UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

THE JOINT OPPOSITION OF THE NUCLEAR ENERGY INSTITUTE; NYE COUNTY, NEVADA; THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS; AND THE STATE OF SOUTH CAROLINA TO THE STATE OF NEVADA'S MOTION TO LIFT THE SUSPENSION OF THE ADJUDICATORY PROCEEDING FOR THE YUCCA MOUNTAIN CONSTRUCTION AUTHORIZATION

I. INTRODUCTION

Pursuant to 10 C.F.R § 2.323(c), the Nuclear Energy Institute; Nye County, Nevada; the National Association of Regulatory Utility Commissioners; and the State of South Carolina (collectively, the "Opposing Parties"), jointly submit this opposition to the Motion[1] filed by the State of Nevada. Among other fatal flaws, Nevada's Motion is untimely because it was not filed in accordance with the 10-day deadline set forth in 10 C.F.R. § 2.323(a)(2). Moreover, there has been no material change in the circumstances that prompted the Commission and the Construction Authorization Board (the "Board") to suspend the adjudicatory proceeding in 2011. Nor has there been any material change in those circumstances since the Commission affirmed the adjudicatory suspension in 2013. Thus, there is no basis consistent with the Commission's

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[1] "Nevada Request to Lift the Suspension of the Adjudicatory Proceeding for Limited Purposes" (Sept. 20, 2022) (the "Motion"). Appended to the Motion at Appendix A is a draft order that would grant Nevada's request. Also included with the Motion at Exhibit 1 is the document Nevada used to consult with the parties to this proceeding in accordance with 10 C.F.R. § 2.323(b).

earlier decisions that warrant lifting the suspension now. For these reasons and the other reasons discussed herein, the Commission should deny Nevada's Motion.

II. BACKGROUND

The suspension of the Yucca Mountain adjudicatory proceeding dates back to September 2011, when the Commission directed in CLI-11-07[2] that the Board, "[c]onsistent with budgetary limitations," complete all necessary and appropriate case management activities by the end of that calendar year.[3] Later that same month, the Board in LBP-11-24[4] ordered that the adjudicatory proceeding be suspended, consistent with the Commission's decision in CLI-11-07, because of the uncertainty over future appropriated Nuclear Waste Fund (NWF) dollars, and the availability of Full-Time Equivalent (FTE) federal employee positions for the proceeding.[5]

Over two years later, in CLI-13-08, the Commission ruled that the adjudicatory suspension would remain in place.[6] The Commission issued CLI-13-08 in response to a writ of mandamus from the U.S. Court of Appeals for the D.C. Circuit directing the Commission to resume the licensing process for the Yucca Mountain construction authorization.[7] More specifically, the D.C. Circuit ordered that the licensing process was to resume "'unless and until Congress authoritatively says otherwise or there are no appropriated funds remaining.'"[8] The

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[2] *U.S. Department of Energy* (High Level Waste Repository), CLI-11-07, 74 N.R.C. 212 (2011) ("CLI-11-07").

[3] *Id.* at 212.

[4] *U.S. Department of Energy* (High Level Waste Repository), LBP-11-24, 74 N.R.C. 368 (2011) ("LBP-11-24").

[5] *Id. at* 369-70.

[6] *U.S. Department of Energy* (High Level Waste Repository), CLI-13-08, 78 N.R.C. 219, 221 (2013) ("CLI-13-08").

[7] *Id.* at 220-21.

[8] *Id.* at 222 (quoting *In re Aiken Cnty.*, 725 F.3d 255, 267 (D.C. Cir. 2013), *reh'g en banc denied*, No. 11-1271, 2013 U.S. App. LEXIS 22003 (D.C. Cir. Oct. 28, 2013)).

Commission thus directed the NRC Staff to use remaining appropriated funds for the Yucca Mountain project to complete and issue the Safety Evaluation Report (SER) associated with the construction authorization application, and request that DOE prepare the supplemental environmental impact statement (EIS).[9]

The Commission explicitly stated that it would continue to hold the Yucca Mountain "adjudication in abeyance."[10] The Commission explained that its decision directing the Staff to complete the SER and requesting that DOE prepare the supplemental EIS would advance the licensing process in a constructive manner and consistent with the D.C. Circuit's decision and available resources.[11] The Commission further explained that its decision to defer other activities, including resumption of the adjudication, was "guided by the fact that the NRC will be unable, at this time, to make meaningful or substantial progress on those fronts."[12] This was because of the "current funding situation" in which Congress had "appropriated no new funds for [the NRC's] review" since fiscal year 2011, leaving available only carryover funds from previous appropriations.[13] And those carryover funds "represent only a fraction of the NRC's 'normal' annual budget for the Yucca review."[14] Consequently, the Commission rejected resuming the adjudicatory proceeding because such resumption would likely result in "resuspension of the case in the near term without completion of meaningful—or substantial—adjudicatory activities."[15]

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[9] *Id.* at 221.
[10] *Id.*
[11] *Id.* at 226.
[12] *Id.* at 227.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 233.

