
**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 10-1050

IN RE AIKEN COUNTY, Petitioner

No. 10-1052

ROBERT L. FERGUSON, *et al.*, Petitioners,

v.

BARACK OBAMA, President of the United States, *et al.*, Respondents.

No. 10-1069

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*, Respondents.

No. 10-1082

STATE OF WASHINGTON, Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*, Respondents.

**Petitioners' Response In Opposition To Respondents' Motion To Vacate
Briefing and Oral Argument Schedule And Hold Cases In Abeyance**

On July 2, 2010, Respondents moved to vacate the expedited briefing and oral argument schedule to which they had earlier stipulated in response to this Court's May 3, 2010 Order. As set forth below, Respondents' motion should be denied for the following reasons. First, Respondents' motion is an improper collateral attack on the Court's May 3, 2010 Order that set this case for expedited briefing. There has been no material procedural change since the Respondents stipulated to the current schedule, or since the Court entered its May 3, 2010 Order. Second, Respondents' motion seeks to have this Court defer to an administrative process before the NRC that, based on Congressional testimony, appears to be prejudged by a majority of Commission members who committed not to second-guess Respondent DOE. Third, Respondents' motion fails to acknowledge that the scope of these consolidated cases is broader than the matter before the NRC, and makes factual assertions regarding the basis for the Respondents' decision to abandon the Yucca Mountain project that, apart from being irrelevant to the motion, are demonstrably untrue. Finally, granting Respondents' motion will give Respondent DOE additional time to further dismantle and permanently end the Yucca Mountain project while evading judicial review by this Court. Irrespective of Respondents' arguments, the issue of whether the Secretary of Energy may unilaterally abandon the Yucca Mountain approval process (including, but not limited to, the attempted withdrawal of the

license application) is properly before this Court under its original and exclusive jurisdiction pursuant to the Nuclear Waste Policy Act.

The Respondents' motion should first be denied because it is simply a veiled attempt to revisit a schedule to which Respondents have already agreed, after this Court had already considered and rejected the same arguments from Respondents. Respondents were well aware of the ongoing NRC licensing proceedings when they *agreed* to an expedited briefing schedule following entry of the Court's May 3, 2010 Order. Respondents knew DOE's motion to withdraw the license application was pending. Respondents also knew that there would be an administrative hearing on their motion, with a decision issued no later than June 30, 2010. *See* Respondent's Mot. to Hold Cases in Abeyance ("Resp. Motion to Hold in Abeyance") at 5, *in re Aiken Cty.*, No. 10-1050 (Doc. 1239422) (April 12, 2010); Resp. Rule 28(j) Letter ("Resp. Letter"), *in re Aiken Cty.*, No. 10-1050 (Doc. 1241961) (April 27, 2010). Indeed, they sought a schedule for briefing before this Court that accommodated the government's workload with respect to the NRC licensing proceeding. Notwithstanding supporting the briefing schedule that was established by this Court, Respondents now argue, two weeks *after* Petitioners expended considerable resources completing and filing their

merits brief on an expedited basis¹, that the case should be held in abeyance indefinitely for the very same reasons the Court already considered and rejected.

As demonstrated by the parties' respective filings with the Court, issues regarding the relevance of the ongoing NRC licensing proceedings to these cases were addressed in the briefing that led to the entry of the Court's May 3, 2010 Order rejecting Respondents' prior motion to hold these cases in abeyance and establishing the expedited briefing and oral argument schedule. Petitioners' Mot. for Expedited Briefing and Consideration ("Mot. to Expedite") at 14, *Ferguson v. Obama*, No. 10-1052 (Doc. 1238016) (April 2, 2010); Resp. Motion to Hold in Abeyance at 5; Petitioners' Reply to Opposition to Mot. to Expedite ("Ferguson Petitioners' Reply") at 4 n.4, *Ferguson v. Obama*, No. 10-1052 (Doc. 1239648) (April 13, 2010).² In connection with that briefing, Respondents raised the very same arguments regarding justiciability and fundamental principles of administrative law to support withholding judicial review that they now raise for a

¹ In the month preceding the Petitioners' June 18 joint merits brief, those petitioners and the intervenor involved in the NRC licensing proceeding (Washington, South Carolina, Aiken County, and NARUC) had filed merits briefs on DOE's motion to withdraw and presented oral argument to the NRC's Atomic Safety and Licensing Board. This effectively gave four of the five Petitioners less than two weeks to prepare the June 18 brief submitted to this Court.

² Respondents altered their argument with respect to the Ferguson Petitioners, who are not before the NRC. *See* Resp. Motion to Hold in Abeyance at 7-8.

second time in their pending motion. Resp. Motion to Hold in Abeyance at 8 (incorporating by reference finality and justiciability arguments made in Respondents' Opposition to Petition filed by Aiken County; *see* Doc. 1236616 at 5-19); Resp. Motion to Hold in Abeyance at 9 ("in the absence of NRC's grant of DOE's motion, DOE has not effected a withdrawal of the application; thus, there has as yet been no failure to take the alleged required action."). The Court, as evidenced by its May 3, 2010 Order, considered Respondents' arguments and the ongoing NRC licensing proceedings, including DOE's then-pending motion to withdraw the license application, and indicated that it will consider the import of those proceedings, as necessary, in connection with the parties' briefs on the merits. *See* May 3, 2010 Order at 2 ("... the parties are directed to address in their briefs whether final agency action is necessary to confer jurisdiction over a petition for review filed pursuant to the Nuclear Waste Policy Act . . . and if so, whether final agency action has been taken."). The recent orders by the NRC's Atomic Safety and Licensing Board ("Board") and the NRC itself, although favorable to the Petitioners, are additional rulings in connection with an ongoing NRC licensing proceeding that the parties and this Court anticipated would occur when the Court issued its May 3, 2010 Order.³ Indeed, in that very order, the

³ The Board's June 29, 2010 61-page opinion and order flatly *rejecting*

Court directed the parties to address the issues raised in Respondents' motion, not in separate motions, but in the briefing itself, which Respondents now seek to indefinitely postpone.

Second, Respondents' motion should be rejected because it is based on a false premise. The principles of ripeness, exhaustion, and primary jurisdiction asserted by Respondents' motion are based on the need to preserve the integrity and autonomy of an administrative process, and ensure that when the administrative proceeding does come before the court, the court will have that mature, considered, and final articulation of the basis of the agency's action. *See, e.g., McCarthy v. Madigan*, 503 U.S. 140, 145-46 (1992); *Pub. Citizen Health Research Group v. FDA*, 740 F.2d 21, 30 (D.C. Cir. 1984) (stating that "finality is primarily concerned with protecting the integrity of the administrative process"). Here, however, the integrity of the administrative process has already been compromised, thus providing further reason for the Court to reject Respondents' renewed arguments that the Court should hold these cases in abeyance until the NRC renders a final decision in response to the briefing it has invited.

DOE's motion given the plain language of the NWPA (Attachment 1 to Respondents' motion) and the NRC's subsequent unusual and likely unprecedented June 30, 2010 *sua sponte* requesting briefing on whether it should review that order (Attachment 2 to Respondents' motion) have done nothing to "materially change" the posture of these appeals, and are addressed below.

The integrity of this process has been compromised because a majority of the NRC's five Commissioners have already committed as to how they would rule in this case. Three Commissioners testified as follows during their confirmation hearing on February 9, 2010, just days after the Respondents announced their final decision to abandon the Yucca Mountain process and in response to an inquiry that originated from Senate Majority Leader Reid of Nevada, a leading opponent of the Yucca Mountain project:

Senator Boxer. ... Now, I have a question here for all three of you from Senator Reid. You can just answer it yes or no. If confirmed, would you second guess the Department of Energy's decision to withdraw the license application for Yucca Mountain from NRC's review?

Mr. Magwood. No.

Senator Boxer. Okay. Anybody else?

Mr. Apostolakis. No.

Mr. Ostendorff. No.

Senator Boxer. Thank you. I think he will be very pleased with that.

