

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

*Before Administrative Judges:
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell*

In the Matter of:

Docket No. 63-001-HLW

**U.S. DEPARTMENT OF ENERGY
(High Level Waste Repository)**

**ASLBP No. 09-892-HLW-CAB04
May 17, 2010**

**OPPOSITION
OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS
TO U.S. DEPARTMENT OF ENERGY'S MARCH 3, 2010
MOTION TO WITHDRAW**

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), and consistent with the April 27, 2010 Construction Authorization Board's April 27, 2010 Order,¹ the National Association of Regulatory Utility Commissioners (NARUC) respectfully files this Answer opposing the March 3, 2010 U. S. Department of Energy (DOE) motion² seeking to withdraw "with prejudice" the application for a license from the Nuclear Regulatory Commission (NRC) to authorize construction of a geologic repository at Yucca Mountain in Nye County Nevada (*DOE Motion*). NARUC opposes DOE's Motion. As discussed *infra*, the motion should be denied. If, however, the Board determines to permit the application to be withdrawn, then consistent with prior NRC precedent it should be granted only without prejudice.

II. BACKGROUND

The need for a secure facility in which to dispose of radioactive wastes has been known in this country since World War II.³ As early as 1957, a National Academy of Sciences report suggested burying radioactive waste in geologic

¹ *CAB Order* (Setting Briefing Schedule) ML101170592 (Apr. 27, 2010) at 2 (unpublished).

² U.S. Department of Energy's Motion to Withdraw (March 3, 2010).

³ *Recommendation by the Secretary of Energy Regarding the Suitability of the Yucca Mountain Site for a Repository Under the Nuclear Waste Policy Act of 1982* at 6 (February 2002), ("*DOE Secretary 2002 Recommendation*") available at: http://www.ocrwm.doe.gov/uploads/1/Secretary_s_Recommendation_Report.pdf

formations.⁴ The federal government's first unsuccessful efforts to site such a geological repository occurred in the 1970s.⁵

In the wake of those efforts, in 1978 President Carter established the Interagency Review Group on Nuclear Waste Management composed of representatives from fourteen federal agencies.⁶ The Interagency Review Group found in 1979 that “a consensus had emerged on a number of fundamental elements of policy,”⁷ including the following:

- The disposal problem “should not be deferred to future generations.”

⁴ Id.

⁵ H.R. Rep. No. 97-491(Pt. I), 97th Cong., 2d Sess. at 26-27 (April 1982), 128 Cong. Rec. 28032 (1982), as reprinted in 1982 U.S.C.C.A.N. 3792, 3793. Congress passed the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2228, to, *inter alia*, encourage private-sector development of the nuclear energy industry. See Davenport, James H., *Yucca Mountain: A Study of Conflicts in Federalism*, 57 Oct. Inter Alia 11 (1992) (“Davenport”). The private sector was “led to believe . . . spent nuclear fuel would be reprocessed and recycled” and that the federal government would build repositories if needed. Id. at 11. Within two decades it became clear that the reprocessing/recycling option was not working. See J. Silberg, *Storage and Disposal of Radioactive Wastes*, 13 Tulsa L.J. 788, 791 (1978); See also H.R. Rep. No. 97-491(Pt. I) at 27. As waste accumulated on-site, industry pressed for government action. Ultimately, on October 18, 1977, DOE announced a new policy targeting the problem. In DOE Press Release R-77-017, captioned “*DOE Announces New Spent Fuel Policy*,” the agency announced it would accept and take title to spent fuel discharged from commercial nuclear reactors and be responsible for both its storage and ultimate disposal.

⁶ That same year, DOE began studying Yucca Mountain, and other possible sites for a geological repository. See, *DOE Secretary 2002 Recommendation* at 4. (“Work began on the Yucca Mountain site in 1978. When the NWPA was passed, the Department was studying more than 25 sites . . . as potential repositories.”)

⁷ See, Macfarlane, Allison M. and Rodney C. Ewing, eds. *Uncertainty Underground: Yucca Mountain and the Nation's High-Level Nuclear Waste*. Cambridge, Mass.: The MIT Press, at 31-32 (2006).

