

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**Before the Commission**

<b>In the Matter of</b>	)	
	)	
<b>U.S. DEPARTMENT OF ENERGY</b>	)	<b>Docket No. 63-001-HLW</b>
	)	
<b>(High Level Waste Repository)</b>	)	<b>October 19, 2010</b>

**CORRECTED ANSWER OF THE STATE OF NEVADA TO THE MOTION FOR  
A COMMISSION ORDER RESTORING THE TECHNICAL REVIEW  
OF THE YUCCA MOUNTAIN LICENSE APPLICATION**

On October 7, 2010, Aiken County, South Carolina, joined by the states of South Carolina and Washington, moved for a Commission order allegedly necessary to restore the NRC Staff's required review of the Yucca Mountain license application. The State of Nevada ("Nevada") opposes the motion. The Native Action Community Council ("NCAC") concurs and joins Nevada in this Answer.

The motion relies on "published news reports" that NRC Chairman Jaczko "has unilaterally directed NRC Staff to stop its review of DOE's Yucca Mountain license application..." Motion at 2. That is it. The "published news reports" are not identified, quoted, or described in any further detail. Such a motion based on unidentified authority is impossible to evaluate on its face and must fail for the simple reason that the moving parties have failed to meet their burden of proof. 10 C.F.R. § 2.325 ("Unless the presiding officer otherwise orders, the applicant or the proponent of an order has the burden of proof"). In fact, the Commission has been unwilling to grant relief based on newspaper articles even when the articles are identified. *See Amergen Energy Co., LLC (License Renewal for Oyster Creek Nuclear Generating Station),*

CLI-08-29, 68 NRC 658, 672 (2008); *Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 3)*, CLI-86-1, 23 NRC 1, 6 note 2 (1986).

Moreover, a letter to Andrew A. Fitz, Senior Counsel for the State of Washington, from NRC Solicitor John Cordes, dated October 13, 2010, further undercuts the moving parties' case for relief. This letter, responding to Mr. Fitz's request for a copy of written communications to the NRC Staff from Chairman Jaczko (or from other NRC Commissioners) "concerning the cessation of [Yucca Mountain] license application review," states simply that "I [Mr. Cordes] have inquired and identified no such documents" (Attachment A at 2).

The October 13, 2010 letter from Mr. Cordes does identify and supply a memorandum to NRC office directors and regional administrators, dated October 4, 2010, providing guidance on budget execution under the Continuing Resolution enacted into law on September 30, 2010. The memorandum is from the NRC's Chief Financial Officer and Executive Director for Operations, not the NRC Chairman or any NRC Commissioner. This guidance does address, in a general fashion, NRC budget execution for the NRC High Level Waste Program. It says nothing specific about Staff's Safety Evaluation Report for Yucca Mountain. Nevertheless, Nevada is aware that two NRC Commissioners have stated a disagreement with the guidance memorandum based on their understanding that it calls for a halt to Staff SER work under the Continuing Resolution. However, the memorandum is within the delegated authority of the Executive Director for Operations and the Chief Financial Officer.<sup>1</sup> The memorandum is therefore effective as an instruction to NRC Staff working on the Yucca Mountain application unless the Commission itself overrides it by majority vote. It appears from an October 14, 2010

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<sup>1</sup> The Commission's OMB-approved regulation for the administrative control of federal funds, dated December 22, 1998, provides (in section 5.b.) that "[t]he Chief Financial Officer (CFO) of the NRC is authorized and directed to discharge all financial management activities and functions, which includes the responsibility for the administrative control of the NRC's funds."

memorandum from the Secretary to Commissioner Ostendorff, and from related memoranda from Commissioners Ostendorff and Svinicki to the Chairman and fellow Commissioners, that a proposal to override the memorandum did not garner the necessary three votes.

Finally, the moving parties have also failed to certify that they made a sincere effort to contact the other parties to resolve the issue. 10 C.F.R. § 2.323 (b) is quite clear that a motion “must be rejected” if it does not include this certification.

For the reasons given above, the motion should be denied.

