 (“The U.S. Nuclear Regulatory Commission staff reviews information submitted by the applicant to determine whether the proposed activities will meet the applicable regulatory requirements, and thus be protective of public health and safety and the environment.”). The staff will also follow existing guidance for concurrence processes. See, e.g., Management Directive 3.57, Correspondence Management (Oct. 18, 2005) (ML053070034) (describing concurrence processes).

¹³ See *U.S. Dep’t of Energy*, CLI-13-08, 78 NRC __ (slip op. at 22) (“We will closely monitor the progress of these activities”); SRM at 2 (identifying situations when the staff should notify the Commission). See, e.g., *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-04-6, 59 NRC 62, 74 (2004) (“NRC Staff reviews, which frequently proceed in parallel to adjudicatory proceedings, fall under the direction of *Staff management and the Commission itself*, not licensing boards. If, as the Board here apparently believed, the NRC staff unreasonably has closed a meeting, or has acted in violation of Commission open meeting policies, that is a matter to be addressed through normal agency channels, outside the adjudication.”) (emphasis added).

¹⁴ *U.S. Dep’t of Energy*, CLI-13-08, 78 NRC __ (slip op. at 6, 16) (noting that “this matter is not strictly adjudicatory in nature or otherwise does not fit cleanly within the procedures described in our rules of practice,” and deciding that the adjudicatory proceeding will remain suspended).

¹⁵ The Five Parties’ Request for Leave asserts, without further discussion, that its request is “in accordance with 10 C.F.R. Part 2.” See Request for Leave at 1; Motion for Reconsideration at 1. The Five Parties do not mention the “compelling circumstances” reconsideration standard. See 10 C.F.R. § 2.323(e).

10 C.F.R. §§ 2.345, 2.341, and 2.323(e),¹⁶ which provide that a motion for reconsideration must show a “compelling circumstance, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.”¹⁷

The Five Parties argue that the Order fails to adequately address issues they previously raised, does not demonstrate that the Commission’s path forward “fully complies with [the] writ of mandamus,” and fails to provide sufficient legal and factual basis for the Commission’s decisions. Motion for Reconsideration at 1. The Five Parties assert that the Commission’s failure to provide an analysis of completion stages for each SER volume prior to orderly closure, additional work remaining for each volume, cost estimates for each volume, and schedule information for each volume renders the Order “arbitrary, capricious, unreasonable,” and violates the Nuclear Waste Policy Act¹⁸ and the writ of mandamus. See *id.* at 2.

The Five Parties suggest that without, for example, information and analysis regarding cost information, “it is impossible to determine” how the Commission estimated the \$ 8.3 million SER cost, and without additional analysis of other NRC costs “the participants in the licensing proceeding, Congress, and other interested parties will be unable to determine” what is achievable with existing funds. *Id.* at 4-5. A motion for reconsideration is not, however, the proper vehicle to obtain such information. A participant’s desire to receive an additional level of detail to conduct its own assessment of cost and scheduling estimates is not a basis for granting reconsideration.¹⁹ In addition, neither the writ of mandamus nor the NWPA require that detailed

¹⁶ See *Virginia Electric & Power Co. d/b/a Dominion Virginia Power & Old Dominion Electric Cooperative* (North Anna Power Station, Unit 3), CLI-12-17, 76 NRC 207, 209 (2012) (“Our rules of practice governing requests for reconsideration are found at 10 C.F.R. §§ 2.323(e), 2.345 and 2.341(d) . . .”).

¹⁷ See *id.* at 209 (quoting 10 C.F.R. § 2.345(b)); *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-13, 65 NRC 211, 214 (2007) (quoting 10 C.F.R. § 2.323(e)).

¹⁸ Nuclear Waste Policy Act (NWPA), 42 U.S.C. § 10101 *et seq.*

¹⁹ See *North Anna*, CLI-12-17, 76 NRC at 209-10 (explaining that a motion for reconsideration “should be based on an ‘elaboration of an argument already made, an overlooked controlling decision or (continued . . .)

cost and scheduling information be provided. Aside from the procedural issue, as described further below, the Five Parties have not shown that the relief requested is either required or otherwise warranted.