- “The most promising technology for the permanent disposal . . . [is] . . . geologic disposal,”
- “[E]fforts to develop geologic repositories should not be delayed pending the further evolution of alternative disposal technologies...”
- “[T]he interim storage of waste should not be a substitute for continuing progress toward opening the first repository.”⁸

The Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. §§ 10101 *et seq.*, endorsed and codified these broad conclusions.⁹

This 1982 legislation required the DOE to site and operate a repository for high-level nuclear waste.¹⁰ It also laid the foundation for the complicated and *very prescriptive* process of identifying an appropriate location for the repository. Key provisions authorized in excruciating detail site characterization activities, eased relevant requirements of the National Environmental Policy Act (NEPA), and addressed State and public participation in the process of site selection.¹¹ The legislation even established special restrictive procedural rules for the House and

⁸ Id.

⁹ Id.

¹⁰ 42 U.S.C. § 10131(b)(1).

¹¹ See 42 U.S.C. §§ 10133(a), 10134(d), 10136(b).

the Senate to virtually guarantee expeditious consideration of any Presidential site recommendation.¹²

Four years later, in 1986, “using a multi-attribute methodology,” DOE ranked the appropriateness of the various sites it had investigated. Yucca Mountain was the top-ranked site.¹³ Less than a year later, Congress amended the NWSA to specify Yucca Mountain as the favored site for the first repository.¹⁴

Between 1987 and 2002, DOE spent “billions of dollars and millions of hours of research”¹⁵ conducting the NWSA-prescribed “site characterization”¹⁶ which ultimately concluded that a repository site could be safely located at Yucca Mountain.¹⁷

¹² See 42 U.S.C.A. § 10135(d) & (e). See also, Gold, Martin B., *Senate Procedure and Practice*, 2nd Edition, at 5-9, 7 (Rowman and Littlefield Publishers Inc. 2008) (“The tight, expedited procedures set forth in the act *profoundly altered* Senate deliberation of the Yucca Mountain Waste repository issue. Potential filibusters on the motion to proceed on and the substance of S.J. Res. 34 were impossible. Amendments that could have introduced further controversy and prevented bicameral consensus were avoided. Most important, the fundamental leadership prerogative of floor scheduling was weakened.” {emphasis added})

¹³ *DOE Secretary 2002 Recommendation* at 4.

¹⁴ See Pub. L. No. 100-203, §§ 5001-5065, 101 Stat. 1330, 1330-227 to 1320-255 (1987) (codified throughout 42 U.S.C.); see also 42 U.S.C. § 10133(a).

¹⁵ *DOE Secretary 2002 Recommendation* at 1, 2. (“Yucca Mountain is far and away the most thoroughly researched site of its kind in the world.” It has been “studied for more than twice the amount of time it took to plan and complete the moon landing.”)

¹⁶ 42 U.S.C. §§ 10132-10133.

¹⁷ DOE also developed a final environmental impact statement for the high level waste repository at Yucca Mountain and the transportation of spent fuel to the repository site Department of Energy, *Final Environmental Impact Statement for a Geologic Repository for the*

Based on that extensive examination, in January 2002, the Secretary of Energy formally recommended to the President that a repository could be safely sited at Yucca Mountain.¹⁸ That recommendation specifies that: “the product of over 20 years, millions of hours, and four billion dollars of this research provides a sound scientific basis for concluding that the site can perform safely during both the pre- and post-closure periods, and that it is indeed scientifically and technically suitable for development as a repository.”¹⁹

Following the NWPA-prescribed procedure,²⁰ the President, in February 2002, recommended Yucca Mountain to Congress.²¹ In April 2002, Nevada, also following procedures prescribed in the NWPA,²² filed a “notice of disapproval” of the President’s recommendation. However, Congress overrode Nevada’s notice through passage of the *Yucca Mountain Development Act*, a Joint Resolution

Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada, (DOE/EIS-0250), February 28, 2002; Department of Energy, *Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada*, (DOE/EIS-0250F-S1), June 2008.

¹⁸ *DOE Secretary 2002 Recommendation*; *H.R. Rep. No. 107-425*, 107th Congress, 2nd Sess., at 533 (2002), as reprinted in 2002 U.S.C.C.A.N. 532.

¹⁹ *DOE Secretary 2002 Recommendation* at 45-46.

²⁰ 42 U.S.C. § 10134(a)(2)(A).

²¹ *H.R. Rep. No. 107-425*, 107th Congress, 2nd Sess., at 534 (2002), as reprinted in 2002 U.S.C.C.A.N. 532.