*See Nomination of NRC Commissioners: Hearing before the Senate Comm. on Environ. & Pub. Works, 111th Cong. 51-52 (2010), excerpt attached hereto as Exhibit A.*⁴ This colors the unusual action taken by the NRC last week, when less

⁴ In addition, in 2005, a fourth Commissioner -- Chairman Jaczko -- recused himself from NRC matters involving Yucca Mountain for a one-year period based

than a day after the Board issued a 61-page opinion resoundingly rejecting DOE's motion to withdraw its license application, the NRC disregarded the rules of appeal it had specifically promulgated for the Yucca Mountain proceeding, *see* 10 C.F.R. § 2.1015, and instead *sua sponte* issued an order directing the parties to submit simultaneous initial and responsive briefing within a two-week period on whether it "should review, and reverse or uphold, the Board's decision." *See* Attachment 2 to Respondents' motion. Given the foregoing Congressional testimony, further proceedings before the NRC itself concerning DOE's motion to withdraw the license application for Yucca Mountain are irreparably tainted.⁵

on his former position as a senior policy advisor to Senate Majority Leader Reid, during which time he worked in opposition to Yucca Mountain. *Pending Nominations of Gregory P. Jaczko and Peter B. Lyons: Hearing Before the Senate Comm. on Environ. & Pub. Works*, 109th Cong. 14 (2005), excerpt attached hereto as Exhibit B.

⁵ *See, e.g., Nuclear Information & Resource Serv. v. NRC*, 509 F.3d 562, 571 (D.C. Cir. 2007) (agency officials should be disqualified "where a disinterested observer may conclude that the official has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it") (internal quotation marks omitted); *U-Haul Co. of Nevada, Inc. v. NLRB*, 490 F.3d 957, 965 (D.C. Cir. 2007) ("[a] meritorious claim [of bias against an administrative official] may be based upon a showing a bias or prejudice that 'stems from an extrajudicial source and results in an opinion on the merits on some basis other than what the judge learned from his participation in the case,' or...upon showing a 'favorable or unfavorable predisposition...so extreme as to display clear inability to render fair judgment'") (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Liteky v. United States*, 510 U.S. 540, 551 (1994)). Indeed, Petitioners who are participating in the NRC proceeding will shortly move to recuse/disqualify these three Commissioners.

Thus, there is little reason for the Court to countenance Respondents' renewed arguments to hold these cases in abeyance until the NRC renders a final decision, which, for the reasons stated in Petitioners' merits brief, lack merit in any event.⁶

Third, Respondents' contention that DOE's attempted withdrawal of the license application is the *primary* issue before the Court in these cases ignores the broader scope of these cases versus the matter before the NRC. While the authority of the DOE to withdraw its license application (and the NRC authority to grant that motion) are relevant to the mandamus actions, the central issue raised by the Ferguson Petitioners, Washington, and South Carolina is whether the plain language of the NWPA permits Respondents to unilaterally and forever abandon the larger process of developing the Yucca Mountain repository, of which the license proceeding is only a subpart. *See* Petitioners' Brief at 42-46. This broader termination issue is not before the NRC, which has no jurisdiction over DOE's actions beyond the license application. It is properly before the Court under the NWPA's judicial review provision, 42 U.S.C. § 10139(a)(1)(A)-(D). *See* Petitioners' Brief at 25-34.

⁶ Nor should the Court allow Respondents to effectively deny the individual petitioners their day in court by forcing them to expend resources they do not have to follow an administrative process, the integrity of which has been compromised.

Further, Respondents' assertions that the Secretary concluded that the Yucca Mountain project is "unworkable" on scientific and technical grounds, apart from being completely irrelevant to this motion, is flatly wrong. To the contrary, as DOE itself represented to the NRC Board, the decision to terminate the Yucca Mountain project was not made based on any identified technical or scientific evidence demonstrating the unsuitability of either Yucca Mountain or DOE's underlying license application. *See* Addendum to Petitioners' Brief at 249 (DOE Reply Brief before Board at 31 n.102) ("the Secretary's judgment here is not that Yucca Mountain is unsafe or that there are flaws in the LA [license application], but rather that it is not a workable option and that alternatives will better serve the public interest."). As described in the Petitioners' opening brief, at the time the Administration's decision to abandon the process for developing Yucca Mountain was announced in January 2010, the decision was explained as follows: "We work for the President, we take our direction from the President, the President has been clear that Yucca Mountain is not an option." *See* Petitioners' Brief at 13, 54.

Finally, and critically, Respondents are silent concerning the basis on which this Court granted expedited consideration. Petitioners have demonstrated, and Respondents have not denied, that in the time since the decision to terminate Yucca Mountain was made, *and before the motion to withdraw the license*

application was even filed, activity with respect to advancing the project has been halted, funding has been cut and diverted, and the project's contracts and teams are rapidly being dismantled and abolished. *See* Addendum to Petitioners' Brief at 264-75. Even since the Board's order finding that the DOE had no authority to withdraw the application, DOE has continued, if not accelerated, its shut down efforts including permanently abolishing the workforce effective September 30, just seven days after oral argument in this case is scheduled. *See* e-mail message from DOE Technical Support to OCRWM West (July 2, 2010, 10:33 AM PDT), attached hereto as Exhibit C; Letter from David Zabransky, Department of Energy, regarding Specific Reduction in Force Notice of Separation (July 7, 2010), attached hereto as Exhibit D. These recent actions by Respondents strongly suggests that Respondents' current motion is nothing more than a pretext to give DOE more time to implement the shut down of Yucca Mountain. From the perspective of Respondents, there is no turning back, even if the NRC does not grant DOE's motion to withdraw the NRC license application for the project. Respondents as much as admitted that during the hearing before the Board that led up to the Board's decision. Transcript of Oral Argument at 78, *in re U.S. Dep't of Energy*, ASLBP No. 09-892-HLW-CAB04 (NRC ASLB June 3, 2010), excerpt attached hereto as Exhibit E ("it's untenable to put the Department of Energy in the position of -- and the Secretary in a position of continuing to prosecute a

license application that the Secretary determines to be contrary to the public interest. We will do what we're ordered to do. But if Congress wanted such a scheme, where the Secretary has determined that prosecuting the application is contrary to public interest, but because of the NRC's determinations he has to do so anyway, Congress would have to have been a lot more explicit than it was.”). In light of Respondents’ position, the Board went so far as to remind DOE that it is expected to pursue the licensing application in good faith. Attachment 1 to Respondents’ motion at 19-20 (“The Board is confident that DOE can and will prosecute the Application before the NRC in good faith, as we believe the NWPA requires.”). Despite the NWPA’s statutory mandate, Respondents have asserted and demonstrated that they will simply not proceed with Yucca Mountain-period. While Respondents urge this Court to wait, they themselves are waiting for nothing.

In summary, there has been no “material change” as a result of the recent orders by the Board and NRC that warrants a “fresh look” by this Court as to whether the appeals should be held in abeyance. The grounds upon which Respondents’ motion is based are precisely the same as those previously raised by Respondents before entry of the Court’s May 3, 2010 order and that are now being briefed in connection with the parties’ merits briefs. The issue before this Court is broader than the question of DOE’s authority to withdraw its license application,

and it is undisputed that DOE will not cease shutting down the project unless this Court orders it to stop. The NRC Commissioners have already indicated that they would not second guess the DOE's decision to terminate the project. DOE began its shut down activity before it even moved to withdraw the license application, and clearly intends to continue to do so regardless of the NRC proceeding. This Court should, therefore, reject Respondents' efforts to delay and evade judicial review.

RESPECTFULLY SUBMITTED this 7th day of July 2010.

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EXHIBIT A

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HEARING ON NOMINATION OF NRC COMMISSIONERS

Tuesday, February 9, 2010

United States Senate

Committee on Environment and Public Works

Washington, D.C.

The committee met, pursuant to notice, at 10:00 a.m. in room 406, Dirksen Senate Office Building, the Honorable Barbara Boxer [chairman of the committee] presiding.

Present: Senators Boxer, Inhofe, Voinovich, Alexander, Carper, Cardin, Klobuchar, Merkley

Also Present: Senator Webb

Senator Boxer. Thank you very much.

Dr. Apostolakis, you mentioned your work with the NRC's Advisory Committee on Reactor Safeguards, and you appreciated conducting all the committee's meetings in public. Do you believe the NRC would benefit from conducting its meetings, deliberations and votes in public?

Mr. Apostolakis. Senator, I am aware of the fact that Chairman Jaczko is promoting this idea. I am very pleased with the way the ACRS has conducted its business. I think we write letters to the Commission in public, we argue about individual words and commas and periods. I think that has been very, very beneficial both to us and the stakeholders. Now, with respect to the Commission itself, in principle, I think it is a good idea. I would like to understand a little better what the downside might be, because I haven't really studied the matter. But in principle, I am for it.

Senator Boxer. How about you, Mr. Magwood? Open and transparent meetings?

Mr. Magwood. I agree with my colleague. In principle, I agree with that direction. The one concern I would have is how it affects the quality of decisions that are made. The current process at NRC involves an iteration of documents between the

various parts of the Commission staffs. That is an opportunity to really delve into issues in a great deal of detail. I would hate to lose that in the process of having open meetings.

But if there is a way of getting both benefits, I would certainly be in favor of it.

