UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Board

Before Administrative Judges:

ASLBP BOARD
09-892-HLW-CAB04
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

In the Matter of	)	
	)	
U.S. DEPARTMENT OF ENERGY	)	**Docket No. 63-001-HLW**
	)	
(High Level Waste Repository)	)	**May 17, 2010**

STATE OF NEVADA'S ANSWER TO THE DEPARTMENT OF ENERGY'S MOTION WITH RESPECT TO WITHDRAWAL OF THE LICENSE APPLICATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION AND SUMMARY. 1

II. THE NUCLEAR WASTE POLICY ACT DOES NOT PREVENT DOE FROM WITHDRAWING ITS APPLICATION. 1

A. The NWPA Does Not Unambiguously Address the Precise Question Whether DOE May Withdraw Its Application. 2

B. It Would be Unreasonable to Construe the NWPA Such that DOE Could Not Withdraw Its Application. 4

C. Conclusion. 6

III. THE LICENSING BOARD MAY NOT SECOND-GUESS DOE'S DECISION TO ASK PERMISSION TO WITHDRAW ITS APPLICATION. 7

IV. A DISMISSAL WITH PREJUDICE MUST BE GRANTED. 9

A. Governing Legal Principles. 9

B. Nevada Will be Substantially Prejudiced by an Inability to Conduct Meaningful Discovery on the LSN in a Future Licensing Proceeding. 12

C. Nevada Will be Substantially Prejudiced Because Expert Witnesses May Not be Available in a Future Licensing Proceeding. 21

D. The Pendency of a Decision on Legal Issues Supports a Withdrawal With Prejudice. 22

E. Nevada's Efforts and Expenses of Preparation for the Licensing Proceeding Support a Withdrawal With Prejudice. 23

F. DOE's Excessive Delay and Lack of Diligence in Prosecuting the Action Warrants a Withdrawal With Prejudice. 24

V. NRC INCURS NO NEPA OBLIGATIONS IN RULING ON DOE'S MOTION TO WITHDRAW. 25

VI. APART FROM THE STIPULATION THAT THE WITHDRAWAL MUST BE WITH PREJUDICE, NO OTHER TERMS OR CONDITIONS ARE APPROPRIATE. 27

CONCLUSION 27

TABLE OF AUTHORITIES

Statutes:

Atomic Energy Act 8

Nuclear Waste Policy Act of 1982, as amended,
42 U.S.C. §§ 10101, *et seq.* ..... passim

Regulations:

10 C.F.R. § 2.107 ..... 1, 3, 27

10 C.F.R. § 20.1402 27

72 Fed. Reg. 57415 (Oct. 9, 2007) 27

Cases and Administrative Decisions:

Cincinnati Gas & Electric Company (Wm. H. Zimmer Nuclear Power Station, Unit 1),
LBP-84-33, 20 NRC 765 (1984) 11

Duke Power Company (Perkins Nuclear Power Station, Units 1, 2, and 3),
LBP-82-81, 16 NRC 1128 (1982) 10

Fisher v. Puerto Rico Marine Management Inc.,
940 F.2d 1502 (11th Cir. 1991) 12

Hydro Resources, Inc.,
CLI-01-04, 53 NRC 31, 2001 NRC LEXIS 12, Slip Op. at 8 (2001) 22

Kunz v. DeFelice,
538 F.3d 667 (7th Cir. 2008) 12

Lawlor v. National Screen Service Corporation,
349 U.S. 322 (1955) 10

Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1),
CLI-90-08, 32 NRC 201 (1990) 7, 8, 25, 26

Northern States Power Company (Tyrone Energy Park, Unit 1),
CLI-80-36, 12 NRC 523 (1980) 7, 8

Pace v. Southern Express Company,
409 F.2d 331 (7th Cir. 1969) 10, 12

Pacific Gas & Electric Company (Stanislaus Nuclear Project, Unit 1),
LBP-83-02, 17 NRC 45 (1983)..... 9

Pelletier v. Zweifel,
921 F.2d 1465 (11th Cir. 1991) 10

Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2),
ALAB-657, 14 NRC 967 (1981) 10, 11, 12

Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1),
ALAB-662, 14 NRC 1125 (1981) 11

Riley v. American Family Mutual Insurance Company,
881 F.2d 368 (7th Cir. 1989) 10

Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station),
CLI-93-03, 37 NRC 135 (1993)..... 8, 26, 27

Shoreham-Wading River Central School District v. NRC,
931 F.2d 102 (D.C. Cir. 1991)..... 8, 26, 27

U.S. Department of Energy (High-Level Waste Repository, Pre-Application Matters),
LBP-04-20, 60 NRC 300 (2004)..... 25

Other Authorities:

MOORE'S FEDERAL PRACTICE, 3rd Edition 10, 12, 23

Senate Report 97-282, "National Nuclear Waste Policy Act of 1981."
(To accompany S. 1662). Nov. 30, 1981 4

On March 3, 2010, the U.S. Department of Energy (DOE) filed a motion pursuant to 10 C.F.R. § 2.107 to withdraw its application for a construction authorization for the proposed Yucca Mountain high-level radioactive waste disposal facility. For the reasons set forth below, the State of Nevada (Nevada) supports DOE's motion to withdraw with prejudice.

I. INTRODUCTION AND SUMMARY.

DOE asked the Licensing Board to dismiss its application with prejudice and to impose no additional terms of withdrawal. DOE explained among other things that the Secretary of Energy has determined that "Yucca Mountain is not a workable option for long-term disposition of these materials [spent nuclear fuel and high-level nuclear waste]" (DOE Motion at pg. 1). DOE also explained that "it does not intend ever to refile an application to construct a permanent geologic repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain" (DOE Motion at pg. 3, note 3).

Nevada submits that: (1) the Nuclear Waste Policy Act of 1982, as amended, allows DOE to withdraw its application; (2) the Licensing Board may not second-guess DOE's reasons for wanting to withdraw its application; (3) DOE's request that the license application be dismissed with prejudice must be granted; (4) NRC incurs no obligation under NEPA to consider the alternative of continuation of the licensing proceeding when it decides DOE's motion to withdraw; and (5), apart from the stipulation that the withdrawal must be with prejudice, no other terms or conditions on application withdrawal are appropriate.

II. THE NUCLEAR WASTE POLICY ACT DOES NOT PREVENT DOE FROM WITHDRAWING ITS APPLICATION.

As explained below, the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101, *et seq. (*NWPA), does not unambiguously address the precise question whether DOE may

withdraw its application, but it would be unreasonable to construe this statute such that DOE would be prohibited from doing so.

A. The NWPA Does Not Unambiguously Address the Precise Question Whether DOE May Withdraw Its Application.

There is no discussion of whether a repository license application may be withdrawn in either the text or the legislative history of the NWPA.

The statutory sequence of events associated with the possible development of a repository at Yucca Mountain began with DOE's recommendation that the Yucca Mountain site (among others) be characterized (NWPA section 112(b), 42 U.S.C. § 10132(b)) and Congress's subsequent selection of the Yucca Mountain site as the only one to be characterized (NWPA section 160, 42 U.S.C. § 10172). It continued with DOE's characterization of the Yucca Mountain site (NWPA section 113, 42 U.S.C. § 10133), DOE's recommendation of the site to the President (NWPA section 114(a), 42 U.S.C. § 10134(a)), the President's approval and recommendation of the site to the Congress (*id.*), Nevada's notice of disapproval of the site (NWPA section 115(b), 42 U.S.C. § 10135(b)), Congress's override of Nevada's notice of disapproval (NWPA section 115(c), 42 U.S.C. § 10135(c)), and DOE's submission of the application (NWPA section 114(b), 42 U.S.C. § 10134(b)). At this point in the detailed statutory development scheme one might expect to see a direction to DOE to prosecute the application to the fullest possible extent, but there is no such direction. Nor, to be fair, is there any mention of a possible withdrawal of the application.

NWPA section 114(d) addresses the NRC's role in the process. Under section 114(d), 42 U.S.C. § 10134(d) :

> The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications, except that the Commission shall issue a final decision approving or

> disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of the submission of such application, except that the Commission may extend such deadline by not more than 12 months if, not less than 30 days before such deadline, the Commission complies with the reporting requirements established in subsection (e)(2).

While the text here is not completely free of any ambiguity, the statutory direction to "consider an application . . . in accordance with the laws applicable to such applications" fairly implies that an application may be withdrawn because the "laws applicable to such applications" include the Commission's regulations, and the Commission's regulations include (and included in 1982) a provision (10 C.F.R. § 2.107) allowing applications to be withdrawn. Congress must have been knowledgeable about the "laws applicable to such applications," including 10 C.F.R. § 2.107, because it would not otherwise have known of the need to make an exception. And the fact that only one exception was made, reflecting the fact that the "laws applicable to such applications" have no deadlines for NRC merits decisions, suggests quite clearly that no other exception (such as an exception for 10 C.F.R. § 2.107) was contemplated.