²² 42 U.S.C. § 10136(b)(1) & (2).

approving the Yucca Mountain site for a repository, signed by the President on July 23, 2002.²³ That resolution designated Yucca Mountain as the site of a permanent repository for high-level radioactive waste and spent nuclear fuel.²⁴

In June 2008, as *mandated* by the NWPA,²⁵ DOE submitted its formal application to the NRC for a license to begin construction of the repository at Yucca Mountain. Once that application was submitted, the NWPA requires the NRC to both consider the application and issue a final decision on the merits.²⁶

On October 22, 2008, the NRC published in the federal register notice of the hearing on the June filing.²⁷ A February 4, 2010-filed “*Department of Energy’s*

²³ See Pub. L. No. 107-200, 116 Stat. 735 (2002), available online at: <http://thomas.loc.gov/cgi-bin/query/D?c107:5:./temp/~c107xiBBM7::>

²⁴ *Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251, 1309 (D.C. Cir. 2004), at: <http://pacer.cadc.uscourts.gov/docs/common/opinions/200407/01-1258a.pdf> 21 (“Congress’s enactment of the Resolution—which independently approved the Yucca site for development—was a final legislative action once it was signed into law by the President....the Resolution is law and cannot be set aside absent a constitutional defect. Having found no such defect, we conclude that ... Congress has settled the matter, and we, no less than the parties, are bound by its decision.”)

²⁵ After Congressional designation of a repository, 42 U.S.C. §10134(b) requires that “the Secretary *shall* submit to the Commission an application for a construction authorization for a repository at such site. . . .”{emphasis added}).

²⁶ 42 U.S.C. §10134(d) requires that the NRC “shall consider an application for a construction authorization” of a repository and “shall issue a final decision approving or disapproving the issuance of a construction authorization”.

²⁷ “Notice of Hearing and Opportunity To Petition for Leave To Intervene on an Application for Authority To Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain,” *In the Matter of United States Department of Energy (High Level Waste Repository)*, 73 Fed. Reg. 63,029 (October 22, 2009) available at: <http://edocket.access.gpo.gov/2008/E8-25293.htm>

Answers to the Board's Questions at the January 27, 2010 Case Management Conference," specified that the Administration's budget request for Fiscal Year 2011 provides no funds for DOE to pursue the license for the Yucca Mountain Facility. The Administration followed up on that notification, by having DOE file the March 3, 2010 motion to withdraw the license application for Yucca Mountain with prejudice, to foreclose a renewed application in the future.²⁸

III. ARGUMENT:

NAR-MISC-01

NEITHER DOE NOR THE NRC HAVE DISCRETION TO TERMINATE THIS PROCEEDING WITH PREJUDICE.

The Supreme Court has instructed: "[I]n interpreting a statute a [tribunal] should always turn to one cardinal canon before all others. . . . [Tribunals] must presume that a legislature says in a statute what it means and means in a statute what it says there."²⁹

In this case the statutory text is clear and unambiguous.³⁰ Congress has required both DOE to submit the license and the NRC to review the license

²⁸ See DOE Motion at 3. In footnote 3, DOE states that it "does not intend to refile an application to construct a permanent repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain."

²⁹ *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992).

³⁰ DOE argues that "the Secretary's interpretation of the NWPA" should be entitled to deference under, *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-45 (1984), *DOE Motion* at 7. However, no deference is due the Secretary's interpretation of the statute because Congress's mandate for the filing and review of the license application is clear on face of the statute. *Id.* at

application on the merits. Indeed, both DOE³¹ and the Licensing Board have previously conceded that DOE is “required to submit an application for a construction authorization to the NRC”³²

Section 10134(b)³³ specifies that DOE “*shall submit* to the [NRC] an application for a construction authorization for a repository at such site. . .” upon the approval of the Yucca Mountain site as a repository pursuant to the NWPAA. {Emphasis added.}

Similarly, Section 10134(d)³⁴ specifies that the NRC “*shall consider* an application for a construction authorization for all or part of a repository” and “*shall issue a final decision* approving or disapproving the issuance of a construction authorization . . .” {Emphasis added.}

Neither provision provides DOE with discretion or authority to summarily terminate the Yucca Mountain licensing process or the NRC with discretion to do

844; see also *The Missouri Municipal League, et al v. FCC*, 299 F.3d 949 at 952 (8th Cir. 2002) (“under. . .Chevron. . .[i]f congressional intent is clear, a contrary interpretation by an agency is not entitled to deference.”) (internal citation omitted).