Respectfully submitted,

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*(signed electronically)*

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Dated: October 19, 2010

# ATTACHMENT A



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

OFFICE OF THE  
GENERAL COUNSEL

October 13, 2010

Andrew A. Fitz  
Senior Counsel  
Office of the Attorney General of Washington  
2425 Bristol Court, SW, 2d Floor  
Olympia, WA 98504-0017

Dear Mr. Fitz

Your letter of October 6, 2010, asked whether the Nuclear Regulatory Commission (NRC) staff, “apparently at the direction of Chairman Jazcko, has ceased (or is in the process of ceasing) work” on the Department of Energy’s (DOE’s) application for NRC approval of a high-level waste facility at Yucca Mountain, Nevada. Pointing to “media accounts,” your follow-up letter on October 7 sought certain “written materials” “concerning cessation of license application review.”

I have enclosed an October 4, 2010, memorandum signed by both the NRC’s Chief Financial Officer, James E. Dyer, and the NRC’s Executive Director for Operations, Richard W. Borchardt. The Dyer-Borchardt memorandum provides guidance to NRC staff offices on budget execution, given that Congress has not yet acted on NRC’s Fiscal Year 2011 budget submission. The agency currently is operating under a Continuing Resolution (CR) that expires on December 3 (Pub. L. 111-242, 124 Stat. 2607 (Sept. 30, 2010)).

With respect to the high-level waste program, the Dyer-Borchardt memorandum states that the CR “does not include specific restrictions on spending funds.” It then directs the NRC staff to “continue its activities on the Yucca Mountain license application in accordance with the Commission’s decisions on the FY 2011 budget using available Nuclear Waste Fund resources during the CR.”

The Commission’s proposed FY 2011 budget – issued in early 2010 and available on NRC’s website – pointed to DOE’s possible filing of a motion to withdraw its Yucca Mountain application, and sought sufficient resources (ten million dollars) for “orderly closure” of NRC’s effort. See NUREG-1100, Volume 26, *Congressional Budget Justification for FY 2011* (Feb. 2010), at pp. 9-10, 55-57, 94-95. “This would involve archiving material, completion of some technical work, knowledge capture and management, and maintenance of certain electronic systems to support these efforts.” *Id.* at 95.

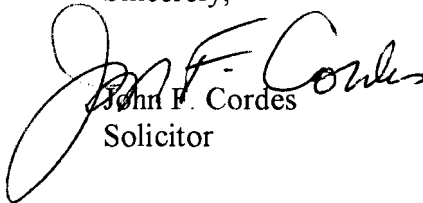
I cannot provide further information on this subject in advance of Commission consideration of the “Motion for a Commission Order Restoring the Technical Review of

the Yucca Mountain License Application” that you, along with your colleagues representing South Carolina and Aiken County, filed late last week. In addition, related issues remain before the Commission on Nevada’s “Petition for Relief with Respect to Possible Issuance of a Partial Safety Evaluation Report for Yucca Mountain” (filed June 14, 2010).

As for your request for a copy of written communications to the NRC staff from Chairman Jazcko or from other NRC Commissioners “concerning the cessation of license application review,” I have inquired and identified no such documents. Your letter also seeks documents containing staff-to-staff communications. Other than the enclosed Dyer-Borchardt memorandum, I am aware of no such documents, but I hasten to add that I have not surveyed the entire NRC staff, which is quite large.

To avoid any future misunderstanding, please do not construe my response to your inquiry as agreement with the suggestion in your October 6 letter that information on NRC budget execution during the CR period relates to your pending litigation or falls under any mandatory-disclosure obligation. As you know, the Federal Rules of Appellate Procedure provide for no discovery in direct-review actions in the courts of appeals. The NRC maintains a public website, where many NRC documents are publicly available, as well as a Freedom of Information Act program enabling the public to seek additional agency records.

Sincerely,

  
John F. Cordes  
Solicitor

cc: Service list in *In re Aiken County*, No. 10-1050 & consolidated cases (D.C. Cir.)



activities under the CR. In addition, contract awards for FY 2011 should be reflected in your Advance Procurement Plan (APP). It is important that offices processing contract documents consistent with their APPs/FUPs continue to focus on improved budget execution during the CR.

With respect to the High-Level Waste Program, the CR legislation does not include specific restrictions on spending funds. Therefore, the staff should continue its activities on the Yucca Mountain license application in accordance with the Commission's decisions on the FY 2011 budget using available Nuclear Waste Fund resources during the CR.