The exception that the Commission "shall issue a final decision approving or disapproving the issuance of a construction authorization not later than [specified dates]" might be read on its face as *both* a time limit for any final decision on the issuance of a construction authorization *and* a direction to the Commission that it must make a final decision on the merits of the application, effectively eliminating the possibility of a withdrawal of the application. However, the language in the second "except that" clause implies that the first "except that" clause is merely a "deadline."

The NWPA legislative history is completely silent on the precise question whether an application may be withdrawn. However, there is frequent mention of the "except that" clause in section 114(d). This discussion is always confined to the reasonableness of the three or four year

limit; there is no suggestion that the clause was intended to preclude the Commission from allowing the application to be withdrawn. *See, e.g.,* Senate Report 97-282, "National Nuclear Waste Policy Act of 1981." (To accompany S. 1662). Nov. 30, 1981, at 33.

In sum, the text of the NWPA and the NWPA's legislative history do not address the precise question whether DOE may withdraw its application. However, the language in section 114(d) suggests that a withdrawal may be allowed.

B. It Would be Unreasonable to Construe the NWPA Such that DOE Could Not Withdraw Its Application.

Various provisions in the NWPA, apart from those discussed above, also suggest that DOE must be allowed to withdraw its application.

NWPA section 114(c), 42 U.S.C. § 10134(c) , provides that DOE shall submit annual status reports on the license application proceeding. These reports must include a description of "any major unresolved safety issues, and the explanation of the Secretary with respect to design and operation plans for resolving such issues." Thus, Congress explicitly recognized that "major unresolved safety issues" might arise even after the site had been characterized and approved by DOE and the President and the application had been submitted and docketed. If DOE agreed that major safety issues were incapable of any satisfactory resolution, it would be unreasonable to suppose that Congress would have expected DOE to continue to prosecute the application as if nothing had happened. Therefore, the NWPA must be construed to allow DOE to withdraw its application in at least some circumstances. The remaining question is whether such circumstances might include those associated with DOE's motion to withdraw.

It is not clear from DOE's motion why DOE concludes that "Yucca Mountain is not a workable option for long-term disposition of these materials [spent nuclear fuel and high-level nuclear waste]" (DOE Motion at pg. 1), although Nevada's admitted contentions (including legal

issue contentions) would offer ample support for such a conclusion. However, it is clear that DOE believes a "comprehensive review" of alternatives to disposition in Yucca Mountain must be undertaken, including "a comprehensive review of policies for managing the back end of the nuclear fuel cycle, including all alternatives for the storage, processing, and disposal of civilian and defense used nuclear fuel and materials derived from nuclear activities" (DOE Motion at pp. 1-2 and note 1). This statement provides a logical, relevant and therefore reasonable basis for withdrawal unless something in the NWPA suggests to the contrary. As explained below, not only is there nothing to the contrary in the NWPA, but in fact Congress addressed this very question in a closely related context and allowed DOE to take these factors into account.

As indicated above, it is apparent that DOE filed its motion because, among other things, it believed that the need for a repository, alternatives to the isolation of high-level radioactive waste and spent nuclear fuel in a repository and, by necessary implication, the time of the initial availability of any repository, must be reconsidered. NWPA section 114(f)(2), 42 U.S.C. § 10134(f)(2) , addresses such factors precisely. It provides that, with respect to NEPA, "compliance with the procedures and requirements of this Act shall be deemed adequate consideration of the need for a repository, the time of the initial availability of a repository, and all alternatives to the isolation of high-level radioactive waste and spent nuclear fuel in a repository." The statutory qualification here is highly significant – DOE need not consider these factors only when there has been "compliance with the procedures and requirements" in the NWPA. If there is not such compliance, then the clear implication is that the NWPA allows DOE to consider these factors.

NWPA section 114(b), 42 U.S.C. § 10134(b) , provides that DOE "shall submit to the Commission an application for a construction authorization for a repository at such site not later

than 90 days after the date on which the recommendation of the site designation is effective under such section [section 115]." The designation of Yucca Mountain as a repository site became effective on July 23, 2002, when the President signed S.J. Res. 34 into law. 42 U.S.C. § 10135 *note*. Thus the statutory deadline for DOE to submit its application was October 21, 2002. No application was filed on or before this date. In fact, DOE did not submit its application until June 3, 2008, missing the statutory deadline by an astonishing 64 months. Clearly, DOE has not complied with the "procedures and requirements" of the NWPA and, as a result, "the need for a repository, the time of the initial availability of a repository, and all alternatives to the isolation of high-level radioactive waste and spent nuclear fuel in a repository" are all factors that DOE may now consider under NEPA.

To be sure, NWPA section 114(f) addresses factors to be considered under NEPA, not factors to be considered in deciding whether an application may be withdrawn under the NWPA. Nevertheless, this is a case where Congressional silence is deafening. If Congress had intended to preclude DOE from considering the need for a repository, the time of the initial availability of a repository, and alternatives to geologic disposal under the NWPA, after allowing these same factors to be considered under NEPA, surely it would have said so explicitly.

C. Conclusion.

The NWPA and its legislative history do not address the precise question whether DOE may withdraw its application. However, simple common sense indicates that DOE must be allowed to withdraw its application in some circumstances, and it would be unreasonable to read the NWPA as prohibiting DOE from withdrawing for the reasons stated in its motion.

III. THE LICENSING BOARD MAY NOT SECOND-GUESS DOE'S DECISION TO ASK PERMISSION TO WITHDRAW ITS APPLICATION.

In the discussion above, Nevada argued that the NWPA allows DOE to withdraw its application for the reasons stated in its motion. The question addressed here is whether, in addition to deciding whether the NWPA allows DOE to withdraw, and whether DOE's stated reasons for withdrawal are permissible ones under the NWPA, the Commission should also address whether DOE's stated reasons are arbitrary or persuasive in light of the history of the Yucca Mountain Project, prior DOE positions, or other considerations. As explained below, the answer to this question is no.

It is an axiom of NRC jurisprudence that the NRC has no nuclear promotional function. Accordingly, the Commission held in *Northern States Power Company (Tyrone Energy Park, Unit 1)*, CLI-80-36, 12 NRC 523, *7 (1980) that:

> Even if deferral of the revocation [of the NRC construction permit] could in some way encourage revival of the project, the NRC cannot base its actions upon such a promotional rationale. We need not belabor the point that the NRC is a licensing and regulatory agency, entrusted with the public health and safety and the protection of the environment. Whether or not to pursue a particular nuclear power project is a decision left to the licensees, and to other government agencies having a proper interest in power supply and electric rates. The NRC cannot order that a plant be built. Thus, it cannot fashion relief which would in any way redress the harm to Dakota ratepayers caused by the cancellation of the Tyrone project.

Tyrone Energy Park stands for the proposition that the NRC may not second-guess a licensee's decision not to complete a plant the NRC allowed to be constructed.

In addition to *Tyrone Energy Park,* other authoritative Commission case law supports the proposition that the Commission will defer to an applicant's decision not to pursue licensing. Perhaps the most noteworthy is *Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1)*, CLI-90-08, 32 NRC 201 (1990). In *Shoreham* the licensee and the State of New York formally agreed that the Shoreham nuclear power plant would not be operated and, at the

licensee's request, the NRC amended the operating license to prohibit operation without Commission approval and approved changes in the physical security and emergency plans that were incompatible with actual operation. Proponents of continued plant operation argued that these actions should not have been taken without an NRC NEPA review that included consideration of resumed operation as an environmentally beneficial alternative. The Commission disagreed. It held that a decision not to operate a nuclear facility is not a Commission action, pointing out that "nowhere in our regulations is it contemplated that the NRC would need to approve of a licensee's decision that a plant should not be operated" and that "LILCO [the licensee] is legally entitled under the Atomic Energy Act and our regulations to make, without any NRC approval, an irrevocable decision not to operate Shoreham." 32 NRC at *12-*13. Because resumed operation was only an alternative to a decision not to operate, but the decision not to operate was not a Commission action, the Commission reasoned that resumed operation was not an alternative to any Commission action that required consideration under NEPA. *Id.* The Commission's decision in CLI-90-08 was affirmed on reconsideration in CLI-91-02, 33 NRC 61 (1991), and a related petition for review was denied in *Shoreham-Wading River Central School District v. NRC*, 931 F.2d 102 (D.C. Cir. 1991). *Shoreham* was followed in *Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, CLI-93-03, 37 NRC 135 (1993).

If, as the Commission held in *Shoreham, Rancho Seco,* and *Tyrone Energy Park*, the Commission cannot second-guess a licensee's decision to abandon a nuclear facility licensed for construction or operation, it logically follows that the Commission also cannot second-guess an applicant's decision to withdraw a license application. Indeed, at least one Licensing Board has so held. In an antitrust case, *Pacific Gas & Electric Company (Stanislaus Nuclear Project, Unit*

1), LBP-83-02, 17 NRC 45, *16 (1983) the Licensing Board stated that "[t]he decision of PG&E to withdraw its application is a business judgment. The law on withdrawal does not require a determination of whether its decision is sound." Accordingly, the application was withdrawn and the proceeding was dismissed.