³¹ “DOE is not only authorized but required to submit a license application for a repository at Yucca Mountain to the NRC.” Final Brief for the Respondents at 22, *State of Nevada v. U.S. Dept. of Energy*, Nos. 01-1516, 02-1036, 02-1077, 02-1179, and 02-1196 (D.C. Cir. May 28, 2003){emphasis added}.

³² *U.S. Department of Energy (High Level Waste Repository)*, LBP-09-6, 69 NRC __ (May 11, 2009) (slip op) at 27.

³³ 42 U.S.C. § 10134(b)

³⁴ 42 U.S.C. § 10134(d)

other than consider the license application on its merits (and render a “final decision approving or disapproving” the application). The use of the “shall” in both subsections - “a command that admits of no discretion on the part of the person instructed to carry out the directive”³⁵ - does not admit any other construction.³⁶

As evidenced by other provisions of the NWPA,³⁷ had Congress wanted to provide either DOE with discretion to terminate the proceedings by withdrawing

³⁵ *Ass’n of Civilian Technicians v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994). Compare, *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). (“The mandatory ‘shall’ . . . normally creates an obligation impervious to judicial discretion.”) See also, *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (“The word 'shall' is ordinarily 'The language of command'” citing *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)). See also, *Zivotofsky v. Sec’y of State*, 571 F.3d 1227, 1243 (D.C. Cir. 2009) (“‘Shall’ has long been understood as ‘the language of command’” except for “rare exceptions . . . that apply only where it would make little sense to interpret ‘shall’ as ‘must.’”).

³⁶ See also *United States v. Ron Pair Enters.*, 489 U.S. 235 (1989). (This case notes, the plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters. Clearly that is not the case presented for review here.)

³⁷ 42 U.S.C. A. § 10133, also uses the mandatory “shall” to require DOE to carry out the site characterization. (“The Secretary shall carry out, in accordance with the provisions of this section, appropriate site characterization . . .”) However, there, unlike the unqualified mandates in both 42 U.S.C.A. §§ 10134(b) and (d), Congress specified a detailed procedure for DOE to follow to terminate the proceedings presumably if the characterization turn up some non-remediable significant flaw. Indeed, even in the same section, at § 10134(a)(2)(A), Congress gave the President discretion to make an independent judgment of the suitability of the Secretary’s recommendation (“If, after recommendation by the Secretary, the President considers the Yucca Mountain site qualified for application for a construction authorization for a repository . . .). Again, Congress did not chose to include similar discretionary terms in the text of 42 U.S.C.A. § 10134(b) or (d). See, e.g., *Lindh v. Murphy*, 521 U.S. 320, 330 (1997) (Statute was explicit in making one section applicable to habeas cases pending on date of enactment, but was silent as to parallel provision). Compare, *Bates v. United States*, 522 U.S. 23, 29 (1997) (inclusion of “intent to defraud” language in one provision and exclusion in a parallel provision);

the application or the NRC authority to do anything but review the application on the merits, it could have done so. It did not.

Moreover, accepting the notion either that DOE has unbridled discretion to withdraw the license application or that the NRC can – without any examination of the merits – grant the DOE motion, necessarily renders both Sections 10134(b) and (d) nullities. Even if there were not ample precedent proscribing such an approach,³⁸ the illogic of such an interpretation of these provisions is obvious. Why would Congress have specified in such great detail the specific steps that the President, the Secretary, the State of Nevada, and even Congress itself had to take to permit the Yucca Mountain license application to be filed, and include provisions mandating that application be filed and examined by the NRC, if DOE could, based on a bare allegation that things have changed³⁹ could simply withdraw

Estate of Bell v. Commissioner, 928 F.2d 901, 904 (9th Cir. 1991) (Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another.)