The Commission identified the meaningful and substantial activities that must occur were the adjudication to resume. In particular, the Commission noted that, consistent with its rules, "not only must the Staff complete its safety and environmental reviews, but a formal hearing must be conducted," and the Commission's "own review of both contested and uncontested issues must take place" "before a final decision approving or disapproving a construction authorization may be reached."[16]

In sum, the Commission concluded that "[b]ased on current cost estimates, at least, we will likely be unable to make meaningful progress on steps other than those outlined in this decision unless and until Congress appropriates additional funds for the agency's Yucca Mountain review process."[17] Nonetheless, the Commission committed that it would "re-evaluate this conclusion in the event that circumstances materially change."[18]

Since the Commission issued its rulings in CLI-11-07 and CLI-13-08, Congress has not appropriated any funds for the Yucca Mountain licensing process.[19] As far as the Opposing Parties are aware, there are no presently ongoing activities associated with the Yucca Mountain project, and it appears that none are likely in the near future.[20] The Opposing Parties are

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[16] *Id*. at 226.

[17] *Id.* at 236.

[18] *Id.* (emphasis added). Following this order, the Commission issued CLI-14-01, denying Nevada's request that the Commission clarify certain aspects of CLI-13-8 and the accompanying Staff Requirements Memorandum (SRM), and denying Nye County, Nevada, the States of South Carolina and Washington, Aiken County, South Carolina, and the National Association of Regulatory Utility Commissioners (together, the "Five Parties") motion for reconsideration of CLI-13-8. *See U.S. Department of Energy* (High Level Waste Repository), CLI-14-01, 79 N.R.C. 1, 2 (2014) ("CLI-14-01"). The Commission reiterated that it was committed to re-evaluating its conclusion in CLI-13-8 "in the event that circumstances materially change." CLI-14-01, 79 N.R.C. at 5.

[19] *See* Motion at 9.

[20] *Id.* n.10.

presently aware of no efforts by DOE or the Biden Administration more broadly to restart the Yucca Mountain Project.

III. Argument

As detailed below, the Commission should deny Nevada's Motion in the first instance because it is untimely. Beyond that fatal flaw, the Motion should also be denied because there has been no material change in circumstances that would warrant lifting the suspension. Finally, Nevada's remaining arguments do not support the relief sought in the Motion.

A. Nevada's Motion is Untimely

The Commission should reject Nevada's Motion out of hand because it is untimely. Under 10 C.F.R. § 2.323(a)(2), Nevada's motion to lift the suspension of the adjudicatory proceeding "must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises."[21] Nevada fails to identify any occurrence or circumstance within ten days (or any number of days for that matter) prior to filing its Motion that would justify filing the Motion now.

Indeed, the Commission made clear that circumstances would have to "materially change" since its and the D.C. Circuit's earlier rulings to prompt a restart of the adjudicatory proceeding, i.e., Congress would need to appropriate additional funds for the NRC's Yucca Mountain review process.[22] As Nevada concedes,[23] this has not happened. Therefore, there has been no material change in the circumstances—within the preceding ten days or otherwise—

[21] 10 C.F.R. § 2.323(a)(2).
[22] CLI-13-08, 78 N.R.C. at 236.
[23] Motion at 9.

described in the Commission's prior rulings that would prompt the Commission to lift its suspension.

Nevada contends that the ten-day limitation in Section 2.323(a)(2) does not apply to its Motion because it seeks to lift the adjudicatory suspension in order to file motions for summary disposition, and motions for summary disposition are not governed by the 10-day limitation in 2.323(a)(2). This circular reasoning fails for multiple reasons.