Senator Boxer. So let me understand that. You are saying that you think it might not be as productive, if you were looking at an analysis and it was in public? Why would that be?

Mr. Magwood. No, my point is that I think it is important to do the analysis, even if it takes a long time, on a textual basis. And if there is a way of actually arriving at decisions in public, I am all in favor of that. I think that is a good thing to do. I want to make sure that we don't lose the detail.

Senator Boxer. Let me just make sure that everyone understands my question. I am not talking about doing the analysis in public. I am talking about the meetings in public and your deliberations and your votes in public, once you have gotten the analysis.

Mr. Magwood. In principle, I don't have a problem with that.

Senator Boxer. Mr. Ostendorff?

Mr. Ostendorff. Chairman Boxer, I support the NRC's

openness and transparency. I am aware that there are some discussions currently underway with existing Commissioners to look at some changes in the voting procedures specifically. In principle, I support openness and those activities. I would like to have an opportunity, once I am confirmed to more fully discuss that and better understand the exact issues.

Senator Boxer. I appreciate that, all of you using the word, in principle. But to me, either it is open or it is shut. So I am going to say to you, just from you to me and me to you, I don't speak for anybody else, I am going to be watching this. Because I think that, yes, analysis and all the hard work has to go on between the folks who you rely on and you should be able to probe that. But once it gets to the meetings, and all the information is out there, I believe this needs to be shared with the public. I think it is important, not just to agree with it in principle but in practice. So I will be following that myself.

Now, I have a question here for all three of you from Senator Reid. You can just answer it yes or no. If confirmed, would you second guess the Department of Energy's decision to withdraw the license application for Yucca Mountain from NRC's review?

Mr. Magwood. No.

Senator Boxer. Okay. Anybody else?

Mr. Apostolakis. No.

Mr. Ostendorff. No.

Senator Boxer. Thank you. I think he will be very pleased with that.

And the last question I have is on re-processing. I went to France, La Hague, I don't know how many of you have been to La Hauge at all. When I went there, I was very open to seeing how this new technology could work. When I left there, I realized that it is far more controversial than it might appear, because, and I am sure, Mr. Magwood, you saw that, this material is so hot, so hot that even though it is contained in a small container, it needs this huge burial site. In La Hague, they are going to have to ship back this waste to the countries that sent it in the first place, after 20 years.

So I guess my question is, to all of you, you can do it in writing, I don't want to take a lot of time, but do you think there needs to be more work on perfecting this type of a technology? Or do you think it is just ready to roll?

Mr. Apostolakis. Senator, I really don't know much about the recycling, so I cannot give you an answer.

Senator Boxer. That is fair. Mr. Magwood?

infrastructure. It is counter-intuitive, and it turns out it is absolutely wrong to say that. They are looking at over 10,000 projects that were completed, they are looking at who the people are that got the jobs. I have this study here if you want to get your hands on it.

I think that concludes everything. Remember, we are not going to have our hearings that we originally were going to have on Thursday and Wednesday. So we are going to do everything today and put off the others until we get back. Does anybody else have any questions, comments? If not, thank you so much. We stand adjourned. And to our friends at the table, thank you very much.

[Whereupon, at 11:50 a.m., the committee was recessed, to reconvene later the same day.]

EXHIBIT B

S. HRG. 109-652

**PENDING NOMINATIONS OF GREGORY B. JACZKO
AND PETER B. LYONS**

HEARING

BEFORE THE

**COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
ONE HUNDRED NINTH CONGRESS**

FIRST SESSION

ON

**THE NOMINATIONS OF GREGORY B. JACZKO AND PETER B. LYONS
TO BE MEMBERS OF THE NUCLEAR REGULATORY COMMISSION**

APRIL 20, 2005

Printed for the use of the Committee on Environment and Public Works



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**PENDING NOMINATIONS OF GREGORY B.
JACZKO AND PETER B. LYONS**

WEDNESDAY, APRIL 20, 2005

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 9:30 a.m. in room 406, Dirksen Senate Office Building, Hon. James Inhofe (chairman of the committee) presiding.

Present: Senators Inhofe, Warner, Voinovich, Carper, Lautenberg, and Obama.

Senator INHOFE. Our meeting will come to order. We always start punctually. Since this is a confirmation hearing, but you have already passed that point, it is still necessary to ask the two of you each the same questions. So I will ask the question, and if you would each respond for the record. Are you willing to appear at the request of any duly constituted Committee of Congress as a witness?

Mr. LYONS. Yes.

Mr. JACZKO. Yes, I am.

Senator INHOFE. Do you know of any matters which you may or may not have thus far disclosed, that might place you in any conflict of interest to this position?

Mr. LYONS. No.

Mr. JACZKO. No.

**OPENING STATEMENT OF HON. JAMES M. INHOFE,
U.S. SENATOR FROM THE STATE OF OKLAHOMA**

Senator INHOFE. All right, good. I will go ahead and start with an opening statement. Today we are going to hear from the two Commissioners recently appointed to the Nuclear Regulatory Commission: Greg Jaczko and Pete Lyons.

Both Commissioners are Senate veterans. Commissioner Jaczko served on Senator Reid's staff, and prior to that, worked for this committee. So he certainly knows his way around here. Commissioner Lyons is a former staffer for Senator Domenici and the Senate Energy Committee. So we welcome both of you here, and we look forward to serving with you.

Both Commissioners were recess appointed by the President in January, and their appointments will not expire for 2 years. It is no secret that the process that led to the recess appointments was one in which I was highly critical. Over the last few years, two Admirals were nominated to the NRC, and both withdrew their names out of frustration with the process.

Numerous other nominees were perpetually held up on the Senate floor. This was the result of the controversy over the nomination of Commissioner Jaczko, and Senator Reid's strong desire to get him on the Commission.

There had been a number of concerns raised with regard to Commissioner Jaczko by those who want to see the success of nuclear power continue to grow in the future. His extensive work in opposition to licensing of Yucca Mountain is at the heart of much of that concern.

I understand that the Commissioner has recused himself from the NRC action on Yucca Mountain for 1 year. I look forward to discussing both the parameters and the timing of that recusal today.

I am not holding this hearing to rehash the history of the last 2 years. While Commissioner Jaczko's past work on nuclear matters has caused concern, I have been pleased to hear reports that in his tenure thus far as Commissioner, he has conducted himself in a manner that is very fair and very open. I am very glad to hear that, and I appreciate that very much. I know that will continue.

Today's hearing is important, because the Commissioners have not had the opportunity to share their views with this committee on nuclear power and what they see as the role of the NRC in regulating nuclear power. As they know, this committee has sole jurisdiction in the Senate over the Nuclear Regulatory Commission.

It is important that we fully understand what is guiding you, and it is equally important that you understand what we hope to see out of the NRC.

I have spent a good deal of time and energy over the past decade working hard to reform the way NRC does business. That effort has been very successful. I want to be certain that not only will that progress not be reversed, but that the NRC will continue to improve.

In 1998, as Chairman of the Nuclear Subcommittee, I began a series of oversight hearings of the NRC. The hearing I held in 1998 was the first such oversight hearing in many, many years. We traced it back as far as we can, and it has been quite some time. I do not think that any bureaucracy, any commission, can go without any oversight, and I think we have a lot of progress as a result of that.

When I began conducting oversight of the NRC, I did so with the goal of changing the bureaucratic atmosphere that had infected the NRC. By 1998, the NRC had become an Agency of process, not results. It was neither efficient nor effective. If the Agency was to improve, it has to employ a more results-oriented approach, one that was risk-based and science-based, and not one mired in unnecessary process and paperwork.

I am pleased that in the last 7 years, we have seen tremendous strides, and those who work for the NRC should be proud. This approach has made the NRC a lean and more effective regulatory Agency.

I have always been an advocate of nuclear energy, and nuclear power has proven to be a safe, reliable, and clean source of energy. Over the next 15 years, our energy demands will increase by nearly 30 percent. If we are to meet the energy demands of the future,

and we are serious about reducing utility emissions, then we should get serious about the zero emissions energy production that nuclear power provides.

Nuclear facilities are more efficient and safe today than ever before, and we are exploring new, even better technologies. We should be excited about the future of nuclear energy. I am pleased with the NRC's commitment to both license renewal and new reactor licensing, as they are key to the continued success of this clean, efficient energy.

The committee will be active this year on legislation pertaining to the NRC. Senator Voinovich and I will be introducing three bills today dealing with nuclear power: reauthorization of Price-Anderson; the nuclear security bill; and reauthorization of the fees bill that this committee passed by unanimous consent almost 5 years ago.