Nevada has not uncovered a single case where the Commission or any of its Licensing Boards have prohibited an applicant from withdrawing its license application. We recognize that none of these cases involved any question whether federal law allowed the licensee to abandon the project. But, as explained in II above, federal law applicable here (the NWPA) does not prohibit DOE from withdrawing, and the reasons DOE gave for withdrawing are permissible ones under the law. The Licensing Board should so hold. To venture further and to second-guess DOE's decision, examining for example whether DOE's stated reasons are persuasive, would assume a development or promotional role that is contrary to NRC's licensing and regulatory charter. Nothing in the NWPA gives the NRC any development or promotional role. Instead, as relevant here, Subtitle A simply requires the NRC to "consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications," subject only to statutory provisions relating to final decision deadlines and repository volume (NWPA section 114 (d), 42 U.S.C. §10134 (d)).

IV. A DISMISSAL WITH PREJUDICE MUST BE GRANTED.

A. Governing Legal Principles.

As explained below, a withdrawal with prejudice does not presume any prior Commission decision on the merits of the application, and is warranted when a party opposing the application would suffer substantial prejudice otherwise.

1. A Commission decision granting DOE's motion to withdraw its application with prejudice is equivalent to federal court order dismissing a case with prejudice. Such a dismissal

gives rise to claim preclusion (*res judicata*), which means that the plaintiff may not re-file the same cause of action. *See Riley v. American Family Mutual Insurance Company*, 881 F.2d 368, 370-73 (7th Cir. 1989); MOORE'S FEDERAL PRACTICE, 3rd Edition at ¶ 41.40 [9][f]. In an NRC context, a withdrawal with prejudice means that the application may not be re-filed.

However, a dismissal with prejudice does not give rise to any issue preclusion (*collateral estoppel*) because there has been no adjudication of the merits. *See Lawlor v. National Screen Service Corporation*, 349 U.S. 322 (1955); *Pelletier v. Zweifel,* 921 F.2d 1465, 1501 (11th Cir. 1991) ("The preclusive effect of a dismissal with prejudice, an unlitigated matter, thus is examined under the requirements for claim preclusion. Since such a judgment is unaccompanied by findings, it does not, however, collaterally estop the plaintiff from raising issues that might have been litigated if the case had proceeded to trial").

Thus, the suggestion (not holding) in cases such as *Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2)*, ALAB-657, 14 NRC 967 (1981), that a withdrawal of the application and a consequent dismissal of the proceeding with prejudice normally means that there was some merits disposition cannot be taken literally for otherwise, contrary to authoritative federal case law, a dismissal with prejudice would give rise to issue preclusion. Instead, *Fulton* and similar cases should be read as suggesting, consistent with federal case law, that a withdrawal and dismissal with prejudice is warranted when (but not only when) the opposing party was about to prevail on the merits. *See Pace v. Southern Express Company*, 409 F.2d 331, 334 (7th Cir. 1969); *Duke Power Company (Perkins Nuclear Power Station, Units 1, 2, and 3)*, LBP-82-81, 16 NRC 1128, 1135 (1982). The application of this principle to the case at hand is discussed further below.

2. There is a plethora of Commission case law applicable to the circumstance where an applicant seeks to withdraw or dismiss its application *without* prejudice and a party to the proceeding insists that the withdrawal must be *with* prejudice. The venerable leading cases are *Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1)*, ALAB-662, 14 NRC 1125 (1981), and *Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2)*, ALAB-657, 14 NRC 967 (1981). These cases hold that withdrawal (or dismissal) with prejudice is "a particularly harsh and punitive term imposed upon withdrawal," the warrant for which must be found in a harm "of comparable magnitude." *Fulton* at *10.

However, these cases do not strictly apply where, as here, the *applicant* wants to withdraw with prejudice. Here a withdrawal and consequent dismissal with prejudice is not a "harsh and punitive term imposed upon withdrawal," as in the cited cases, but the very outcome desired by the applicant, the person most directly affected. Moreover, the criterion developed in the two cited cases, that a withdrawal with prejudice requires a showing of some harm "of comparable magnitude," cannot logically apply here. When an applicant asks for a withdrawal and dismissal with prejudice, it makes no sense to ask whether there is any harm [to other parties] "of comparable magnitude" to that suffered by the applicant because the applicant is not harmed at all by an outcome it requested.

In *Cincinnati Gas & Electric Company (Wm. H. Zimmer Nuclear Power Station, Unit 1*), LBP-84-33, 20 NRC 765 (1984), the Licensing Board refused to allow a withdrawal with prejudice notwithstanding that all parties (including the applicant) agreed with such an outcome because "[o]rdinarily such a condition would only be imposed if substantial prejudice would otherwise result to a party who opposed the application" and no such showing was made. *Id* at *5. The *Zimmer* Board based its standard on the Appeal Board's decisions in *North Coast* and

Fulton. While, as discussed above, these two cases are not strictly applicable when an applicant seeks (or consents to) a withdrawal with prejudice, nevertheless the standard applied in Zimmer (a withdrawal with prejudice is warranted when substantial prejudice would otherwise result to a party who opposed the application) finds strong support in federal case law and is the correct one. *See Kunz v. DeFelice*, 538 F.3d 667, 677 (7th Cir. 2008); *Pace v. Southern Express Company, supra.*

Kuntz and Pace enumerated various factors that should be evaluated in deciding whether a dismissal should be with prejudice, including "[t]he defendant's effort and expense of preparation for trial," "excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action," and "the fact that a motion for summary judgment has been filed by the defendant." *Kunz v. DeFelice*, 538 F.3d 667, 677-678 (7th Cir. 2008), citing *Pace v. Southern Express Company,* 409 F.2d 331, 334 (7th Cir. 1969). Other courts have considered an inability to conduct meaningful discovery if the case is re-filed in the future, MOORE'S FEDERAL PRACTICE, 3rd Edition, ¶ 40.40[6], and the potential unavailability of witnesses in a second suit. *Fisher v. Puerto Rico Marine Management Inc*., 940 F.2d 1502, 1503 (11th Cir. 1991). These legal principles are applied below.

B. Nevada Will be Substantially Prejudiced by an Inability to Conduct Meaningful Discovery on the LSN in a Future Licensing Proceeding.

1. DOE's motion for a dismissal with prejudice flows logically from the fact that it will not *ever* "refile an application to construct a permanent geologic repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain" (DOE motion at pg. 3, note 3). An NRC decision to the contrary –that the withdrawal and dismissal must be *without* prejudice— would mean that DOE could re-file the application at any time in the future. In theory, this could be one year from now, five years from now, or a century from now. As indicated above, the

federal courts consider that an inability to conduct meaningful discovery in a future case is an important factor in deciding whether a dismissal should be with prejudice.

As explained in detail below, It has been clear, since at least the time of the LSN Administrator's (LSNA's) articulation of his concerns on December 17, 2009 that in order for the entirety of DOE's LSN data collection to be preserved in a manner that is accessible and retrievable by other parties, beyond the termination of this licensing proceeding, it would be necessary for DOE to aggregate its 36 million single-page images into document-level entities, to convert them to PDF files, and to store them in a method (such as CDs) that would make them available for future access by the parties or potential parties. DOE's responses (1) at the January 27, 2010 Case Management Conference, (2) in its February 4, 2010 Answers to CAB04 inquiries, and (3) in its February 19, 2010 Status Report establish that DOE has no intention of maintaining its LSN data collection one day beyond the end of the current licensing proceeding and completion of judicial review.

Instead, DOE instead intends to allow its LSN functionality and computer codes to fall into disuse and become unusable and irrelevant. DOE does not intend to aggregate its 36 million single-page images of LSN data into meaningful document-level entities, or to convert its current data contained on a variety of difficult-to-access formats into accessible, retrievable PDF files for its LSN collection. Instead, DOE intends to abandon its responsibility for the maintenance of its LSN collection and turn over only a portion of that collection to a different federal agency for disposition, leaving a large part of its LSN Documentary Material to become almost immediately inaccessible and unusable. Furthermore, the federal agency to which DOE will turn over title to only a fraction of its LSN data will, in its own discretion, make decisions with respect to the

retention of those documents, the formatting of those documents, and the retrievability or accessibility of those documents to future users.

2. On December 17, 2009, the LSNA, Mr. Dan Graser, submitted a Memorandum to CAB04 in which he articulated adverse impacts which he believed would be visited upon the LSN should DOE decide to terminate its involvement in the LSN. On December 22, 2009, CAB04 issued an order concerning the LSNA's Memorandum, in which it invited the parties to comment thereon, no later than January 21, 2010. The Board commented that it was "especially interested in DOE's position with respect to the LSNA's conclusions." However, while a number of parties submitted comments in response to the CAB's December 22nd Order, DOE did not.