First, Nevada's reading of Section 2.323(a) is inconsistent with its plain text. The rule states in relevant part, "[a]ll motions, other than motions for summary disposition, must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises."[24] The most obvious reason for why Nevada cannot escape the 10-day limit, is that the Motion it has filed is a motion to lift the suspension, not a motion for summary disposition. The rule on its face provides no exception for Nevada's Motion (or any other motion), whether or not the Motion is a condition precedent for a subsequent summary disposition motion.[25]

Further, had the Commission intended to exempt any other motion from the scope of Section 2.323, it knew how to do so. In the preceding subsection, Section 2.323(a)(1), the Commission prescribed that its general rule on motions did not apply to Section 2.309 motions for new or amended contentions.[26] The Commission explicitly stated that "the term 'all motions' includes any motion except § 2.309 motions for new or amended contentions filed after the deadline."[27] Nevada's reading of the rule is simply inconsistent with the plain reading of the rule's text.

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[24] 10 C.F.R. § 2.323(a)(2) (emphasis added).
[25] Motion at 8-9.
[26] 10 C.F.R. § 2.323(a)(1).
[27] 10 C.F.R. § 2.323(a)(1) (emphasis added).

Second, the Commission amended Section 2.323(a)(2) to exclude motions for summary disposition from the 10-day deadline for purposes entirely inapposite to Nevada's arguments. In 2020, the Commission promulgated "Non-Substantive Amendments to Adjudicatory Proceeding Requirements."[28] The NRC included in its non-substantive amendments the clarification that the deadline for general motions did not apply to motions for summary disposition.[29] The NRC made this and other "non-substantive" changes because, since its prior update to its rules of practice, it had "identified additional provisions that should be updated to reflect . . .current agency practice."[30]

The relevant, current agency practice is this: the NRC's rules repeatedly specify when motions of summary disposition are due. Take, for example, the schedule for a high-level waste geologic repository construction authorization proceeding set forth in 10 C.F.R. Part 2 Appendix D. In that schedule, motions for summary disposition are due 20 days after the completion of discovery and the issuance of an order finalizing issues for hearing and setting a schedule for prefiled testimony and hearing.[31] For another example, in a Part 2 Subpart G adjudicatory proceeding, motions for summary disposition "must be filed no later than 20 days after the close of discovery."[32] And in a Part 2 Subpart L adjudicatory proceeding, motions for summary disposition are due "no later than 45 days before the commencement of hearing."[33]

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[28] Non-Substantive Amendments to Adjudicatory Proceeding Requirements, 85 Fed. Reg. 70,435 (Nov. 5, 2020) (amending 10 C.F.R. § 2.323(a)(2)).

[29] *Id.* at 70,436.

[30] *Id.*

[31] 10 C.F.R. Part 2 Appendix D, "Schedule for the Proceeding on Consideration of Construction Authorization for a High-Level Waste Geologic Repository."

[32] 10 C.F.R. § 2.710(a).

[33] 10 C.F.R. § 2.1205(a).

In short, the NRC's non-substantive amendment to Section 2.323(a) clarified that its 10-day deadline was not intended to override deadlines for summary disposition motions prescribed elsewhere in the NRC's rules. The amendment did not waive application of the Section 2.323(a) 10-day deadline to any other motion. Nor did the amendment give license to ignore the 10-day deadline any time a proceeding participant might seek to file a procedural motion (such as Nevada's Motion) so that it could then file a motion for summary disposition.

Nevada also claims that the purported burdens imposed on Nevada by the indefinite suspension of the adjudicatory proceeding "increased gradually as time passes" and "cannot be decided solely by reference to some point in time, after which some ten-day clock would begin to run, or some excuse for not filing earlier would be needed."[34] But this claim is a problem of Nevada's own making. Nevada did not have to wait eleven years to file its Motion, nor does Nevada in any way provide supporting evidence for these supposed "burdens."

Nevada also claims that it could not have used the passage earlier this year of the most recent appropriations legislation that did not include funds for Yucca Mountain as the trigger for the 10-day deadline.[35] Nevada alleges that filing the Motion then might have constituted a waiver of its objection to Commissioner Wright's participation on Yucca Mountain issues, purportedly because only three Commissioners (including Commissioner Wright) were appointed at that time, and three Commissioners are needed for a quorum.[36]

This argument is a red herring. Had Nevada filed its Motion earlier this year, it would have been untimely for all the same reasons previously stated. Further, there is nothing unique about this year's lack of funding for Yucca Mountain in appropriations legislation compared to

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[34] Motion at 9.
[35] *Id.* at 9 n.10.
[36] *Id.*

the prior ten years of appropriations legislation without such funding. But even assuming the Motion could have been deemed timely had it been filed within ten days of the passage of this year's legislation, nothing prevented Nevada from filing its Motion while simultaneously seeking to preserve its recusal concerns. And even if there were a credible question over Commissioner Wright's participation in ruling on Nevada's Motion, the Commission has contingency plans in place to ensure it can carry out its functions, including adjudication, even when its membership falls short of a quorum.[37]

For all of the foregoing reasons, Nevada's Motion is untimely and should be denied for this reason alone.