³⁸ And there is: *Negonsott v. Samuels*, 507 U.S. 99 (1993). (A court must, if possible, give effect to every clause and word of a statute.) *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985). (A statute should be interpreted so as not to render one part inoperative.) See also, *United States v. Chavez*, 228 U.S. 525 (U.S. 1913); *Bd. of Educ. of City Sch. Dist. of City of New York v. Harris*, 622 F.2d 599, 611 (2d Cir. 1979) (refusing to adopt reading of statute that would render it “in operation, a nullity”); *Trichilo v. Secretary of Health & Human Services*, 823 F.2d 702, 706 (2d Cir. 1987) (“we will not interpret a statute so that some of its terms are rendered a nullity”); *Garnes v. Barnhardt*, 352 F. Supp. 2d 1059, 1065 (N.D. Cal. 2004)(an “agency interpretation that nullifies part of a formally promulgated regulation deserves no deference.”).

³⁹ The only justification DOE presents is found on page 3 of its motion: “It is the Secretary of Energy’s judgment that scientific and engineering knowledge on issues relevant to disposition of high-level waste and spent nuclear fuel has advanced dramatically over the twenty years since

it (or the NRC could permit such action.) Both actions are tantamount to an agency repealing a federal statute.

DOE argues the NWPA does not require the Secretary to (i) obtain a license for the Yucca Mountain repository, or (ii) pursue other permits necessary to open the repository.⁴⁰ DOE also argues “it has not been the NRC’s practice to require any litigant to maintain a license application that the litigant does not wish to pursue.”⁴¹ However, past NRC practice is hardly relevant to the situation presented here where both DOE arguments ignore the fact that the litigant’s wishes in this case are irrelevant. Unlike any case involving a typical licensee, in this case, Congress passed a law requiring DOE, whatever its views, to file the application.

Even if DOE could file an unsupported motion to withdraw, it is difficult to understand how granting the DOE motion can meet NRC’s “statutory obligation *to complete its examination of the application* within three years of its filing.”⁴² The NRC must “*consider* an application for a construction authorization for all or part

the Yucca Mountain project was initiated.” The motion also notes “the Secretary of Energy has decided that a geological repository at Yucca Mountain is not a workable option for long term disposition of these materials.” There is no explanation why it may not be workable – or why – the Secretary’s unsupported judgment can trump Congressional conclusions to the contrary signed into law by the President of the United States.

⁴⁰ *DOE Motion* at 5-6.

⁴¹ *Id.* at 6.

⁴² *In re United States DOE*, 63 N.R.C. 143, 146 (N.R.C. 2006) {emphasis added}

of a repository” and “ *issue a final decision* approving or disapproving the issuance of a construction authorization”⁴³ There is no question that the NWPA is geared to assure an NRC review of the DOE application on the merits.⁴⁴ Granting the *DOE motion* with prejudice will have the same effect as a denial of the license on the merits – *without the required review*.

NAR-MISC-02

IF THE NWPA DOES NOT PRECLUDE DOE FROM MOVING TO DISMISS, DOE HAS FAILED TO MEET THIS BOARD’S REQUIREMENTS FOR DISMISSAL WITH PREJUDICE.

The *DOE motion* not only attempts to circumvent the statute’s clear instructions, it also – with no factual basis⁴⁵ – seeks dismissal with prejudice to “provide finality in ending the Yucca Mountain project.”⁴⁶ DOE contends, if granted with prejudice, NRC action approving its motion will preclude DOE from ever filing another application for a repository at Yucca Mountain.

Examination of the DOE motion indicates there is no real effort to provide any justification. The motion does provide a bare statement that the science has

⁴³ 42 U.S.C. § 10134(d) {emphasis added.}

⁴⁴ See *In re United States DOE*, 69 N.R.C. 367, 464 (N.R.C. May 11, 2009) (“Congress thus envisioned a situation where, *after the Commission’s review*, the Commission could find that DOE, although the designated Applicant, would not be the designated licensee.”){emphasis added}.

⁴⁵ See note 38, *supra*.

⁴⁶ *DOE Motion* at 3.

improved during the last 20 years, but fails to cite any flaw in the license application or reference any record evidence that Yucca Mountain site will not be capable of meeting NRC licensing requirements.

Indeed, the extensive record built to date and submitted by DOE strongly suggests the proposed repository will in fact meet NRC performance standards.⁴⁷

However, even if the Board determines that neither the plain text of the NWPA nor the absence of any rationale or evidence to justify the motion standing alone precludes DOE from moving to withdraw its application, the *DOE motion* still does not meet the Board's requirements for withdrawal with prejudice.

