

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

_____)	Docket No. 63-001-HLW
In the Matter of)	
U.S. DEPARTMENT OF ENERGY)	
(License Application for Geologic)	November 27, 2013
Repository at Yucca Mountain))	
_____)	

**REQUEST FOR LEAVE TO FILE MOTION FOR RECONSIDERATION OF
MEMORANDUM AND ORDER**

In accordance with 10 C.F.R. Part 2 and the Commission’s inherent authorities, Nye County, Nevada, the State of South Carolina, the State of Washington, Aiken County, South Carolina, and the National Association of Regulatory Utility Commissioners (collectively the “Five Parties”) respectfully request leave to file a Motion for Reconsideration of the Commission’s November 18, 2013 Memorandum and Order (the “Order”). The Order fails to adequately address issues previously raised by the Five Parties or to demonstrate that the Commission’s chosen path forward fully complies with writ of mandamus issued by the U.S. Court of Appeals for the D.C. Circuit. *In re Aiken County*, 725 F.3d 255, 267 (D.C. Cir. 2013), *request for rehearing en banc denied on Oct. 28, 2013*. A copy of the Motion for Reconsideration is attached for the convenience of the Commission.¹

¹ Counsel has in good faith attempted to contact all of the parties to the Yucca Mountain proceeding. All of the other parties that timely responded reserved the right to respond to the Five Parties’ request and motion in the future.

Respectfully Submitted this 27th day of November, 2013

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MOTION FOR RECONSIDERATION OF MEMORANDUM AND ORDER

In accordance with 10 C.F.R. Part 2 and the Commission’s inherent authorities, Nye County, Nevada, the State of South Carolina, the State of Washington, Aiken County, South Carolina, and the National Association of Regulatory Utility Commissioners (collectively the “Five Parties”) respectfully request that the Commission reconsider its November 18, 2013 Memorandum and Order (the “Order”) and issue a revised order. The Order fails to adequately address issues previously raised by the Five Parties and does not demonstrate that the Commission’s chosen path forward for the licensing of the nuclear waste repository at Yucca Mountain fully complies with writ of mandamus issued by the U.S. Court of Appeals for the D.C. Circuit. *In re Aiken County*, 725 F.3d 255, 267 (D.C. Cir. 2013), *request for rehearing en banc denied on Oct. 28, 2013*. The Order also fails to provide a sufficient legal and factual basis for the Commission’s decision. Without additional information and modification to the Order, the only potential recourse is to seek relief from the United States Court of Appeals for the D.C. Circuit.

That Court ordered the Commission to “promptly continue with the legally mandated licensing process.” *In re Aiken County*, 725 F.3d 255, 267 (D.C. Cir. 2013). Even though the

Court recognized that the Yucca Mountain licensing had never been fully funded, similar to other major federal projects requiring years to complete, the Court ordered the Commission to “effectuate the original statutory scheme as much as possible, within the limits of the added constraint.” *Id.* at 259 (citing *City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977)). NRC’s Order falls short of this requirement.

The NRC Order properly finds “completion of the [Safety Evaluation Reports] SER volumes to be [an] appropriate next step in the licensing process.” Order at 9, 11–12. It then directs the Staff to complete the SERs. *Id.* at 12. However, in doing so, the Order only reiterates that the Staff informed the Commission that the remaining SERs could be “completed and issued concurrently in approximately twelve months after the Staff initiates work” and then directs that the Staff should “work on the completion of all remaining volumes concurrently but issue each SER volume upon completion.” *Id.* at 11–12. The Order does not provide an analysis of the stage of completion that each individual SER was in when the licensing was improperly halted; does not specify what additional work remains for completion of each SER; fails to provide an individual cost estimate for completing each SER; and fails to provide revised staff deadlines or a schedule for the release of each individual SER volume. Given that NRC staff directly involved in development of the SERs previously testified that the SERs were in advanced stages of completion,² these Commission’s failures render the Order arbitrary, capricious, unreasonable, and violative of the Nuclear Waste Policy Act (“NWPA”) as well as the Court’s writ of mandamus.

² 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* (Sept. 30, 2013), at 3–10 (Five Parties Response); see also *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* (Aug. 23, 2013) (Nye County Motion), and *Points and Authorities in Support of Motion* (August 23, 2013) (Nye County Points and Authorities).

A. The Commission Should Create a Schedule for Release of Each Individual SER.

Appendix D of the NRC's Rules of Practice and Procedure³ provides a schedule for the licensing proceeding, and this schedule includes firm deadlines for different milestones in the licensing proceeding, including the issuance of the SERs. The Atomic Safety and Licensing Board ("ASLB") assigned to adjudicate the license had to modify the schedule for SER issuance due to the improper delaying actions of the previous NRC Chairman. Full compliance with the D.C. Circuit's writ of mandamus and with the NWSA, 42 U.S.C. § 10134(d), requires establishing actual deadlines for the issuance of the individual SERs. At the very least, such deadlines would help deter the types of delays that led to the D.C. Circuit's writ of mandamus in the first place. Therefore, the Five Parties respectfully request that the Commission issue an order outlining a schedule of deadlines for the issuance of the remaining SERs.⁴

B. The Commission Should Provide Detailed Statements of Remaining Work on Each SER and a Cost Estimate for Each SER's Completion.