3. On January 27, 2010, CAB04 held a case management conference at the NRC's Las Vegas Hearing Facility, in order to address with the parties the issues raised in the LSNA's December 17th Memorandum. At the conference, CAB04 discussed with the parties the concerns expressed by the LSNA in his December 17th Memorandum and inquired of each party if they were willing to preserve their LSN document collections in a way that would be calculated to survive the termination of the LSN portal as an operating entity. In the course of its conference with the parties, the CAB04 specifically asked for and received the assurance of every party, except DOE, that in the event of the termination of the LSN portal, each would be willing to preserve their collection of documents now in their LSN collection in searchable, retrievable PDF files and to archive those documents on an appropriate number of CDs, and make those CDs available to whomever may be designated by the CAB04 in a suitable data format and transfer media. While all the other parties acceded to this direct request for their commitment by CAB04, DOE was noticeably alone in declining to so commit.

DOE began (Tr. 372, *et seq*.) by describing the component parts of its LSN data collection, which comprise four separate categories of documents: (1) official Office of Civilian Radioactive Waste Management (OCRWM) project records from DOE's Records Processing Center (RPC); (2) emails and email attachments; (3) paper documents (typically captured from individual office or desk files of DOE or DOE contractor personnel); and (4) e-files (again, typically captured in electronic form from computers or laptops of DOE or DOE contractor personnel).

The CAB04 inquiry commenced with respect to the first category of documents, project records from DOE's Record Information Center (RIS): "Is there any reason why DOE cannot archive that subset in PDF format?" DOE's response: "Technologically, I suppose it can be done. The reason we can't commit to that, Your Honor, is the vast number of documents involved . . . without an allocation in the budget to undertake that conversion, I don't think we can commit to that" (Tr. 374). DOE went on to concede that the second category of documents (emails and attachments) were likewise not in PDF files (Tr. 375). Again, with respect to the third (paper copies) and fourth (electronic images) categories of LSN data, DOE conceded they were likewise not in PDF files (Tr. 376).

The CAB04 discussed with DOE the critical "functionality" of its LSN data collection, under whose structure and technology a search on DOE's LSN collection results in a responsive acquisition of single-page images, with those images converted to a single .PDF document for delivery to the searcher. CAB04 focused on the fact that this unique functionality is based upon a complex set of technological media involving a "custom code lengthy computer program" which effects the retrieval of single-page images and their conversion to aggregated PDF documents (Tr. 379-80). The CAB04 discussed the inevitable obsolescence of the technology

created by DOE years ago to effect this result, as well as the loss of personnel who were involved in its creation and suggested that "archiving that strikes me as being roughly akin to tossing it into the waste basket because of the almost intolerable number of things that can go wrong when you put it back together" (Tr. 380), and later suggesting that archiving the documents without access "unless I'm wildly mistaken, is essentially like lighting a match to it" (Tr. 381), adding "If it can't be retrieved, what good does it do to archive it" (*id*). In response to this candid expression of concern, DOE's response was equally candid and is critical to the ultimate fate of the LSN as a usable system: "Your Honor is correct, it would, at least at present, be more feasible or better to maintain, not to go in a lights-out mode with the server, but to keep it up and running, if the objective were to preserve the ability to re-access those documents at some point in the future" (Tr. 381).

Before concluding the Case Management Conference, the CAB04 gave DOE a "homework" assignment, requiring DOE to articulate its position with respect to its continued maintenance of its LSN document collection in the event of a hypothetical termination of the licensing proceeding, with such response by DOE due February 4, 2010, subsequent to the release of the Administration's budget recommendation anticipated to be public February 1, 2010. (Tr. 383). In so requiring, the CAB04 specifically stated it would be interested in knowing:

- whether DOE is preparing an archiving plan for its LSN collection in a format that is readily retrievable, and
- what the format of the archived documents would be for the documents in its LSN collection that are not currently in PDF format.

Given the concerns regarding the potential loss of the LSN portal and its now-incorporated millions of documents, should it be deactivated or decommissioned, CAB04

cautioned at the close of the hearing: "It would seem only prudent that these collections be archived in a readily accessible format, so because none of us do know the future and for that very reason contingency plans for that need to take place" (Tr. 384).

4. DOE timely filed some of its Answers to the Board's questions at the January 27, 2010 Case Management Conference on February 4, 2010. DOE's Answers made clear that it has no intention of preserving its LSN data collection beyond the termination of the licensing proceeding. And since it had announced on February 1, 2010, in a filing with CAB04, its intention to withdraw its License Application with prejudice, its limited commitment to "comply with LSN requirements during the remainder of the licensing proceeding," constituted a very short-term commitment indeed. (The Department of Energy's Answers to the Board's Questions at the January 27. 2010 Case Management Conference, 02/04/2010 at 2). In its February 4th Answers, DOE went on to state that it would archive its "project records thereafter in compliance with federal requirements." (*Id*.). This statement is important, for two different reasons: (1) it only talks about archiving DOE's "project records" which is a far cry from preserving *all* the data in its LSN collection, and a far cry from preserving all the 36 million pages of information which DOE had identified as LSN "Documentary Material" while certifying its compliance with LSN requirements throughout this licensing proceeding; and (2) archiving part of its LSN collection "in compliance with federal requirements" again says nothing about archiving even *that* fraction of its LSN collection in a way which is searchable or accessible or retrievable by other parties in the future.

Addressing the issue of the format in which it would archive a fraction of its LSN collection, DOE ignored the CAB04 advice that it would be "only prudent that these collections be archived in a readily accessible format." Instead, acknowledging that some 87 percent of its

collection was .TIFF format (*Id*. at 3), and declining to commit to their being preserved in a "readily retrievable format," DOE stated instead that "DOE will work with NARA [National Archives and Records Administration] to ensure that the format of its archived LSN records" will satisfy NARA (not NRC). (*Id*. at 4). Going on to address exactly what format that might be, DOE recites its understanding that the file format of its current LSN collection "would be acceptable to NARA" (*Id*.), thus foreclosing the notion that it will convert its documents to PDF files as urged by the LSNA in his December 17th Memorandum, or the CAB04 in its January 27 Case Management Conference.

Finally, on the issue of whether DOE would aggregate its 36 million single-page images into document-level entities, DOE noted only that it was "investigating" this option. (*Id*.). DOE attached to its February 4th Answers an Exhibit A, which calculated the numbers of documents in each of the four categories it had earlier described (OCRWM project records, emails and attachments, paper files, and electronic files), detailing the number of pages in each category and their format, and concluding that almost *none* of the documents are in PDF files (urged as necessary by the LSNA and CAB04), but are rather in TIFF and JPEG formats. DOE also attached an Exhibit B to its February 4th Answers, an excerpt from the Administration's FY2011 budget recommendation which stated, among other things, that "[a]ll funding for Project has been eliminated due to the withdrawal of the License Application" (Exhibit B at 184); and "[t]he Administration has determined that developing the Yucca Mountain repository is not a workable option and that the Nation needs a different solution for nuclear waste disposal. The Office of Civilian Radioactive Waste Management will be terminated" (*Id*. at 194).

DOE concluded by promising to supplement its Answers and its archiving plan with respect to its LSN data collection by February 19, 2010.

5. DOE's February 19, 2010 filing, supplementing its February 4th Answers, makes clear that DOE is abandoning any responsibility to maintain or preserve its LSN data collection in accessible, searchable form after the termination of the licensing proceeding. While promising that it will keep its LSN participant website compliant and accessible via the NRC's LSN portal until there is a final non-appealable order dismissing the License Application and terminating these proceedings, DOE likewise makes clear that it will effectively terminate any responsibility on its part for preserving its relevant documents at that time and will abandon and allow to disappear any and all LSN Documentary Material, except for that portion of its LSN data collection which DOE will simply "punt" to a different federal agency (NARA) for disposition or retention entirely at the whim of that agency.

In that regard, DOE asserts it will file with NARA a Standard Form 115 (Request for Records Disposition Authority) (February 19, 2010 DOE Status Report at 2). DOE concedes, however, that "[a]lthough NARA will consider DOE's disposition recommendation" the outcome is entirely up to NARA. (*Id*.) DOE concedes it will be left up to this different federal agency how long documents may be retained and whether any of them should be deemed "permanent" or "temporary." (*Id*. at 3). DOE intends to transfer legal title to its permanent records to NARA, but claims it "will work with" NARA to determine an appropriate retention schedule. (*Id*.) Again, this is DOE-speak for a total abdication of responsibility with respect to its documents and is no commitment at all to ensuring the future availability of its LSN Documentary Material in accessible form, either to the parties to the current proceeding or to the public in general.