Staff is already in preliminary discussions with the Minority on these issues, and I anticipate an NRC oversight hearing in the future, as well as a classified hearing on the nuclear security. It is my hope to have these bills out of the committee in the very near future.

I want to thank the Commissioners for being here today, and I look forward to your testimony.

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE
STATE OF OKLAHOMA

Good morning, today we are going hear from two Commissioners recently appointed to the Nuclear Regulatory Commission: Greg Jaczko (YATSKO) and Pete Lyons. Both Commissioners are Senate veterans. Commissioner Jaczko served on Senator Reid's staff and prior to that worked for this committee. Commissioner Lyons is a former staffer for Senator Domenici and the Senate Energy Committee. Welcome to both of you. Commissioner Jaczko, welcome back to EPW.

Both Commissioners were recess-appointed by the President in January and their appointments will not expire for 2 years. It's no secret that the process that led to the recess appointments was one in which I was highly critical. Over the last few years two Admirals were nominated to the NRC and both withdrew their names out of frustration with that process. Numerous other nominees were perpetually held up on the Senate floor. This was the result of the controversy over the nomination of Commissioner Jaczko and Senator Reid's strong desire to get him on the Commission. There had been a number of concerns raised with regard to Commissioner Jaczko by those who want to see the success of nuclear power continue to grow in the future. His extensive work in opposition to licensing of Yucca Mountain is at the heart of much of that concern.

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I am not holding this hearing to rehash the history of the last 2 years. While Commissioner Jaczko's past work on nuclear matter has caused concern, I have been pleased to hear reports that in his tenure thus far as Commissioner, he has conducted himself in a manner that is both fair and open. It is my hope that this will continue. Today's hearing is important because these Commissioners have not had the opportunity to share their views with this committee on nuclear power and what they see as the role of the NRC in regulating nuclear power. And as they know, this committee has sole jurisdiction in the Senate over the Nuclear Regulatory Commission. It is important that we fully understand what is guiding you, and it is equally important that you understand what we hope to see out of the NRC.

I have spent a good deal of time and energy over the past decade working hard to reform the way NRC does business. And that effort has been very successful. I want to be certain that not only will that progress not be reversed, but that the NRC will continue to improve.

In 1998, as chairman of the Nuclear Subcommittee, I began a series of oversight hearings of the NRC. The hearing I held in 1998 was the first held by this committee in years. Fortunately, every year since that time we have had the Commission appear before us. Senator Voinovich has continued this rigorous oversight as the current chairman of that subcommittee.

When I began conducting oversight of the NRC, I did so with the goal of changing the bureaucratic atmosphere that had infected the NRC. By 1998, the NRC had become an Agency of process, not results. It was neither efficient nor effective. If the Agency was to improve it had to employ a more results-oriented approach—one that was risk-based and science-based, not one mired in unnecessary process and paperwork. I am pleased that in the last 7 years, we have seen tremendous strides and those who work for the NRC should be proud. This approach has made the NRC a lean and more effective regulatory Agency.

I have always been an advocate of nuclear power. Nuclear power has proven to be a safe, reliable and clean source of energy. Over the next 15 years, our energy demands will increase by nearly 30 percent. If we are to meet the energy demands of the future, and we are serious about reducing utility emissions, then we should get serious about the zero emissions energy production that nuclear power provides. Nuclear facilities are more efficient today than ever before—and we are exploring new, even better technologies. We should be excited about the future of nuclear energy. I am pleased with NRC's commitment to both license renewal and new reactor licensing, as they are key to the continued success of this clean, efficient energy.

The committee will be active this year on legislation pertaining to the NRC. Just this week three bills were introduced by Senator Voinovich and myself dealing with nuclear power: reauthorization of Price Anderson; a nuclear security bill; and reauthorization of a fees bill that this committee passed by unanimous consent almost 5 years ago. Staff is already in discussions with the Minority on these bills, and I anticipate an NRC oversight hearing in the near future as well a classified hearing on nuclear security. It is my hope to have these bills out of committee in the very near future.

I want to thank the Commissioners for being here today and I look forward to their testimony.

Senator INHOFE. Senator Voinovich, before you came in, we went through the required questions. Since they are already on the Commission it is not like the normal type of hearing that we have. So I recognize you at this time.

**OPENING STATEMENT OF HON. GEORGE V. VOINOVICH,
U.S. SENATOR FROM THE STATE OF OHIO**

Senator VOINOVICH. Thank you, Mr. Chairman.

I think it is wonderful that we are having this hearing, and I welcome our two Commissioners here this morning. Mr. Jaczko and Mr. Lyons, thank you for being here today.

Mr. Chairman, you and I both take oversight responsibilities of the NRC very seriously. You set the tone, and I am trying to follow in your footsteps. Together, we have held six oversight hearings of the NRC, starting in 1998, when you were Chairman of the Clean Air Climate Change and Nuclear Safety Committee, which I now chair.

An important part of this oversight involves close scrutiny of those individuals who are nominated by the President to lead the Commission. That is why I signed a letter, along with 14 of my colleagues, in November 2004, urging Leader Frist to not confirm the Republican or Democratic nominees to the Commission without a hearing.

Due to Senator Reid's insistence that many other nominees not be confirmed by the Senate until Mr. Jaczko be placed on the Commission, President Bush recess appointed both of you to the Commission. I strongly believe that circumventing this committee and

the Senate is the wrong way to do things, but that is the way it happened.

Mr. Chairman, I thank you for your strong leadership in holding this hearing today. Although the nominees are both already serving on the Commission, I welcome the opportunity to ask them some important questions on the record.

Mr. Jaczko, I signed the letter, not only because of process concerns, but also because of significant questions about your impartiality. We had a wonderful meeting in the office, and I appreciate the time that you spent with me. I am not going to go into all the details. We know what they are.

I would like to say that I am pleased, along with what the Chairman had to say, that the reports are that you have been fair and open as a Commissioner. However, I have been in this business long enough to understand that perception is not often reality.

I look forward to talking with you further about how some of these things, in terms of negative perceptions, can be worked out. I think the most important thing is that your actions speak louder than your words, and I have to say, good job.

You also have agreed to recuse yourself from NRC action on Yucca Mountain for 1 year. Like the Chairman, I would like to talk about some of the details and what that recusal means.

Mr. Lyons, your nomination and confirmation occurred very quickly after the other pending nominee withdrew his name. I am concerned that the speed at which you went through the process did not allow enough time to be fully vetted. I thank you for coming in to meet with me personally. I enjoyed meeting with you, also.

All that being said, I look forward to hearing your words this morning, and having you answer some of our questions. I know this is a special day for your respective families, because of the fact that they are here today. I just want to thank them for the sacrifice that they have made. Mr. Jaczko, you have been through a little bit more than Mr. Lyons.

I know it is really interesting in life. Those of us who are in the business get a lot of flak. And we can take it, because it is part of it. But for our families, it is very difficult. I know my mother, when I was Mayor of the city of Cleveland, chose not to subscribe to the Cleveland Plain Dealer. She just did not. She said, "I just do not want to read it any more, George."

So we thank you for what you have been through. It is harder on the families. So thank you, Mr. Chairman.

[The prepared statement of Senator Voinovich follows:]

STATEMENT OF HON. GEORGE V. VOINOVICH, U.S. SENATOR FROM THE
STATE OF OHIO

Good morning. Mr. Jaczko and Mr. Lyons, thank you for being here today.

Mr. Chairman, you and I both take our oversight responsibilities of the Nuclear Regulatory Commission very seriously. Together, we have held six oversight hearings of the NRC starting in 1998 when you were chairman of the Clean Air, Climate Change, and Nuclear Safety Subcommittee that I now chair.

An important part of this oversight involves close scrutiny of those individuals that are nominated by the President to lead the Commission.

That is why I signed a letter along with 14 of my colleagues in November 2004 urging Majority Leader Frist to not confirm the Republican or Democrat nominees to the Commission without a hearing.

Due to Senator Reid's insistence that many other nominees not be confirmed by the Senate until—you Mr. Jaczko—be placed on the Commission, President Bush

recess appointed both of you. I strongly believe that circumventing this committee and the Senate is the wrong way to do things.

Mr. Chairman, I thank you for your strong leadership in holding this hearing today. Although the nominees are both already serving on the Commission, I welcome the opportunity to ask them some important questions on the record.

Mr. Jaczko, I signed the letter not only because of process concerns but also because of significant questions about your impartiality. As a senior policy advisor to Senator Reid, you worked for several years against important issues that will be or are before the Commission—specifically the licensing of Yucca Mountain as the Nation's nuclear waste repository.