The Order reflects sufficient basis and explanation for the Commission's decision.²⁰ The Order indicates that the Commission considered the participants' submissions, including the Five Parties' views,²¹ and projected costs of licensing activities. *U.S. Dep't of Energy*, CLI-13-08, 78 NRC __ (slip op. at 6-11). The Order also addresses the principles that guided the decision. *See id.* at __ (slip op. at 8-11). The Commission, as the Five Parties recognize, has discretion in determining how to comply with the writ of mandamus.²² While the Order does not provide detailed planning, scheduling, and cost information preferred by the Five Parties, the Order provides a reasoned basis for the selected "pragmatic course of action to resume the licensing process." *U.S. Dep't of Energy*, CLI-13-08, 78 NRC __ (slip op. at 8). For example, the Order explains that SER completion is the "next significant milestone in the Appendix D schedule" and a "discrete task that may be completed with existing funds." *Id.* at __ (slip op. at 12). The Order also explains why the Commission decided to continue to suspend the adjudicatory proceeding and declined to consider some of the participants' requests, and provides that should the Commission lift the suspension of the proceeding, "participants will have the opportunity to re-submit requests associated with the conduct of the proceeding." *Id.*

principle of law, or a factual clarification[,]” and that such a motion will be rejected if, for example, it does not point to any fact or legal principle the Commission overlooked and simply reargues matters the Commission considered but rejected) (internal citations omitted).

²⁰ In reviewing agency action alleged to be arbitrary and capricious, a court will “ensure that the agency has ‘examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Shieldalloy Metallurgical Corp. v. NRC*, 624 F.3d 489, 492 (D.C. Cir. 2010) (internal citations omitted).

²¹ *See* Nye County, Nevada, the States of South Carolina and Washington, Aiken County, South Carolina, and the National Association of Regulatory Utilities Commissioners Consolidated Response to NRC Order of August 30, 2013 and to Other Parties' Submittals, dated September 30, 2013.

²² *See* Motion for Reconsideration at 4; *U.S. Dep't of Energy*, CLI-13-08, 78 NRC __ (slip op. at 8).

at __ (slip op. at 16-21).

The Five Parties acknowledge that the Order “properly finds ‘completion of the . . . SER volumes to be [an] appropriate next step in the licensing process.’”²³ However, the Order recognizes that SER completion is just the next step in the licensing process.²⁴ The Order and SRM indicate that the Commission will monitor the progress of the directed activities and “will re-evaluate this conclusion in the event that circumstances materially change.” *Id.* at __ (slip op. at 22). *See also* SRM at 2. Thus, for example, if sufficient funds remain, the Commission could direct Staff to complete additional activities, including those suggested by the Five Parties. *See* Motion for Reconsideration at 5 n.9. Accordingly, for the reasons set forth above, Staff is of the view that the Commission’s decision is well-reasoned and the Five Parties have not demonstrated that the relief requested is warranted.

²³ Motion for Reconsideration at 2 (quoting *U.S. Dep’t of Energy*, CLI-13-08, 78 NRC __ (slip op. at 9, 11-12)).

²⁴ *See, e.g., U.S. Dep’t of Energy*, CLI-13-08, 78 NRC __ (slip op. at 9, 12).

CONCLUSION

Staff is of the view that Nevada's request for SRM clarification is misplaced and the Five Parties have not demonstrated that the relief requested in the Motion for Reconsideration is warranted. Staff will continue to follow the Commission's direction and pursuant to the SRM, will keep the Commission informed of its activities, unless it receives further direction from the Commission.

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
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
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U. S. DEPARTMENT OF ENERGY) Docket No. 63-001-HLW
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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC Staff Answer to Petition for Clarification and Response to Motion for Reconsideration" have been served on the following persons this 9th day of December, 2013, by Electronic Information Exchange in the above-captioned proceeding.

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