On the subject of formatting, DOE defers to "NARA record formatting requirements" – explaining that if NARA deems the records should be retained "temporarily," then the documents DOE will turn over are "acceptable in their current format." (*Id*.) As observed and

acknowledged by DOE earlier, this format is not PDF. DOE goes on to admit that "(1) NARA would not require the DOE LSN collection to be converted to PDF format, and (2) NARA would not require DOE to restructure its LSN collection to archive each document in that collection as a single file, rather than being stored page by page in separate files." (*Id*. at 3-4) DOE concludes its February 19th filing by claiming "DOE also will work with NARA to ensure that the disposition of DOE's LSN collection complies with any applicable NARA requirements regarding retrievability of documents" (*Id*. at 4), without specifying what those might be.

6. DOE's March 3, 2010 Motion to Withdraw adds nothing of substance to DOE's prior positions. DOE's Motion embraces its other filings regarding LSN documentation, including its answers to questions posed at the January 27 case management hearing.

7. One can only conclude after reviewing all that was said and written that DOE's position embodies precisely the fears expressed by the LSNA in his December 17th Memorandum. DOE rejects the CAB04 request (agreed to by every other party to this proceeding on the record at the January 27th hearing) to preserve their LSN document collections in Portable Document Format (PDF) files on CDs (with copies made available to whomever the CAB04 designates in a suitable data format and transfer media). In the end, DOE only pays lip service to the preservation of a *portion* of its LSN collection and not the rest; and even as to that portion, DOE declines to commit to:

- aggregate its single page images (now on the LSN and numbering some 36 million) into meaningful documents (a process heretofore accomplished by the complex LSN servers, software, and codes, but which will be abandoned according to DOE);
- convert its files into accessible, searchable PDF files;
- place its documents electronically on CDs, and retain them, and make copies of such CDs available to the LSNA, the NRC, and the other parties in a suitable data format and transfer media.

In his December 17, 2009 Memorandum, the LSNA articulated several detriments which he believed would result as a direct consequence, should DOE decide to terminate its participation in the LSN. These detriments anticipated by the LSNA included the following:

- 98.9 percent of the LSN collection belonging to DOE and would become unavailable to the other parties and the public;
- the DOE document collection could not operate in a "lights-out" mode, and any effort by DOE to do so for an extended period of time would render the DOE collection inaccessible;
- the LSN portal itself operated by the LSNA would likely take five years and multiple millions of dollars to resurrect if it were decommissioned;
- the DOE document collection would be extremely difficult to salvage if it were ever decommissioned, due to the obsolescence of DOE's original software and the inevitable introduction of new personnel unfamiliar with DOE's current LSN operating environment at some future date; and
- the LSN collection of DOE could not be preserved in the event of the termination of its involvement in, and maintenance of, its presence in the LSN, unless DOE committed to aggregate its current page-level data images back into document-level entities and convert the document-level entities to text-searchable PDF files.

8. Clearly, DOE's plans will cripple the ability of Nevada and any of the other potential parties in any future proceeding involving Yucca Mountain to conduct meaningful discovery. This would severely prejudice those parties' ability to participate in the event that this or any similar project was ever proposed for Yucca Mountain in the future. This factor alone should lead to an order accepting DOE's withdrawal with prejudice.

C. Nevada Will be Substantially Prejudiced Because Expert Witnesses May Not be Available in a Future Licensing Proceeding.

As indicated above, the potential unavailability of witnesses in a second proceeding would also cause substantial prejudice to Nevada and is another factor supporting a withdrawal with prejudice. Nevada's sustained and concerted effort to find expert witnesses in the key

scientific disciplines so that DOE's application could be reviewed, technical contentions could be filed, and experts would be available for discovery and testimony are described in detail in the affidavit of Mr. Bruce Breslow, the Executive Director of the Nevada Agency for Nuclear Projects (Exhibit 1) at paragraphs 5, 23-26. Because of business and other conflicts, Nevada had to look world-wide for experts. Expert and consulting contracts cannot be kept in force for some indefinite period and, if the application is resubmitted, Nevada will find it almost impossible to put its scientific team together again (Exhibit 1 at ¶ ¶ 23-25).

In another, less complex licensing proceedings, the Commission held that "the amount and complexity of information the intervenors and their experts reviewed . . . were formidable. To compel them now to wait years without knowing when or if there will be any further hearing imposes an unacceptable and unfair burden." *Hydro Resources, Inc*., CLI-01-04, 53 NRC 31, 2001 NRC LEXIS 12, Slip Op. at 8 (2001). The burden on Nevada here would be even greater.

D. The Pendency of a Decision on Legal Issues Supports a Withdrawal With Prejudice.

Eleven legal issues were fully briefed and argued and a decision on them was imminent when DOE moved to suspend the proceeding because of its intention to withdraw the application. A decision adverse to DOE on some of these legal issues, particularly issues 8 (whether the defense in depth principle requires a drip shield neutralization analysis) and 10 (the propriety of DOE's proposal to install drip shields only after the wastes are emplaced) would strike at the heart of DOE's post-closure safety case, and would likely pave the way for a summary rejection of the application unless DOE reevaluates its safety case and is able to make substantial changes to its application. Thus, the pending briefs and arguments over legal issues are the functional equivalent of motions and arguments for partial summary judgment.

As indicated above, in the federal courts the fact that a motion for summary judgment had been filed by the defendant when the plaintiff filed its motion for dismissal is another factor supporting a dismissal with prejudice. In fact, "a dismissal to avoid the effect of other unfavorable, but not necessarily dispositive rulings by the court may constitute legal prejudice" (MOORE'S FEDERAL PRACTICE, 3rd Edition, ¶ 41.40[7][b][v]). Therefore, the pendency and imminence of a ruling on the 11 legal issues is another factor supporting a withdrawal with prejudice.

E. Nevada's Efforts and Expenses of Preparation for the Licensing Proceeding Support a Withdrawal With Prejudice.

As indicated above, another factor the federal courts consider in deciding whether a withdrawal should be with prejudice is the defendant's efforts and expenses of trial preparation.

DOE's Motion comes almost one and one half years after publication of the Notice of Hearing, and almost six years after DOE first tendered its LSN certification, effectively opening the discovery process. When this proceeding was suspended depositions were just scheduled, but the scheduling was preceded by years of document discovery, especially production of documents on the LSN. Moreover, unlike in the federal courts where notice pleading is the norm, NRC's rules require that contentions be filed at the very beginning of the proceeding, and each technical contention must be accompanied by information establishing a genuine dispute. For Nevada, this meant that Nevada's expert team had to plan years in advance, keep up-to-date on DOE's application plans and, when the application was finally filed after years of delay, engage in a time-consuming and expensive review of the sixteen-volume application. Nevada eventually filed over 200 contentions, all of them supported by the equivalent of an expert report. Nevada also needed to review no less than six draft or final DOE environmental impact statements, and examine the basis for two DOE LSN certifications, as well as comply with its

own LSN responsibilities. In addition, Nevada sponsored scientific research on key subjects such as metals corrosion and volcanism.

These efforts are described in more detail in Exhibit 1 at ¶¶ 14-15, 20-21, 26-41. As required by law and directed by the Nevada Legislature, Nevada expended many millions of dollars of its own funds to oversee the Yucca Mountain project and to prepare for and participate in this licensing proceeding and closely related judicial challenges (for example successful challenges to EPA's and NRC's Yucca Mountain licensing rules). This is *in addition to* the much larger sums Nevada received in federal oversight funding to oversee DOE's scientific work, conduct its own scientific investigations and research, and participate in the licensing proceeding (Exhibit 1 at ¶¶16-18).

This is probably the only legal proceeding in the history of the United States where efforts and expenditures of this magnitude were required by an opposing party just to advance to the deposition discovery phase. These remarkable and probably unprecedented efforts and expenses of trial preparation warrant a withdrawal with prejudice.

F. DOE's Excessive Delay and Lack of Diligence in Prosecuting the Action Warrants a Withdrawal With Prejudice.

Finally, also as indicated above, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action is another factor the federal courts consider in deciding whether dismissal should be with prejudice.

NWPA section 114 (b) (42 U.S.C. § 10134 (b)) required DOE to file its license application within 90 days after the President's site recommendation became effective, or by October 21, 2002. October 21, 2002 came, went, and receded into history without any application being filed. DOE also failed to plan adequately to meet its LSN requirements, and as a result its initial LSN certification was struck and its revised plan (one of many) to file the

application in late 2004 was aborted. *See U.S. Department of Energy (High-Level Waste Repository, Pre-Application Matters)*, LBP-04-20, 60 NRC 300 (2004). The application was finally tendered on June 3, 2008, almost six years after the statutory deadline, and docketed three months later, on September 8, 2008. During the period from October 21, 2002, when the application was supposed to be filed, and June 3, 2008, when it as finally tendered, Nevada had to maintain its legal and expert team so that it would be prepared to contest the application when it was filed. This would have been unnecessary had DOE met the statutory deadline.

DOE's Yucca Mountain Project stumbled for years without adequate management and supervision. NEV-SAFETY-001, which was admitted by the Board but rejected by the Commission on purely legal grounds, details numerous examples of DOE management deficiencies, including a policy of giving NRC only the "minimum information" (e-mail message Rickertsen to Swift, August 1, 2002, DEN001231578 at 1) and the idea that "proof that will get us through the regulatory hoops" need not be "rigorous" (Rickertsen e-mail string, September 3, 1996, DEN001222278 at 1).