As the Chairman mentioned in his opening statement, I too am pleased with reports that you have been fair and open thus far as a Commissioner. However, I have been in this business long enough to understand that 'perception is often reality'. I look forward to talking with you further about how you will overcome these negative perceptions. Additionally, I understand that you have agreed to recuse yourself from NRC action on Yucca Mountain for 1 year, and I would like to talk to you about the details of that recusal today.

Mr. Lyons, your nomination and confirmation occurred very quickly after the other pending nominee withdrew his name. I am concerned that the speed at which you went through this process did not allow enough time for you to be fully vetted. I thank you for coming in to meet with me recently and look forward to asking you additional questions today.

With all of that being said, I want to look forward. I thank you both and your families for your willingness to serve. The NRC plays a critical role in the welfare of the American public and their number one concern must be safety.

The NRC currently has a very full plate, including:

- Considering license renewals, applications for new plants and power up-rates at existing plants, and the licensing of the Yucca Mountain nuclear waste repository;
- Ensuring public confidence in nuclear power and that nothing like the Davis-Besse incident ever occurs again; and
- Evaluating and strengthening security at the Nation's nuclear plants.

I want to make sure that the NRC has the budget and personnel to get the job done well in all of these areas. I recently met with Chairman Diaz who told me that increases are needed for fiscal year 2006, and I want to hear both of your thoughts on what the Commission needs as well.

While the NRC will be busy, this committee and my subcommittee will also be very busy over the next 2 months on nuclear issues. First, Chairman Inhofe and I introduced three pieces of legislation today on reauthorization of the Price Anderson nuclear insurance program, nuclear security, and reauthorization of the fees that make up a large part of NRC's budget. These bills have all been considered by the committee in the past, and I hope to get them reported out of the committee before June.

Second, I plan to hold the annual NRC oversight hearing when we return from the recess at the end of this month. Third, in May, I am working with Chairman Inhofe to hold a classified hearing on nuclear security.

Mr. Chairman, thank you again for your strong leadership and for holding this important hearing. I look forward to hearing from our witnesses today.

Thank you.

Senator INHOFE. Thank you, Senator Voinovich. I might add, my wife and I, we canceled our subscription to the Tulsa Daily World 25 years ago. So that is a policy.

I want to say this about Senator Voinovich. He is now chairman of the subcommittee that I chaired. There is no one in America more qualified to deal with the air issues and the nuclear issues than he is. He has an extensive background in that.

I will recognize Senator Lautenberg, for an opening statement.

**OPENING STATEMENT OF HON. FRANK R. LAUTENBERG,
U.S. SENATOR FROM THE STATE OF NEW JERSEY**

Senator LAUTENBERG. Thank you very much, Mr. Chairman. Holding this hearing is very important to me. New Jersey has its problems, which I will talk about.

We have two people before us today, that we are pleased that you bring the capabilities that you each do. Senator Reid, particularly, Mr. Jaczko, appreciated your service; Senator Jack Reid and Senator Harry Reid.

Now that we have that straight, we can get on to the other things. I know that members of the committee and staff are familiar with these nominees. Mr. Jaczko formerly worked for Senator Harry Reid, and Mr. Lyons worked for Senator Domenici. The NRC is rarely in the public spotlight. But its mission is crucial, and will only become more important in the future.

Now my home State gets more than half of its electric power from three nuclear facilities. Nuclear power is vital to the economy of our region.

Mr. Chairman, I cannot help but think about what happened when we closed down two brand-new facilities, one in New Hampshire and one in Long Island. It cost billions of dollars. We were unwilling to accept the presence of these facilities and the locations they were at.

Now we find ourselves leaning far more to the dependence on nuclear facilities than ever before. The main thing that we are concerned about, as we have heard discussions in the Senate and the Congress for a long time, is the fact that nuclear power is vital to the economy of our region. I believe it has the potential for the future as a source of energy that does not produce air pollution, that is common from other power plants.

But public safety must always, always be the No. 1 concern with regard to nuclear power facilities. It is the NRC's job to make sure that public safety is the top priority.

In New Jersey, the public and the Department of Environmental Protection have some safety concerns about our nuclear plants. The Oyster Creek facility, for instance, is the oldest operating nuclear facility in the country. It will be 40 years old when its current license expires in 2009.

There is significant disagreement in my State about whether Oyster Creek should be relicensed. As the time for that decision grows closer, it is absolutely essential that we be able to turn to the NRC for factual, unbiased information.

There are also concerns about the safety issues with two other plants: the Salem and Hope Creek nuclear power plants. Once again, it is up to the NRC to insist that a culture of safety is in place at every nuclear facility.

Now, of course, we have to come up with a safe, feasible solution to the problem of nuclear waste. The newly released report by the National Academy of Sciences raises a red flag about the practice of storing spent fuel rods in pools of water.

Now we all know it is not an easy problem to solve. I am also concerned about the potential for a catastrophe during transport, should all of this stored nuclear waste be moved to one central location.

Dry cask storage may not be a perfect solution. But it might be the best solution that we can find at this time. The question is, can we implement a better solution? If we cannot, should we go forward using nuclear energy and relying on dry cask storage? Without alternatives, we are left in a dilemma that seems unsolvable. The an-

swers to these questions have tremendous implications for our national energy policy, as well as our national security.

So again, Mr. Chairman, I commend you for getting to this hearing. It is long overdue, I think, and I look forward to hearing the views of Mr. Jaczko and Mr. Lyons on these and other matters. Thank you.

Senator INHOFE. Thank you, Senator Lautenberg.

We have been joined by Senator Warner, who is the senior member of this committee. He has requested, Mr. Lyons, that he introduce you. So after his opening remarks and introduction, we will ask each of you to introduce any family that is here before we get started.

Senator Warner.

**OPENING STATEMENT OF HON. JOHN W. WARNER,
U.S. SENATOR FROM THE COMMONWEALTH OF VIRGINIA**

Senator WARNER. Thank you, Mr. Chairman and colleagues of the committee.

This is indeed an individual who requires no introduction, but he very graciously asked me to do so, and I am privileged to do so. I shall be brief.

This individual is one of the President's nominees to be a Commissioner, as we all know, for the Nuclear Regulatory Commission, but his career is extraordinary. He has been in both public service and scientific world.

He spent almost three decades at Los Alamos National Laboratory. As you know, that is one of our premiere institutions for a wide range of complicated things integral to our security system. He served first as a scientist in the laboratories and nuclear programs, and later as a manager of energy, environment, and industrial partnerships.

In 1997, Dr. Lyons accepted an invitation from our good friend and close colleague, Senator Domenici, to come to Washington and work in his Senate Office. Dr. Lyons worked for Senator Domenici for almost 10 years on issues related to nuclear energy, global and non-proliferation, energy policy, and programs involving the Department of Energy. He may call on you to come back on a sabbatical to get his bill through. It is coming up pretty soon, I think. So maybe we had better move along pretty quickly.

I had the opportunity recently to visit with Dr. Lyons in connection with this new appointment. We discussed concerns we both share about the decline in the number of scientists and engineers who are graduating from colleges and universities in this country, and about the need for nuclear power. I feel very strongly about that.

I very much enjoyed our conversation and meeting. I understand that your lovely wife is here today. I will accede to the Chairman's desire to have you introduce her.

So I strongly recommend to the committee, and then I shall do so to the full Senate, the advice and consent be conferred upon this man, that he be allowed to accept the President's appointment.

Thank you very much.

Senator INHOFE. Thank you, Senator Warner.

If you would like, Mr. Jaczko and Dr. Lyons, to introduce any family who is here, this is the time to do it.

Mr. JACZKO. Actually, I am accompanied by my staff, which I think is my new family.

[Laughter.]

Mr. JACZKO. So I do not have any other family members here.

Mr. LYONS. The only family member who was able to be here today is one of my three sons, David.

Senator INHOFE. Good. David, we welcome you here.

Mr. LYONS. Also there are several members of my staff here. Thank you, sir.

Senator INHOFE. All right, good.

Mr. Jaczko, you may start off with your opening statement. If you want to limit your comments, your entire statement will be placed in the record.

**STATEMENT OF GREGORY B. JACZKO, NOMINATED BY THE
PRESIDENT TO BE A MEMBER OF THE NUCLEAR REGU-
LATORY COMMISSION**

Mr. JACZKO. Thank you, Mr. Chairman. First, I would like to thank Chairman Inhofe and Senator Voinovich for the kind words that you had to say about me in your opening remarks. I do appreciate that very much. I appreciate Chairman Inhofe and other committee members for inviting us here and giving us this opportunity to testify before the Environment and Public Works Committee.