Additionally, in light of the significant amount of evidence that the majority of the remaining SERs were nearly completed when the licensing was improperly halted,⁵ the Five Parties respectfully request that the Commission provide (or direct the Staff to provide) a detailed listing of what work remains on each individual SER, and an explanation for estimating that an additional twelve months is required. Given the Commission's past conduct that led to the Court's decision and writ of mandamus, it is incumbent on the Commission to demonstrate the factual basis for concluding that twelve months—one third of the three year period proscribed by statute for the adjudication of the entire license—are required to issue SERs that are known to have been almost complete two years ago.

³ 10 C.F.R. Part 2, Appendix D.

⁴ The Five Parties still maintain that a more appropriate and cost-effective step would have been issuing the unredacted and uncensored SER-3 immediately, and restoring the remaining SERs to their original state, reviewing where required, and issuing promptly. Five Parties Response at 8.

⁵ See Five Parties Response at 3–10.

The Five Parties are not suggesting that the Commission does not have some discretion—indeed a range of discretion—to determine how to comply with the D.C. Circuit’s order. But the Commission has an obligation to explain, on the record, the rationale and factual basis for such an extraordinary amount of time. If the Commission has not solicited estimates from the staff who previously worked on the SERs, that failure should also be rectified.

C. The Commission Should Provide the Requested Details and Analysis So That Its Aggregated Estimate of the Time and Cost for All SERs Can Be Evaluated.

The Order also provides that the estimated cost of completing the SERs is \$8.3 million. Order at 11–12. However, despite an increase from the already-inflated prior staff estimate of \$6.5 million,⁶ no attempt whatsoever is made to provide a basis for these estimated costs.⁷ As the Five Parties have previously detailed,⁸ the prior cost estimate of \$6.5 million to release the nearly-completed remaining volumes was, and is, an unreasonable figure. Yet this figure has now risen to \$8.3 million without Commission justification. That estimate reflects Congressional testimony presented by Chairman Macfarlane last month, but gives no further supporting information than provided to Congress. Full compliance with the writ of mandamus and the NWPA requires that the Commission ensure that the remaining funds are spent in the most efficient and justifiable manner possible. Without such information and analysis, it is impossible to determine why the Commission has estimated the cost of completion of all the SERs at such enormous and unsubstantiated levels, between \$6.5 and \$8.3 million.

⁶ The Staff previously estimated that completing and issuing the SERs would cost \$6.5 million. Order at 12, n. 39.

⁷ Footnote 39 of the Order does note that the estimated cost has been “affected by the length of time the licensing process was suspended.” Though it is unclear why this would be the case.

⁸ Five Parties Response at 10–12.

D. The Commission Failed to Adequately Assess Other NRC Costs and Sources of Revenue For Going Forward With the Licensing Proceeding.

Even taking the Commission's highest estimate, the Order fails to address NRC's costs, as opposed to those of the parties, in fully recognizing the Atomic Safety and Licensing Board's ("ASLB") authority to resume the illegally halted licensing proceeding.⁹ The Commission also does not provides an adequate explanation for why prompt issuance of the SERs, followed by staged discovery and adjudication of Phase I post-closure issues, is not achievable with available funds.¹⁰ The parties to the proceeding are unable to assess whether the Commission's denial of the request for an ASLB case management conference and resumption of Phase I discovery is justified without the information and analysis requested by the Five Parties in Sections A through D, coupled with an estimate of the cost of ASLB and NRC staff costs in conducting Phase I discovery. Without additional analysis of ASLB costs, raised by the Five Parties and others, the participants in the licensing proceeding, Congress, and other interested parties will be unable to determine if serial discovery and adjudication of post-closure safety issues is achievable with existing NRC funds. The Five Parties also note that NRC also has not addressed past violations of the Purpose Act or instituted action to recoup or restore appropriations illegally used to terminate, rather than conduct the licensing proceeding, as requested by the Five Parties in its previous submittals.¹¹

⁹ Even based on what appears to be the inflated total cost estimate for issuing the SERs, reviewing the EIS, and loading the DOE's LSN document collection and other participants' collections into non-public ADAMS, the Commission will still have approximately \$1.4 million in unobligated funds to proceed with the adjudication. As explained previously, resuming Phase I discovery will be a cost primarily borne by the participants and would only require oversight by a single ASLB judge, whose salary is limited by statute. Five Parties Response at 21–22; Nye County Points and Authorities at 14–15. Further, the ASLB orders regarding the LSN provided for continuation of the proceeding without the LSN, as counsel for NRC has conceded *In re Aiken County, et al.*, Case No. 11-1271 (D.C. Cir. Aug. 13, 2013), Oral Argument Transcript at 49:12–14. Thus, the remaining \$1.4 million could be sufficient to cover NRC's costs of resuming Phase I discovery and adjudicating post closure issues.

¹⁰ Five Parties Response at 3–16; Nye County Points and Authorities at 14–17.

¹¹ See Five Parties Response at 17–18; Nye County Points and Authorities at 10–14.

CONCLUSION

The Commission's Order of November 18, 2013, failed to address critical issues raised by the Five Parties and again suspended the licensing proceeding without providing adequate justification. For all of the above-stated reasons, the Five Parties respectfully request that the Commission reconsider its order in accordance with this Motion and revise it to immediately and fully address the issues previously raised and detailed in sections A through D above.

Respectfully Submitted this 27th day of November, 2013

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Five Parties' "Request for Leave to File Motion for Reconsideration" in the above-captioned proceeding have been served on the following persons this 27th day of November, 2013, by Electronic Information Exchange.

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