DOE's excessive delay and lack of diligence in prosecuting the action warrants a withdrawal with prejudice.

V. NRC INCURS NO NEPA OBLIGATIONS IN RULING ON DOE'S MOTION TO WITHDRAW.

As explained below, the NRC will not incur any NEPA obligation to evaluate the alternative of a continuation of the Yucca Mountain licensing proceeding in ruling on DOE's Motion.

This NEPA legal question was addressed in a case discussed above, *Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1)*, CLI-90-08, 32 NRC 201 (1990). To repeat, in *Shoreham* the licensee and the State of New York formally agreed that the Shoreham

nuclear power plant would not be operated and, at the licensee's request, the NRC amended the operating license to prohibit operation without Commission approval and approved changes in the physical security and emergency plans that were incompatible with actual operation. Proponents of continued plant operation argued that these actions should not have been taken without an NRC NEPA review that included consideration of resumed operation as an environmentally beneficial alternative. The Commission disagreed. It held that a decision not to operate a nuclear facility is not a Commission action, pointing out that "nowhere in our regulations is it contemplated that the NRC would need to approve of a licensee's decision that a plant should not be operated" and that "LILCO [the licensee] is legally entitled under the Atomic Energy Act and our regulations to make, without any NRC approval, an irrevocable decision not to operate Shoreham." 32 NRC at *12-*13. Because resumed operation was only an alternative to a decision not to operate, but the decision not to operate was not a Commission action, the Commission reasoned that resumed operation was not an alternative to any Commission action that required consideration under NEPA. *Id.* The Commission ultimately concluded that "the NRC Staff need not file an EA or an EIS reviewing and analyzing 'resumed operation' of Shoreham as a nuclear power plant as an alternative under NEPA." *Id* at *18.

The Commission's decision in CLI-90-08 was affirmed on reconsideration in CLI-91-02, 33 NRC 61 (1991), and a related petition for review was denied in *Shoreham-Wading River Central School District v. NRC*, 931 F.2d 102 (D.C. Cir. 1991). *Shoreham* was followed in *Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, CLI-93-03, 37 NRC 135 (1993).

If the NRC had no NEPA obligation to consider continued operation as an alternative in *Shoreham* and *Rancho Seco*, it follows for the same reasons that it has no obligation here to consider continuation of the Yucca Mountain licensing proceeding as a NEPA alternative.

VI. APART FROM THE STIPULATION THAT THE WITHDRAWAL MUST BE WITH PREJUDICE, NO OTHER TERMS OR CONDITIONS ARE APPROPRIATE.

Pursuant to 10 C.F.R. § 2.107, the Commission may impose terms on a license withdrawal. Here, apart from stipulating that the withdrawal and dismissal must be with prejudice, no additional terms are necessary or appropriate.

In a typical application withdrawal, additional terms and conditions would relate to radiological site remediation. However, as far as Nevada is aware, no radioactive materials subject to NRC jurisdiction remain on (or under) the Yucca Mountain site. Therefore, even if NRC's regulatory authority over DOE were as expansive as its authority over commercial entities, there would be no basis for the NRC to impose terms and conditions related to site remediation. While DOE will have some non-radiological remediation duties after the Project is ended, enforcing these duties falls outside of the Commission's jurisdiction. *See* 10 C.F.R. § 20.1402; 72 Fed. Reg. 57415, 57420 (Oct. 9, 2007) ("the NRC does not possess statutory authority to regulate activities that do not have an impact upon radiological health and safety or common defense and security").

CONCLUSION

DOE's Motion to Withdraw with prejudice should be granted.

Respectfully submitted,

(*signed electronically*)
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Dated: May 17, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Atomic Safety and Licensing Board
Before Administrative Judges:

ASLBP BOARD
09-892-HLW-CAB04
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

In the Matter of	**)**	
	)	
U.S. DEPARTMENT OF ENERGY	**)**	**Docket No. 63-001-HLW**
	)	
(High Level Waste Repository)	**)**	**May 17, 2010**

AFFIDAVIT OF BRUCE BRESLOW

I, Bruce Breslow, the undersigned affiant, do hereby swear that the following matters are true and correct based on my personal knowledge:

1. I am the Executive Director of the Nevada Agency for Nuclear Projects ("Agency"), the Agency vested by state law to carry out the duties and responsibilities imposed on the State of Nevada ("Nevada"), by the Nuclear Waste Policy Act ("NWPA"), as amended. 42 U.S.C. 10101, *et seq*. I have been the Executive Director of the Agency since January 2009.

2. The primary responsibility of the Agency is to oversee and evaluate the U.S. Department of Energy's ("DOE's") programs (a) to characterize or otherwise study the proposed Yucca Mountain site in southern Nevada for the purpose of assessing its suitability as a repository for high-level nuclear waste ("Yucca Mountain Project"), (b) to apply for all necessary licenses for the Yucca Mountain Project, and (c) if the Yucca Mountain Project is licensed, to construct and operate it as a repository for the disposal of high-level radioactive waste.

3. I hire and supervise consultants and scientists to assist the Agency and oversee DOE's evaluation of the Yucca Mountain site. My position also involves regularly tracking and

evaluating the Yucca Mountain Project. That is the basis of my personal knowledge of the matters stated in this Affidavit. The purpose of my Affidavit is to articulate in part the vast investment of effort and expenditures by Nevada over the last 25 years in overseeing, analyzing and critiquing DOE's Yucca Mountain Project, detailing the creation of and work of Nevada's world class licensing team and identifying the irrevocable, severe harm and loss of that investment which would result to Nevada if this proceeding were dismissed without prejudice, instead of **with** prejudice.

Affidavit Facts

4. Dismissal **without prejudice** (leaving open the possibility of a new LA at some indefinite time in the future) would be extremely harmful to Nevada. The following additional detailed facts reflect the adverse consequences if the CAB should order the License Application withdrawn "without prejudice," thus forcing all of the parties to the current proceeding into a sort of "limbo" where they may or may not face a renewal of the proceeding, some indefinite number of years from now; on the other hand, if the withdrawal of the proceeding is granted "with prejudice," as requested by the applicant, and the application is not renewed, then the following adverse consequences will not occur, or will be irrelevant to future events.

5. Due to DOE's public commitment to withdraw its License Application, Nevada has severely cut back the staff and experts with its Agency for Nuclear Projects; if the licensing proceeding is terminated without prejudice Nevada would face the prohibitive cost and difficulty of reconstituting that Agency and its functions, and trying to recapture the vast quantity of information and experience lost in the interim. For example, the State's LSN administrator is one of the positions that the Governor has proposed to be terminated.

6. Nevada's Agency for Nuclear Projects has already begun terminating the contracts of its licensing consultant team, because DOE has stated "[I]t does not intend ever to refile an application . . . to construct a repository . . . at Yucca Mountain." (Motion to Withdraw fn.3.)

7. A termination of the licensing proceeding without prejudice would hinder or preclude any effort to determine and implement the most beneficial use of the Yucca Mountain location, different from a high-level nuclear waste repository, due to the uncertainty of when or if that use might be implemented, or when the chosen use might be supplanted by some other use. The requirement for site reparation is spelled out in the Nuclear Waste Policy Act.

8. This is not a simple case that the parties and adjudicators may easily pick up and resume years down the road. The case record is voluminous, and the legal and technical issues are multifaceted and difficult. A dismissal without prejudice would require the applicant, the Commission and Staff, and the numerous other parties (all of them probably staffed by new and different persons at such a time) to begin virtually from scratch to acquaint themselves with the disparate details of this case.

9. Neither the applicant, the Commission, the Staff, nor any other party can even guess, much less pinpoint, when or if a Yucca Mountain repository License Application might be refiled if dismissal without prejudice were granted. A financially strapped state such as Nevada cannot expend the resources necessary to stand continuously at the ready, to reengage in a contested adversarial licensing proceeding, for some unknown and indefinite time into the future.

10. In rejecting open-ended delay in licensing proceedings, the Commission has previously held "expert affidavits may grow stale and dated with time, and previously retained experts who have a familiarity with the case may prove unavailable years down the road." *Hydro Resources, Inc*., 53 NRC 31, CLI-01-04 (2001). These predictable eventualities would

create enormous prejudice for Nevada, if dismissal were granted without prejudice. (For example, one of our key experts, former NRC Commissioner Victor Gilinsky is in his mid-70s.)

11. In rejecting open-ended delay in licensing proceedings, the Commission has previously held "the amount and complexity of information the intervenor and their experts have reviewed were formidable; to compel them now to wait years without knowing when or if there will be any further hearing imposes an unacceptable and unfair burden." *Hydro Resources, Inc*., 53 NRC 31, CLI-01-04 (2001). This consequence of a dismissal of this proceeding without prejudice would create an enormous, onerous burden on Nevada.