NRC precedent indicates that dismissal with prejudice should be granted *only after the merits of the case have been evaluated and adjudicated*.⁴⁸

⁴⁷ NARUC's third contention - *NAR-MISC-03 DOE'S decision to irrevocably terminate the Yucca Mountain project is arbitrary and capricious in violation of the Administrative Procedures Act* - points out accurately that by filing the motion with no justification, no administrative record or colorable explanation included, DOE's action is the archetype of arbitrary and capricious action prohibited by the Federal Administrative Procedures Act, 5 U.S.C.A. §§ 500 *et seq.*. While the NRC may not technically have the jurisdiction to evaluate DOE's violation of the APA, as discussed, *infra*, the board's own precedent, and administrative law principles require some record basis for any NRC final decision on the merits of the Yucca Mountain application required by the NWPA. The motion to withdraw does not provide any reasoning or explanation besides the decision of the Secretary of Energy to abandon the project. The motion recognizes that the Yucca Mountain project was initiated by Congress over 20 years ago, and that scientific and engineering knowledge have advanced dramatically in that period. *DOE Motion* at 3. However, DOE does not identify any specific advance that purportedly could justify ignoring the law, much less reversing, without explanation or record, the nation's long standing nuclear waste policy, and effectively abandoning billions of dollars and decades of work invested in the Yucca Mountain facility.

⁴⁸ See *Philadelphia Electric Co.* (Fulton Generating Units 1 and 2), ALAB-657, 14 NRC at 973, 978-79 (1981) (citing *Jamison v. Miracle Mile Rambler, Inc.*, 536 F.2d 560, 564 (3d Cir. 1976); *Puerto Rico Power Authority* (North Coast Nuclear Plant, Unit 1) 14 N.R.C. 1125, 1133

Indeed, dismissal with prejudice is a severe sanction that the NRC has determined should be applied sparingly.

Puerto Rico Power Authority, at 1133, recognizes that:

(1) it is highly unusual to dispose of a proceeding on the merits, *i.e.*, *with prejudice*, when in fact the health, safety and environmental merits of the application have not been reached; (2) the effect spent in pursuing a nuclear power plant application at the same site for a second time is presumptively preceded by a judgment, entitled to some credence, that there exists a public interest need for the plant's power; and (3) the number of potentially acceptable sites for a nuclear power plant are perforce limited: they should not be eliminated from further consideration absent good and sufficient reason.

Applied to the instant case, these factors argue against granting withdrawal with prejudice: (1) neither the Board nor the NRC have yet evaluated all of the health, safety, and environmental merits of the license application; (2) the long history outlined, *supra*, of the government's efforts to find a repository, the beginning of the evaluation of Yucca Mountain in 1978, the national consensus that led to the enactment of the NWPA, and the selection of Yucca Mountain as the favored site for the nation's first geological repository lends considerable credence to the idea that the geological repository, if approved, will be in the public interests; and (3) the history of this proceeding suggests the number of potentially

(1981); “[I]t is highly unusual to dispose of a proceeding on the merits, *i.e.*, *with prejudice*, when in fact the health, safety and environmental merits of the application have not been reached;” *Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3)*, ALAB-662, 14 NRC 1128, 1135 (1982) (holding that dismissal with prejudice amounts to adjudication on the merits); *Yankee Atomic Elec. Co. (Yankee Nuclear Power Station)*, LBP-99-27, 50 NRC 45, 51 (1999) (holding that dismissal with prejudice amounts to adjudication on the merits).

acceptable sites for a geological repository are even more limited than those of a nuclear plant. Hence, *Puerto Rico Power Authority* test for withdrawal with prejudice of the application weighs heavily against granting DOE's motion.

Moreover, NRC precedent indicates that, generally, a dismissal with prejudice requires some showing of harm to either a party or the public interest in general and requires careful consideration of the circumstances, giving due regard to the legitimate interests of all parties.⁴⁹ Any conditions prescribed by a licensing board at the time of withdrawal must bear a rational relationship to the conduct and legal harm that they are meant to address.⁵⁰ In *Philadelphia Electric Company*,⁵¹ the possibility of a subsequent application to construct a nuclear facility did "not provide the requisite quantum of legal harm to warrant dismissal with prejudice."