As we move forward, the OCFO will refine the CR plan and issue allowances for every CR period thereafter, until such time the agency receives its full appropriation/apportionment. After the agency receives its full-year appropriation/apportionment, this guidance will be rescinded and all normal budget execution operations will be resumed.

cc: PMDA/DRMA Directors

MEMORANDUM TO THOSE ON THE ATTACHED LIST DATED: October 4, 2010

SUBJECT: GUIDANCE UNDER A FISCAL YEAR 2011 CONTINUING RESOLUTION

	<b><u>E-Mail Mail Stops</u></b>
Edwin M. Hackett, Executive Director, Advisory Committee on Reactor Safeguards	RidsAcrsAcnw_MailCTR Resource
E. Roy Hawkens, Chief Administrative Judge, Atomic Safety and Licensing Board Panel	RidsAslbpManagement Resource
Stephen G. Burns, General Counsel	RidsOgcMailCenter Resource
Brooke D. Poole, Director, Office of Commission Appellate Adjudication	RidsOcaaMailCenter Resource
Hubert T. Bell, Inspector General	RidsOigMailCenter Resource
Margaret M. Doane, Director, Office of International Programs	RidsOipMailCenter Resource
Rebecca L. Schmidt, Director, Office of Congressional Affairs	RidsOcaMailCenter Resource
Eliot B. Brenner, Director, Office of Public Affairs	RidsOpaMail Resource
Annette Vietti-Cook, Secretary of the Commission	RidsSecyMailCenter Resource RidsSecyCorrespondenceMCTR Resource
Michael F. Weber, Deputy Executive Director for Materials, Waste, Research, State, Tribal, and Compliance Programs, OEDO	RidsEdoMailCenter Resource
Darren B. Ash, Deputy Executive Director for Corporate Management, OEDO	RidsEdoMailCenter Resource
Martin J. Virgilio, Deputy Executive Director for Reactor and Preparedness Programs, OEDO	RidsEdoMailCenter Resource
Nader L. Mamish, Assistant for Operations, OEDO	RidsEdoMailCenter Resource
Kathryn O. Greene, Director, Office of Administration	RidsAdmMailCenter Resource
Patrick D. Howard, Director, Computer Security Office	RidsCsoMailCenter Resource
Roy P. Zimmerman, Director, Office of Enforcement	RidsOeMailCenter Resource
Charles L. Miller, Director, Office of Federal and State Materials and Environmental Management Programs	RidsFsmeOd Resource
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Thomas M. Boyce, Director, Office of Information Services	RidsOis Resource
James F. McDermott, Director, Office of Human Resources	RidsHrMailCenter Resource
Michael R. Johnson, Director, Office of New Reactors	RidsNroOd Resource
Catherine Haney, Director, Office of Nuclear Material Safety and Safeguards	RidsNmssOd Resource
Eric J. Leeds, Director, Office of Nuclear Reactor Regulation	RidsNrrOd Resource
Brian W. Sheron, Director, Office of Nuclear Regulatory Research	RidsResOd Resource
Corenthis B. Kelley, Director, Office of Small Business and Civil Rights	RidsSbcrMailCenter Resource
James T. Wiggins, Director, Office of Nuclear Security and Incident Response	RidsNsirOd Resource
Marc L. Dapas, Acting Regional Administrator, Region I	RidsRgn1MailCenter Resource
Luis A. Reyes, Regional Administrator, Region II	RidsRgn2MailCenter Resource
Mark A. Satorius, Regional Administrator, Region III	RidsRgn3MailCenter Resource
Elmo E. Collins, Jr., Regional Administrator, Region IV	RidsRgn4MailCenter Resource

CC: TO THOSE ON THE ATTACHED LIST DATED: October 4 2010

SUBJECT: GUIDANCE UNDER A FISCAL YEAR 2011 CONTINUING RESOLUTION

Name/Office

Mail Stop

B. Gusack, NRO	T6 – D2
B. Ficks, OIS	O13 – H16M
B. Holt, RGN III	RGN III
J. Horn, HR	GW5 – A6
J. Dambly, ADM	TWB5 – E19M
J. Golder, FSME	T8 – A23
J. Coleman, RGN II	RGN II
M. Givvines, NRR	O13 – H16M
M. Muessle, RES	CSB6 – D20M
M. Hays, RGN IV	RGN IV
P. Baker, RGN I	RGN I
S. Abraham, NSIR	T4 – A45
T. Pulliam, NMSS	EBB – C1 24