12. By virtue of DOE's sudden withdrawal of its License Application, Nevada is deprived forever of what was an imminent decision on some 10 legal issues, some of which could be decided in a way destructive of DOE's License Application, and precluding construction of a repository at Yucca Mountain; those legal issues were already fully defined, fully briefed, and fully argued by the parties and were awaiting a CAB decision at the time it stayed this proceeding to await the DOE motion to withdraw. If the withdrawal of the License Application is truly with prejudice to refiling it in the future, then the CAB's failure to rule on these legal issues may be irrelevant; if the matter is dismissed without prejudice, then this failure will cause serious and permanent prejudice to Nevada.

13. On February 9, 2010, DOE withdrew 116 water permit applications it had filed with the Nevada State Engineer to support its building a rail line to handle waste transportation from Caliente to the Yucca Mountain Project, stating that "DOE does not intend to pursue the applications." There will be a severe impact on a water-stressed state such as Nevada should the withdrawal of the License Application and water permits be temporary only and those applications must be dealt with again in the future.

14. Preparing for and intervening in an NRC licensing proceeding has been a lengthy, extremely costly, and resource-intensive process. The State is required to provide NRC with all the documents, data, and other materials it plans to use in the licensing proceeding in a format compatible with NRC's LSN. That effort, which the Agency began before 2004, involves thousands of documents and hundreds of person-hours as well as the services of a specialty contractor for scanning, formatting, and loading the information into a web-compatible database system.

15. The State of Nevada has been fully engaged in every step – from reviewing, commenting on, and when necessary, challenging EPA and DOE and NRC licensing regulations to participating in pre-license proceedings and forums, to producing detailed technical analyses supporting contentions the State introduced relative to DOE's assertions about site performance, to substantive and procedural legal challenges to NRC's implementation of the process, and to full-scale participation in the NRC proceedings themselves. The effort on the part of the State to effectively engage in the NRC licensing arena and adequately protect Nevada's interests has been the most complex and costly activity in which the Agency has ever engaged.

16. As of June 30, 2010, the State of Nevada will have authorized the expenditure of multi-millions of dollars substantiating its position with respect to the Yucca Mountain Project and its anticipated licensing in conducting oversight beginning in fiscal year 1992 when the State began employing its own resources to support this effort.

17. As of June 30, 2010, the State of Nevada will have authorized the expenditure of substantial additional amounts acquired through other fund sources to substantiate its position with respect to the Yucca Mountain Project and its anticipated licensing and conducting oversight.

18. As of June 30, 2010, the State of Nevada will have received substantially greater millions of dollars in federal oversight funding, which it has used since 1984 in overseeing DOE's scientific work, conducting its own, and in oversight of DOE's Yucca Mountain Project and participation in the current licensing proceeding. Nevada may be forced to repeat such expenditures if the withdrawal is without prejudice, and the licensing proceeding is reactivated at some indefinite time in the future.

19. This enormous investment of resources and effort by the State of Nevada over the past 26 years will largely be lost or become obsolete, its witnesses and experts unavailable, for some hypothetical proceeding in the distant future. Due to the irrevocable and massive harm represented by this loss of investment, any withdrawal of DOE's License Application, or dismissal of this proceeding, other than **with prejudice** (to avoid its repetition in the future) would be intolerable.

20. Nevada was required to mount a substantial effort including engaging numerous researchers and scientific experts, conducting research studies, and analyses on key suitability/licensing issues – reviewing thousands, even tens of thousands, of documents and engaging highly specialized legal expertise for NRC proceedings.

21. Not only has the State of Nevada spent an enormous amount of time in creating its own LSN document collection, but it has also spent time, effort, and resources on its oversight of the LSN, in general, and DOE's contribution to and compliance with the LSN program (this is particularly true from 2004 through the present).

22. Potential impacts from the federal high-level waste program stem directly from two interrelated sources: the repository facility itself and the transportation of high-level waste to the facility. Operating with respect to both of these sources are (1) the interplay of each with the direct, physical, environmental, economic, and public health contexts that characterize both

elements; and (2) the potent, but less well understood effects that stem from the nuclear nature of the facility and the waste shipments, together with public responses to things nuclear, especially to high-level radioactive waste.

23. Nevada has engaged a team of world-class experts comprising some 30 in number, skilled in the particular scientific disciplines applicable to the Yucca Mountain Project and to DOE's License Application; the affidavits and anticipated testimony of this expert team may be lost forever if the dismissal of the licensing proceeding is without prejudice. Since DOE casts such a wide net over scientific work in this country, Nevada has had to look worldwide for scientists and experts for Yucca Mountain oversight. If the license is resubmitted later, with so many scientists trying to get work with DOE, Nevada will find it almost impossible to put together a scientific team again.

24. Nevada's oversight has involved a sustained and concerted research effort to address key technical and scientific issues that are expected to be important to the State's licensing intervention. To that end, the Agency's licensing team includes nationally and internationally recognized scientists and experts in the fields of hydrology, water infiltration, water chemistry, geochemistry, future climate, volcanism, corrosion, erosion, and health physics. These scientists have worked closely with the State's licensing team, compiling data from over two decades of Agency-sponsored research on the Yucca Mountain site, an effort which has supported the State's contentions in this licensing proceeding. They will not likely be available as expert witnesses during any future licensing proceeding, should this one be dismissed without prejudice.

25. State of Nevada's legal and consultant licensing team is, for the most part, not comprised of State of Nevada employees. Whether they are or are not employees, the impact of a dismissal **without** prejudice to Nevada would be stunning and irrevocable:

- Based in reliance upon DOE's commitment to withdraw its License Application with prejudice, the financially strapped State of Nevada has already informed almost all those members of the licensing team who **are** Nevada employees that their services may be terminated during the next State legislative session.
- The attorneys and the expert consultants (many of whom are from Europe) who are **not** Nevada employees have heretofore committed a significant portion of their time and effort to the critically important task of readying the State of Nevada for its current participation in the licensing proceeding. Needless to say, those persons' contracts cannot be kept in force through some indefinite period of "limbo" or "suspended animation," but must be terminated by the State of Nevada as a consequence of the withdrawal of DOE's License Application. It would be impossible to reconstitute Nevada's vast and efficient licensing team for some hypothetical proceeding in the distant future, given the employment termination of those members who are state employees and the contract terminations of those who are not.

26. Nevada's oversight has included original, independent, scientific research in the field and experiments in the laboratory. An example of this is the decades-long extensive field work in the area of volcanism; another example is the lengthy and substantial laboratory experimental work done in the area of corrosion of the Alloy-22 metal relied upon by DOE for emplacement of waste in its planned repository. In both areas, the result of Nevada's analyses (which have resulted in multiple publications in peer-reviewed journals) has been decisively contradictory to those of DOE. The persons involved in this work, and the value of their work products such as scientific notebooks, will be lost to Nevada should the proceeding be dismissed without prejudice, to be resumed at some distant, indefinite date in the future.

27. The Agency for Nuclear Projects, in conjunction with affected counties and cities in Nevada, prepared a comprehensive report on the potential impacts of a repository on the State of Nevada and on the nation as a whole. That report, "A Mountain of Trouble: A Nation at Risk – a Summary of Impacts of the Proposed Yucca Mountain High-Level Nuclear Waste Program," was transmitted to the Secretary of Energy and was included in the package of materials he submitted to the President as part of the Yucca Mountain site recommendation. The Report, which is over 1,500 pages in length and encompasses three volumes, was completed in February 2002. It incorporates the research and findings of a major research effort. It is available on the Agency for Nuclear Projects' website at: http://www.state.nv.us/nucwaste/yucca/impactreport.pdf.

28. The Nevada research and comprehensive report produced in 2002 concluded that the Yucca Mountain program is both “unworkable” and unnecessary [this coincides precisely with the conclusion of the current administration and DOE in 2010]. In 2002, Nevada's Commission on Nuclear Projects found that Yucca Mountain was unsuitable as a geologic repository site; that the project put forward by the Secretary of Energy and recommended by the President was illegal; that the impacts of the program, should it be completed, would wreak economic and environmental havoc on Nevada and on other parts of the country affected by nuclear waste shipments; and that damages were being done to American federalism and state-federal relations through the heavy-handed and potentially unconstitutional way in which Yucca Mountain was being forced on the State of Nevada.

29. In its February 6, 2002 transmittal of "A Mountain of Trouble: A Nation at Risk" to the Secretary of Energy, Nevada's Agency for Nuclear Projects stated "The only way to 'fix' the program is to acknowledge that it is unfixable and, thereby, permit the nation to move on and consider other, more appropriate, less damaging, and more promising approaches to managing

spent nuclear fuel and high-level radioactive waste." [This statement, made more than eight years ago, again precisely foreshadowed the current overdue acknowledgement of these facts by the Department of Energy.]