It has been a privilege for me to serve as a Commissioner on the U.S. Nuclear Regulatory Commission since January of this year. I have spent the last 3 months learning about the Agency's processes, programs, and structure. I have had an opportunity to travel to several of our regional offices to visit nuclear power plants, as well as nuclear fuel cycle facilities. I have had an opportunity to visit six different States, as I said, in three of our four regions.

I have made a point of reaching out to various stakeholders in the industry to hear firsthand their views about the impact that the NRC's policies have on licensees in the communities around the Nation. I look forward to continuing to serve the public in my new role. As I said, it is an honor for me to be here today.

As the Nation's regulator of commercial uses of nuclear materials, the NRC serves an important public policy role. Its efforts are defined clearly in its mission statement, which has been developed over several decades through guidance from the Congress and this committee, in particular.

As you know, the mission of the NRC is to license and regulate the Nation's civilian use of nuclear materials, to ensure the adequate protection of public health and safety, common defense and security, and the protection of the environment.

I believe this is a very concise and powerful statement. I see my challenge as a Commissioner is to interpret and put into practice this mission statement in an effective regulatory framework.

I appreciate the important oversight role that this committee has played in the work of the NRC, and I look forward to working closely with the committee to develop and foster that relationship.

I also look forward to building new relationships, and productive and collaborative relationships with the licensees and stakeholder groups to accomplish this goal.

I will pledge that I will work with licensees to ensure the NRC's programs and regulations continue to promote the safety and security of our Nation's nuclear facilities.

The role that Congress, State and local governments, and stakeholders play in this process is very important. The Congress represents the interests of the American people by ensuring the safe and secure use of nuclear materials. I look forward to hearing those views on the issues facing the NRC and ensuring that these concerns are appropriately addressed within the Commission.

I would also like to say that I have been very pleased to work with the NRC staff. Chairman Inhofe, you mentioned the bureaucracy, and I think the NRC is fairly small when it comes to bureaucracy. We have about 3,000 employees. But I have found that it is a very dedicated, very skilled, and very talented group of people, and I have been very fortunate to work with them.

As I said, I have had an opportunity to not only be in our headquarters offices, but also to visit our three regional offices, and see some of the people who are out in the field, which I think is, in some sense, really the face of our Agency.

I will also work to foster a sense of trust and openness between the NRC staff and the Commission. Because I believe that is crucial to our Agency conducting its mission and achieving its mission.

I believe that my background enables me to achieve these goals. I have a Bachelor's Degree and a Doctorate in particle physics. I also had an opportunity to serve as an adjunct professor at Georgetown University.

I have also had the opportunity to work both in the U.S. House of Representatives and here in the Senate, working both for this committee and members who serve on this committee.

My professional life has been devoted to science and its impact on public policy. I see my position as an NRC Commissioner as a logical extension of that path.

The challenges the Agency faces in the years to come are numerous and varied, from integrating safety and security into our nuclear power plant regulatory framework, to ensuring the safe use of nuclear material in medical and industrial applications, to maintaining transparency and openness in our post-September 11th environment.

Openness, specifically, has been a vital focus, at least as far back as the early 1990's, with Chairman Ivan Selin's belief that the Agency should increase its "efforts to reach out to the public at large, to recognize how important public credibility is to the achievement of its regulatory goals." I believe that is just as true today as it was then.

I look forward to delving into these important issues with all my fellow Commissioners, with Commissioner Lyons, the NRC staff, and all interested stakeholders.

I pledge to you to consider the complex policy issues that come before the Commission in a fair, objective, and open-minded manner, based on my scientific and public policy background, and an

awareness of the direct impact that the decisions I make have in our communities and on our licensees.

As I said, I look forward to working closely with this committee, as you provide guidance and direction. I welcome any questions you may have this morning, and I will be responsive to your concerns in the future. Again, I want to thank you for the opportunity to testify today.

Senator INHOFE. Thank you, Dr. Jaczko.

Dr. Lyons.

STATEMENT OF PETER B. LYONS, NOMINATED BY THE PRESIDENT TO BE A MEMBER OF THE NUCLEAR REGULATORY COMMISSION

Mr. LYONS. Thank you, Chairman Inhofe, Senator Carper, Senator Lautenberg, Senator Warner, Senator Voinovich. I thank you very much for the opportunity to testify before your committee. It is an honor and a privilege to appear before you today.

I was greatly honored by my recess appointment by the President to serve on the NRC. After being sworn in on January 25, I have been busy, along with my fellow Commissioners, in deliberations on a variety of issues.

During these few months of NRC service, I have valued the guidance from the three senior members of the Commission, and support from the outstanding and dedicated staff at the NRC.

Nuclear energy is a vital component of our Nation's energy portfolio, providing 20 percent of our Nation's electricity. Nuclear technologies are important to many other industries, and help to underpin our Nation's strong economy, quality of life, and standard of living. But nuclear energy and other nuclear technologies will be utilized only if safety, security, and environmental considerations are addressed to the satisfaction of the public.

The Commission has a vital role with respect to the safety and security of our civilian nuclear plants, fuel cycle facilities, and other civilian applications of nuclear technologies. The challenging and crucial nature of the Commission's decisions is absolutely important on all of these issues.

I want to assure the committee that I am committed to careful evaluation of the facts of each case on which I render a decision. I pledge to you that all decisions I make will be based on the existing laws and regulations and on the merits of each specific case.

I believe that my past experience will be useful in my service on the Commission. My academic training, particularly in nuclear physics at Cal Tech, my three decades at Los Alamos, and my 8 years on Senate staff have prepared me, I believe, for this new role.

I have always viewed national security as a very broad arena, to include our Nation's military, economic, safety, and environmental well-being. Within that broad definition of national security, I have contributed to a very wide range of national security interests, throughout my service at Los Alamos and in the Senate.

I view this service as a Commissioner as another opportunity to contribute to our Nation's security through the NRC's focus on safety, security, and environmental impacts of civilian uses of nuclear technologies.

My experience at Los Alamos provided many lessons relevant to this appointment. At the laboratory, I led and managed very large, complex national security projects with critical deadlines and complex safety issues, involving hundreds of scientists.

During my time on Senate staff, I supported policy deliberations on a wide range of civilian and military nuclear issues.

I will draw on this range of knowledge and experience as I discharge my responsibilities on the Commission.

I look forward to future interactions with this committee. I assure you that I stand ready to respond to any and all inquiries from this committee, and that I welcome guidance from your committee, now and throughout my tenure at the NRC, as I discharge my responsibilities at the Commission. I look forward to answering your questions, and I thank you for the opportunity to appear here today.

Senator INHOFE. Thank you, Dr. Lyons.

The Chair, at this point, would yield to Senator Warner for comments.

Senator WARNER. Just very quickly, Mr. Chairman and members of the committee, I think we are fortunate to have two eminently qualified individuals. Both of you have my strongest support.

Again, Dr. Lyons, I return to the discussions that we had in my office regarding the future of nuclear power. I do not want to go into a great dissertation on this, but I do believe our country has to look at that. You can see the rest of the world moving, in some way, toward greater accessing of nuclear power. Is that not correct? You see it in Europe. You see it in Asia.

Mr. LYONS. Very much so, sir.

Senator WARNER. We simply cannot ignore this opportunity. I want to assure the American public that I take a position of urging consideration of nuclear power, from the standpoint of one who has associated with the Navy basically my entire lifetime. The safety record there is extraordinary; no incidents of any danger to the individuals.

The safety records of nuclear power throughout the world, have there been any incidents recently of harm to individuals in the growing nuclear power industry elsewhere in the world?

Mr. LYONS. To my knowledge, there are no recent significant incidents.

Senator WARNER. To mine, either. So I do hope Americans keep an open mind, as we see our gasoline prices at the pump climb.

You have talked about this, Mr. Chairman, China drawing so much of the world's resources of energy now that we have to look at these alternatives. I thank the Chair and members of the committee.

Senator INHOFE. Well, thank you, Senator Warner, and I agree with all of your comments. We have been joined by Senator Carper.

Senator Carper.

Senator CARPER. Thanks, Mr. Chairman.

Senator Warner mentioned his experience with the Navy. Along with other services in the Armed Forces in our country, he served as the Secretary of the Navy for a number of years.

I think I have shared with him this story. But about 2 years ago, I took our son's Boy Scout troop to Norfolk Naval Station. I do this

about every other year. We visit ships and submarines and aircraft carriers. We sleep in the beds and eat in the galley. It is a lot of fun for them and, frankly, for me and the adults who go along, too.

A couple of years ago when we were there, about 3 years ago now, one of the ships that we visited was the Teddy Roosevelt. It is 1,000 feet long. It is about 30 stories high. When it goes to sea with the Air Wing aboard, there are about 5,000 sailors and 75 aircraft. The Teddy Roosevelt stops to refuel once every 25 years.