By the same token, the only possible "harm" outstanding on the DOE motion is the

⁴⁹ See *Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1)*, ALAB-662, 14 NRC 1125, 1132, 1135 (1981); *Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2)*, ALAB-657, 14 NRC 967, 973, 978-979 (1981) (The applicant, Philadelphia Electric, sought permission to withdraw, without prejudice, its application for construction of the Fulton Station reactor. Intervenors requested that motion be granted with prejudice, citing costs incurred by the NRC and other parties since the start of the licensing proceeding, alleged adverse physical and mental health effects, as well as diminution of property values. The Licensing Board dismissed PECO's application with prejudice. However, the Appeal Board vacated the Licensing Board's decision, finding that the decision was not supported by the record and there was no showing of harm that would result from the withdrawal. 14 NRC at 979; *Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3)*, LBP-82-81, 16 NRC 1128, 1134 (1982), citing Fed.R. Civ.P. 41(a)(1), (2); *LeCompte v. Mr. Chip Inc.*, 528 F.2d 601, 603 (5th Cir. 1976), citing 5 Moore's Federal Practice, §41.05 (2d ed. 1981).

⁵⁰ *Philadelphia Electric Company*, 14 NRC at 974 (citing *LeCompte v. Mr. Chip, Inc.* 528 F.2d 601, 604 (5th Cir. 1976)).

⁵¹ *Id.* at 979.

possibility of a future docket on a renewed application for the Yucca Mountain repository, which, under the cited precedent, could not constitute sufficient harm to warrant dismissal with prejudice.

DOE's motion does not even attempt to assert that the application caused harm to any party or the public in a manner that would justify the motion to withdraw the application with prejudice. Instead their motion seeks *finality*.⁵² But granting the motion with prejudice unquestionably harms the interests of those who support the application and to the public interest codified in the NWPA in the requirement for DOE to file and the NRC to consider an application for licensing of a repository at Yucca Mountain. The Board should deny the motion to withdraw the application with prejudice because "the public interest would best be served by leaving the ... option open to the applicant should changed conditions warrant its pursuit."⁵³

DOE tries to leap-frog over this precedent by a somewhat uninspired construction of 10 C.F.R. § 2.107(a).⁵⁴ Section 2.107(a) provides that,

⁵² DOE cites four cases to support its thesis that the NRC must "defer to the judgment of policymakers in the Executive Branch." DOE Motion at 4, fn. 4. The first three do not involve either withdrawal or prejudice. All are distinguishable on the facts and the law from current circumstances.

⁵³ Id.

⁵⁴ This section might not even apply to the withdrawal of the Yucca Mountain license application. 10 C.F.R. § 2.1000 states, in pertinent part, that "The rules in this subpart [J], together with the rules in subparts C and G of this part, govern the procedure for an application for authorization to construct a high-level radioactive waste repository at a geologic repository

“Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.” DOE suggests, notwithstanding the earlier cited extensive NRC precedent pointing out the need for a merits review – and to avoid harm, that this rule, allows the presiding officer to prescribe as a term – that the motion is granted with prejudice. As discussed, *supra*, NRC precedent suggests otherwise.

IV. CONCLUSION

For the foregoing reasons, NARUC respectfully requests that the DOE Motion be denied.

DATED this 17th day of May, 2010

Signed (electronically) by JAMES BRADFORD RAMSAY

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operations area noticed under §§ 2.101(f)(8) or 2.105(a)(5)” Section 2.107 is not among the listed sections.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:
U.S. DEPARTMENT OF
ENERGY
(High Level Waste Repository)

Docket No. 63-001-HLW
ASLBP NO. 09-892-HLW-CAB04
May 17, 2010

CERTIFICATE OF SERVICE

I, James Bradford Ramsay, hereby certify that copies of the National Association of Regulatory Utility Commissioners' (NARUC) Answers to the U.S. Dept. of Energy's Motion to Withdraw with Prejudice dated May 17, 2010, have been served upon the following persons by Electronic Information Exchange.

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ADDITIONAL CERTIFICATION

Availability of Material

As required by 10 C.F.R. § 2.1012(b) and 10 C.F.R. §2.1003, the undersigned also has made a good faith effort to substantially comply with the “Availability of Material” requirements, 10 C.F.R. § 2.1003. NARUC has been in communication with Daniel J. Graser, the NRC’s Licensing and Support Network Administrator to obtain technical guidance to comply with this provision.

[Signed Electronically by James Bradford Ramsay]

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