30. The Executive Summary of "A Mountain of Trouble: A Nation at Risk" observed that over 15 years of intensive research and oversight had been conducted by the State of Nevada and independent scientists studying the impacts of this major, first-of-a-kind federal program, and had led to the inescapable conclusion that: the proposed Yucca Mountain high-level nuclear waste repository program has the potential to wreak economic, social, and environmental devastation on at least 44 states, including Nevada, hundreds of major cities, and thousands of communities across the country through which spent nuclear fuel and high-level radioactive waste must travel.

31. In "A Mountain of Trouble: A Nation at Risk," Nevada examined in detail and wrote extensively concerning its analysis of national transportation impacts; program costs; impacts to Nevada's economy; reductions in property values along transportation routes; impacts to State of Nevada agencies and local public safety agencies; impacts to Nevada local governments; and impacts to Native American communities.

32. Nevada has spent enormous time, effort, and resources investigating and analyzing the national and local alternatives DOE has or will consider with respect to the shipment of waste to a proposed Yucca Mountain repository. Nevada continues to believe that there is no acceptable rail route for transporting nuclear waste to Yucca Mountain. All of the routes identified by DOE over the years, including the Caliente and Mina alternatives, result in shipments impacting major Nevada population centers and traverse environmentally, economically, and culturally sensitive areas of the State. All of them face major geographic, engineering, and institutional obstacles.

33. When DOE evaluated candidate repository sites in six states in the early 1980s, Yucca Mountain ranked the worst in terms of transportation access (both rail and highway). That situation has not changed, and other difficulties have developed in a rail spur to the site, including the impacts any such spur would cause, and continue to be strong reasons why Yucca Mountain is an unsafe and unsuitable repository location, and why the State of Nevada has been constrained to continue to spent substantial resources in evaluating and opposing unacceptable transportation alternatives.

34. Nevada's preparation for the licensing proceeding has included conducting and synthesizing research in all the crucial areas where licensing contentions are to be argued and assuring that the State's findings will have a high degree of credibility and be widely recognized in the scientific community as well as by the NRC licensing boards.

35. With respect to its flawed transportation effort, DOE applied to the Surface Transportation Board (STB) for a Certificate of Public Convenience and Necessity to construct and operate a proposed Caliente rail spur. Nevada filed substantial comments challenging DOE's application and urging STB to reject it on various grounds, including the application's lack of completeness, DOE's failure to include operations, plans, and other documents necessary for reviewing the application, DOE's failure to address potential terrorism and sabotage risks posed by the rail line and the cargo it would carry, and DOE and STB's failure to evaluate impacts of the proposed rail line on the national rail transportation system.

36. By far the greatest effort in terms of time, resources, and effort on the part of the Agency for Nuclear Projects was the State’s preparation for intervening in the NRC licensing process and particularly development of contentions challenging specific inadequacies in DOE's License Application.

37. The licensing process is an extremely complex one, both legally and technically. The effort on the part of the Agency to effectively engage in the NRC licensing arena and adequately protect Nevada's interest has been the most complex and costly activity in the agency's history.

38. In an effort to carry out its NEPA responsibilities, DOE issued a total of six draft and final EISs related to the Yucca Mountain Project during 2007 and 2008, geared toward DOE's June 2008 target for submitting a License Application to the NRC. Although DOE had prepared a final EIS for the Yucca Mountain Project in 2002 to accompany the Secretary of Energy's recommendation of the Yucca Mountain site to the President for development as a repository, DOE subsequently made significant changes to the design of the project that required supplemental NEPA documentation. In addition, DOE decided to supplement its environmental analyses with respect to the proposed Caliente rail corridor and to prepare a separate EIS supporting the selection of rail alignment within the preferred corridor. Nevada's Agency for Nuclear Projects staff, supported by its legal team and technical experts, reviewed each of DOE's draft EISs and provided extensive comments. These comments can be found on the Agency's webpage at: http://www.state.nv.us/nucwaste/news2008/pdf/nv080109seis.pdf and http://www.state.nv.us/nucwaste/news2008/pdf/nv080109rail.pdf.

39. In commenting on the three draft EISs, the Agency focused on the extensive deficiencies in DOE's documents. The comments, in particular, noted that the actions proposed by DOE in the three EISs, when taken together, comprised nothing less than a major restructuring of the entire Yucca Mountain high-level radioactive waste management program. The proposed changes affected the universe of repository program elements, including the actual design of repository surface facilities, the characteristics of the waste disposal packages and engineered barrier systems, the thermal characteristics of the repository subsurface, the long-

term performance of the waste isolation system and how that is modeled, the repository waste acceptance process, and the entire national and Nevada waste transportation systems.

40. Nevada's comments on the draft rail corridor SEIS and the draft realignment EIS concluded that those EISs were premature in the absence of a national DOE spent fuel and high-level radioactive waste transportation plan. Nevada's comments also faulted DOE's failure to conduct a national scoping process; the inadequate analysis of rail corridors in Nevada and the inappropriate selection of the Caliente rail corridor; the inappropriate and potentially illegal inclusion of the Mina rail corridor as an alternative to the proposed action (since the route could not be used to objections by the Walker River Paiute Tribe); DOE's failure to provide basic information about the Caliente and Mina rail alignments that is necessary for impact assessment; DOE's failure to provide reliable cost information about the proposed Caliente and Mina rail lines; insufficient assessment of land use and other impacts; DOE's failure to access impacts in Las Vegas and Clark County, as well as impacts to the Reno-Sparks metropolitan area, Washoe County, and communities along the I-80 corridor; incomplete and inadequate assessment of adverse impacts to Native Americans; and inadequate treatments of accidents and terrorism and sabotage impacts.

41. As a direct result of its Yucca Mountain Project oversight, and enormous effort and expenditure of resources, Nevada successfully prepared and had admitted in this licensing proceeding some 225 specific analyses (contentions) of the inadequacy of DOE's LA (an exponentially higher number of technical and legal contentions than had ever been admitted in any prior NRC licensing proceeding), which admitted contentions were to be the subject of deposition testimony from both Nevada and DOE witnesses beginning February 17, 2010, but for the stay of the proceeding. This anticipated testimony and the detailed support for these contentions may be lost forever if a dismissal is granted without prejudice.

42. In July 2004, DOE announced that it had met NRC's criteria for document availability by launching a web-based document access system. Almost immediately, however, it became apparent that the database was seriously deficient, incomplete and replete with major technical and security-related problems. Based upon the expenditure of substantial effort and resources by the State of Nevada to review and challenge the DOE LSN certification, that certification was set aside by the NRC licensing board in a decision affirmed by the NRC. It took DOE more than three years (until November 2007) to correct its regulatory inadequacies and recertify the LSN.

43. On July 9, 2004, the United States Circuit Court of Appeals for the D.C. Circuit issued a landmark ruling on a complex set of legal cases brought by the State of Nevada, joined by others; the Court delivered a major and perhaps fatal blow to the federal program when it granted the Plaintiffs' petition to vacate the U.S. Environmental Protection Agency's (EPA) radiation health protection standard for a Yucca Mountain repository. The Court went even further and voided NRC's licensing regulations to the extent that those regulations rely on the rejected EPA standard. [It took both entities some five years to re-issue and publish new final rulemakings, which Nevada has likewise challenged.]

44. On November 22, 2004, the NRC and DOE attended a Quarterly Management Meeting in Rockville, Maryland. Dr. Margaret Chu, Director of DOE's Office of Civilian Radioactive Waste Management, stated that DOE was evaluating the impact of significant events "including the U.S. Court of Appeals decision on the EPA radiation protection standard and DOE's certification of availability of documents relevant to the licensing YM repository." She acknowledged that "DOE will not submit the LA to the NRC in December 2004, but would provide a revised schedule as soon as it is available." She also stated that "the delay will not be significant." DOE was unable to file its LA until June, 2008.

45. DOE's current refusal to commit to preserving its entire LSN (Licensing Support Network) collection of licensing-relevant Documentary Material (compiled in accordance with 10 C.F.R. 2.1001, *et seq.*) in a searchable, retrievable format would prejudice Nevada, and every other party to the licensing proceeding, and the public, should a License Application for a repository at Yucca Mountain ever be brought up again. The only way to assure this prejudice is not visited on Nevada and the other licensing parties is to grant the applicant's request that its withdrawal be **with prejudice**.

Further, the affiant says not.

Bruce Breslow

The above-named affiant personally appeared before me this 10 day of May, 2010, and executed this affidavit.

DIANA RODRIGUEZ
NOTARY PUBLIC
STATE OF NEVADA
No.09-10518-3 My Appt. Exp. July 14, 2013

Notary Public, State of Nevada
My Commission expires: July 14, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Board

In the Matter of	)	
	)	
U.S. DEPARTMENT OF ENERGY	)	**Docket No. 63-001-HLW**
	)	
(High Level Waste Repository)	)	

CERTIFICATE OF SERVICE

I hereby certify that the foregoing State of Nevada's Answer to the Department of Energy's Motion with Respect to Withdrawal of the License Application has been served upon the following persons by the Electronic Information Exchange:

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