Senator WARNER. In other words, those sailors sleep on full reactors.

Senator CARPER. They sleep right on those reactors. You and I have known a number of people who live on reactors on the submarines and aircraft carriers and other ships.

We live in a day when today, close to 60 percent of our oil is imported. We have these huge trade deficits. Nuclear power, while not having a perfect record has, I think, a distinguished record, especially in the U.S. Navy.

Senator WARNER. We might add the pollution factor.

Senator CARPER. Absolutely.

Senator WARNER. We realize with our environment, how hard you are working on cleansing the air, yourself. You are a pioneer now on this committee on the question of clean air. If there is any question about that, nuclear power is a major contributor to our clean air.

Senator CARPER. As we wrestle with multi-pollutant legislation, we do not have to worry about sulphur dioxide emissions from these plants. We do not have to worry about nitrogen oxide, mercury, or CO₂ at all. For us to ignore that kind of potential, we do so at our own peril.

Having said all that, and as one who is an advocate of developing the next generation of nuclear power plants to create some of our electricity, your job, your role, is all the more important.

We have come to, I think, a point in our Nation's history where a lot of people who have been skeptical, dubious, of nuclear energy, because of the safety concerns, what do we do with the waste, and do we have to worry about a Chernobyl or Three Mile Island incident? We always have to be mindful and vigilant that that can happen.

But your jobs are more important than ever. Just at a time when people are willing to take a second look to consider how we might better utilize nuclear power to meet our energy needs, your role is all the more critical and you need to be all the more vigilant. We appreciate your service, and we are glad that you are here today. We look forward to asking you questions. Thank you.

Senator INHOFE. Thank you, Senator Carper.

Senator Obama, we have concluded with opening statements. But if you have one, we would recognize you at this time.

Senator OBAMA. Thank you, Mr. Chairman.

I am happy to wait and participate in the question and answer portion.

Senator INHOFE. All right, sir.

Well, I will go ahead and start. Dr. Jaczko, I could not believe it was you when I walked through that door, with your bright and

shiny smiling face. I could not see any horns. I just am delighted that you are not what I expected.

I think it would be unreasonable for this committee to ask any former staffers to recuse themselves from areas which they have dealt with before, because you have dealt with all areas, both of you have.

I do not think it is unusual, though, that if there is a particular area that you have been committed to, that has been such a topic of conversation, that we would request a recusal.

I understand that you did recuse yourself for a period of 1 year on issues dealing with Yucca Mountain. The only tough question you will get today is, will you continue to recuse yourself for the rest of your service on items dealing with Yucca Mountain?

Mr. JACZKO. Mr. Chairman, to answer that question, I think I want to say, first of all, that I do believe I can be fair and objective on all matters, including Yucca Mountain, that may come before me as a Commissioner. I agreed to recuse myself for 1 year, because I thought it was appropriate given, I believe, the perceptions about my ability to be objective and fair.

My hope is that within 1 year, I will have demonstrated that absolutely I can be fair and objective. My hope is that at the end of my recusal, that the answer to that question will be self-evident, whether or not I need to further recuse myself. But I will certainly continue to discuss with our Office of General Counsel, as well as other members of the Commission, what my appropriate action should be on any matters, including Yucca Mountain, after that recusal.

Senator INHOFE. Well, you know, there is some precedent for this. It was Commissioner Curtis, a few years ago, who had had a very similar association with Seabrook. He did recuse himself, by letter to us, in his tenure of service. So if that is the request I make of you, do I understand that you prefer not to do that?

Mr. JACZKO. I would certainly review that. I am not familiar with all the details of his circumstances, and I will certainly review that with the Office of General Counsel and seek their advice on the similarities with my circumstance.

Senator INHOFE. All right, and to both of you, I think what Senator Warner said certainly speaks for, I think, all of us on this committee. As we look at the energy crisis that we are faced with today, and you see how far we have come in nuclear energy. Yet, we know that, in my opinion, we are going to have to dramatically expand the use of nuclear energy over the coming years.

Now to do this, it is going to mean that you will have to continue the very aggressive record that the NRC has had in granting licenses and renewals and this type of thing. I would just ask each one of you, you have been on the job now, so you are pretty familiar with what resources you have. Do you have the resources to keep up that record, the record to which the Commission has been challenged, in terms of new facilities and expansions?

Mr. JACZKO. I could begin. I certainly think this is something that we are taking a very good look at, in making sure that we do have the resources to do that. I think, right now, we have some uncertainties because we do not have any definite new license applications. I think it makes it, of course, difficult for us to plan and

budget until we have some definite idea of what exactly we may be receiving in terms of new license applications.

So I think we certainly have resource challenges, from a human capital standpoint, which I know this committee has been very, very interested in, and has introduced legislation on those issues. Certainly, maintaining that expertise is an important part of what we need to do to make sure we have the resources and ensure that we are providing the new expertise as members of our staff retire.

Senator INHOFE. OK, very good.

Dr. Lyons, do you have any thoughts on that?

Mr. LYONS. Senator Inhofe, before Commissioner Jaczko and I arrived, the Commission had been demonstrating a very impressive record on license renewals. I believe they have processed about 30 license renewals to date. They have been doing it on a very time-effective, predictable basis. Certainly, I look forward toward continuing that record.

I think I have perhaps two specific comments. While the license renewals are important, I think it is also of substantial interest that in two recent cases, license renewals have been not denied, but returned to the licensee as being inadequate. As we look at license renewals, it is very important that we demand that they maintain the high standards of the ones to date.

On the subject of new reactors, if such applications are submitted, I have a very strong concern, which I have expressed in some Commission meetings, that we are not adequately budgeting for at least what industry is proposing in the way of new license applications. I am concerned about that.

Senator INHOFE. I see.

Senator Lautenberg.

Senator LAUTENBERG. Thank you very much, Mr. Chairman.

It is interesting to see now how the outreach, if I can call it that, for consideration of nuclear power is certainly there.

I would ask this. There have been a couple of notorious failures of plants that were built and never really operated. They were abandoned, finally. One was in New Hampshire. One was in Long Island, and another was in Washington. Each one was a loss of several billion dollars, and several billion dollars at a time when a billion was a lot of money.

The fact of the matter is that there ought to be something in the history of those that tells us about the things that prevented these plants from ever really operating. One, I think, was low power for while, and it eventually shut down.

So I do not know whether either of you are familiar with those situations, or if you are familiar enough to even talk about them at the moment. But if not, I would ask you each to take a look at the history, and see what it is that went wrong.

Dr. Lyons, you know, in my State, over 50 percent now of our energy is created from a nuclear facility. We worry a lot about the safety standards. It is a very crowded State. It is the most densely populated State in the Union. As I mentioned in my opening remarks, the oldest nuclear plant in the country is there at Oyster Creek.

EXHIBIT C

----- Original Message -----

From: DOE Technical Support
Sent: 07/02/2010 10:33 AM PDT
To: OCRWM West
Cc: Kelly Knopf; Kory.Hay@rw.doe.gov
Subject: System Shut Down List

The following applications will be shut down and will not longer be available after COB Friday, July 2, 2010:

License Application Completions (LAC)
Request for Additional Information System (RAIRS)
Contentions Action Tracking
Technical Data Management System (TDMS)
Curatorial Sample Information Tracking System (CSITS)
Controlled Document Information System (CDIS)
Document Input Reference System (DIRS)
AFSWeb
Lessons Learned/Generic Implications (LL/GI)
Training Server
One Point of Entry (OPE)
Requirements Traceability Network (RTN)

If you have any questions or concerns, please contact Scott McCord at 821-8169.

EXHIBIT D



Department of Energy
Washington, DC 20585



1072

MEMORANDUM FOR: [REDACTED]
FROM: DAVID ZABRANSKY [Signature]
SUBJECT: SPECIFIC REDUCTION IN FORCE NOTICE OF SEPARATION
DATE: JULY 7, 2010

This is to provide you with official notice that in accordance with the Deputy Secretary's memorandum of February 3, 2010 concerning the affect of the President's FY 2011 budget request eliminating funding for the Office of Civilian Radioactive Waste Management (RW), the position of [REDACTED] GS [REDACTED]-14, that you currently occupy, position number [REDACTED] located in the OFFICE OF TECHNICAL MANAGEMENT, will be abolished. It has been determined, through application of the Reduction in Force (RIF) regulations (5 CFR Part 351), that there are no other positions within the competitive area to which you have an assignment right.

This RIF action has been reached on the basis that the Office of Civilian Radioactive Waste Management and all positions within your competitive area and level will be abolished on September 30, 2010. Therefore, you will be separated from Federal service on September 30, 2010.

General information concerning the application of RIF procedures may be found at OPM's website at http://www.opm.gov/Reduction_In_Force/employee_resources/index.asp. Copies of the RIF regulations and the records on which this action is based are being maintained in the Headquarters Human Resources Operations Division. You may make an appointment to review this material by calling either your servicing Human Resources Specialist, Ms. Tiffany Sample on (202) 586-9289 or Ms. Tracy Warrick, Supervisory Human Resources Specialist on (202) 586-6788. If you are a bargaining unit employee, you are entitled to have a National Treasury Employees Union (NTEU) representative assist you in reviewing your personnel records or files relating to this RIF action. Questions concerning NTEU representation should be directed to Ms. Theresa Heinicke of the Headquarters Labor and Employee Relations Office on (202) 586-8469.

Because you are eligible for an immediate annuity, you are not entitled to severance pay. You are considered to be eligible for an immediate annuity if you meet the age and service requirements for a voluntary retirement (this includes MRA+10 for FERS employees), discontinued service retirement, or early out retirement. Information about benefits for separated employees and retirement benefits can be found in the Attachment 1 "The Employee's Guide to RIF Separation Benefits," which is also available at OPM's website at [http://www.opm.gov/Reduction In Force/employee_resources/EGRIFBEN.asp#TOD](http://www.opm.gov/Reduction%20In%20Force/employee_resources/EGRIFBEN.asp#TOD) . (NOTE: Any section of this guide that covers information related to severance pay and/or its computations are not applicable to you.) You may contact Ms. Toshia Brown at (202) 586-6726 if you have any questions about your RIF Separation or Retirement Benefits.

In addition, you will receive a lump-sum payment for the accumulated annual leave credited to you at the time of separation.

This notice also establishes your potential eligibility for priority consideration if you are found well qualified for Federal vacancies in your local commuting area under OPM's Interagency Career Transition Program (ICTAP). After you have been separated, you will be eligible for reemployment assistance through the Department of Energy's Reemployment Priority List. Information on the Department of Labor's Career One Stop Employment Tools and Career Transition website can be found at <http://www.careeronestop.org/>

You have the right to appeal this action to the Merit Systems Protection Board (MSPB). However, you may not file the appeal until the day after the effective date of your separation from Federal service, and you must file no later than 30 calendar days after the effective date. You have the right to be represented by an Attorney in this matter or any other person you may choose. Your appeal must be filed in writing with the appropriate MSPB office by personal delivery, by facsimile, by mail, by commercial overnight delivery, or via the MSPB online appeal process. Information on how and where to file an MSPB appeal are included in Attachment 2, "How to File an Appeal". Under the provisions of 5 CFR 1201.22(c), if you do not submit an appeal within 30 days, it will be dismissed as an untimely filed unless a good reason for the delay is shown. The MSPB judge will provide you an opportunity to show why your appeal should not be dismissed as untimely.

So that we have a record that you have received this notice, please sign and date the Acknowledgment of Receipt Form at the end of this letter and return it to an HR representative from your servicing Human Resources Office or mail it to the address noted on the form.

On behalf of the management of the Office of Civilian Radioactive Waste Management and the Department of Energy, I want to express my sincere appreciation for your dedicated service, commitment and the contributions you have made toward the accomplishment of our mission.

EXHIBIT E

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Judge Thomas S. Moore, Chairman

Judge Paul S. Ryerson

Judge Richard E. Wardwell

In the Matter of
U.S. DEPARTMENT OF ENERGY

Docket No. 63-001-HLW

ASLBP No.

09-892-HLW-CAB04

(High Level Waste Repository)

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1 >>JUDGE RYERSON: You cite a case at footnote
2 28 of your reply brief that says, "where Congress
3 includes particular language in one section of the
4 statute, but omits it in another section of the
5 same act, it is generally presumed that Congress
6 acts intentionally and purposefully in the
7 disparate conclusion or exclusion.

8 And applying that doctrine to 113 and
9 114, doesn't that mean that the Secretary's
10 discretion has been taken away by 114, which does
11 not include the very language that's in 113?

12 >>MR. LEV: No, because what -- 114 adopts
13 the ordinary rules of the Commission, which permit
14 withdrawal. Congress could not have been
15 clearer --

16 >>JUDGE RYERSON: Let me ask again, the
17 question I had before was: without 2.107,
18 assuming that we read it differently, do you still
19 argue that 114 conveys discretion on the
20 Secretary?

21 >>MR. LEV: Not if the ordinary practice of
22 the Commission were to allow such withdrawals,
23 which is what's being adopted here. I think
24 what's significant there, though, is that Congress
25 knew how to tell the secretary how not to do

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1 things.

2 To look at 114(b) in isolation and say
3 you have to submit and then not read 114(d) to
4 tell you what happens after you submit, that the
5 ordinary rules apply, that the Secretary is
6 treated like a volunteer, I think ignores the
7 structure of that provision. I also, if I
8 might --

9 >>JUDGE RYERSON: In interpreting 114(d),
10 which instructs the Commission to examine the
11 application and consider it, is it your argument
12 that we owe Chevron deference to DOE's
13 interpretation of the NRC's responsibility?

14 >>MR. LEV: No, except for the -- in the
15 following sense; that part of what any
16 determination there has to be understood against
17 the background authority of the Secretary, the
18 discretion to make these decisions.

19 And the question is, in giving authority
20 to the NRC to adjudicate, was Congress telling the
21 NRC that it can second guess the policy discretion
22 of the Secretary under the Atomic Energy Act; and
23 I don't think there's any evidence that Congress
24 did that.

25 And I think we need to remember the

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1 context here, which is the Secretary is not going
2 forward with the repository, and has decided that
3 this application is contrary to public interest.

4 And I think that unless -- let me put it
5 this way; what you would -- the reason why Nye
6 County has said, what you should do here is grant
7 an indefinite suspension, is because it's
8 untenable to put the Department of Energy in the
9 position of -- and the Secretary in a position of
10 continuing to prosecute a license application that
11 the Secretary determines to be contrary to public
12 interest.

13 we will do what we're ordered to do.
14 But if Congress wanted such a scheme, where the
15 Secretary has determined that prosecuting the
16 application is contrary to public interest, but
17 because of the NRC's determinations he has to do
18 so anyway, Congress would have to have been a lot
19 more explicit than it was.

20 >>JUDGE MOORE: well, excuse me, counsel, I
21 thought Congress and you agreed that you had an
22 obligation to file that application, and I thought
23 Congress told you to do it 90 days, and it took
24 you four years. So for four years, you were out
25 of compliance with the law, and you didn't have

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1 any trouble with that.

2 So you -- what's the difference between
3 disobeying one statute and -- one section of the
4 statute and disobeying another, as far as your
5 likes and dislikes?

6 >>MR. LEV: AS to 114(b), for the reasons
7 I've explained, the guts of that is the 90-day
8 deadline.

9 what Congress contemplated -- and
10 Your Honor is right, it was not met. But what
11 Congress contemplated was that very soon after the
12 secretary chose to recommend this, that he would
13 file an application with the Commission.

14 There's no reason to believe at that
15 point that the Secretary wouldn't have wanted to
16 file the application, he had just recommended it.

17 so the guts of 114(b) is to make sure
18 that he does it quickly. That you have to read
19 the sentence as a whole, which is to submit the
20 application in not longer than 90 days.

21 That said, the question then becomes,
22 what does the Secretary -- what options does the
23 Secretary have once the application is submitted.
24 And there is nothing in the statute that says the
25 Secretary does not have his ordinary discretion to

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1 decide this is not the right way to go forward.

2 In fact, the structure of the NWPA, and
3 this comes back to Your Honor's question about the
4 legislative history.

5 The structure of the NWPA is that the
6 Secretary has to go through a series of hoops if
7 he wants to go forward. But throughout the
8 statutory scheme, he does not have to go through
9 hoops, he can unilaterally decide not to go
10 forward. That structure is quite powerful
11 throughout the scheme.

12 And to use your example -- I want to
13 come back to the legislative history, the example
14 Your Honor --

15 >>JUDGE WARDWELL: But not with 113, you
16 would have to complete 113 is what you just told
17 me earlier, the steps --

18 >>MR. LEV: No, he has to comply with the
19 steps, but he makes the decision -- subject -- on
20 his own, does not need authority.

21 And that's why the Lyons, Kansas example
22 is important, because what that actually shows --
23 that was an instance where the Secretary was
24 trying to go forward and hadn't obtained
25 concurrence of important stakeholders. That's

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