B. Lifting the Adjudicatory Suspension Now Would Result in a Waste of Everyone's Resources

The Commission should deny Nevada's Motion because lifting the adjudicatory suspension now would result in a waste of all parties' resources without completing any meaningful tasks. Nevada cavalierly ignores the resources that the Opposing Parties and other parties to the proceeding would need to expend if the Commission were to permit Nevada to file its summary disposition motions.

Nevada argues that the DC Circuit's writ of mandamus from *In re Aiken County* "requires the Commission to spend its remaining resources to make some significant progress in the adjudicatory proceeding."[38] However, Nevada offers up no evidence for this assertion beyond

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[37] The NRC maintains a contingency plan to mitigate the loss of quorum through a delegation of authority. Should the absence of a quorum arise, the authority to carry out Commission functions (including adjudication) is delegated to the Chairman (or, if the Chairman is incapacitated or the position unfilled, the longest-serving Commissioner). *See, e.g.,* Notice of Delegation, 60 Fed. Reg. 34,561 (July 3, 1995) ("Under section 1 of Reorganization Plan No. 1 of 1980, the Commission's functions are limited to policy formulation, rulemaking and adjudication. It is imperative that the agency be able to carry out these functions at all times.").

[38] Motion at 5.

its own conclusory statement. Nevada fails to point to anything in the mandate which would require the NRC to resume the adjudicatory proceeding at this time. The D.C. Circuit's mandamus required resumption of the "licensing process"[39] and did not prescribe any particular task or sequence of tasks that the NRC must accomplish in order to adhere to the mandamus.[40] In fact, as the Commission has previously stated, the court's order "afforded [the Commission] broad discretion in choosing a pragmatic course of action to resume the licensing process".[41] When the NRC previously declined to resume the adjudication or reconstitute the Licensing Support Network (LSN) in 2013, it made a pragmatic decision guided by the fact that the NRC was unable, at that time, to make meaningful or substantial progress in either the adjudication or the LSN.[42] Nevada fails to point to any recent (material or otherwise) change in circumstances demonstrating otherwise.

Indeed, the circumstances that led the Commission and the Board to suspend the adjudication, and then to decline to resume it, have not changed. The D.C. Circuit ordered that the licensing process was to resume "unless and until Congress authoritatively says otherwise or there are no appropriated funds remaining,"[43] and those are the criteria the Commission applied when declining to resume the adjudication in 2013.[44] There is no credible basis—and Nevada identifies none—for the Commission to depart from applying the DC Circuit's criteria. Furthermore, Congress has not appropriated any funds for the Yucca Mountain licensing process in more than a decade.[45] And as far as the Opposing Parties are aware, there are presently no

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[39] *In re Aiken Cnty.*, 725 F.3d at 267.
[40] CLI-13-08, 78 N.R.C. at 226.
[41] *Id.*
[42] *Id.* at 226-27.
[43] *In re Aiken Cnty.*, 725 F.3d at 267.
[44] CLI-13-08, 78 N.R.C. at 226.
[45] Motion at 2.

ongoing activities associated with the Yucca Mountain project, and it appears that none are likely in the near future. Thus, applying the D.C. Circuit's criteria, there is no basis for the Commission to lift the adjudicatory suspension at this time.

In addition, resumption of the adjudication would require the expenditure of substantial resources by the Commission and NRC Staff. While the Commission may well have approximately $294,812.00[46] remaining in Nuclear Waste Fund appropriations, there is no telling whether those funds are adequate. Nevada argues that the Commission should be required to spend these remaining resources answering its Motion and responding to its three planned motions for summary disposition, and any follow-on motion that may be appropriate.[47] Other than its own guesswork,[48] Nevada provides no information showing that such funds are sufficient for these tasks. And it is more than likely that $294,000 is far from enough money for the NRC Staff and Commission to complete these tasks. Nevada also fails to assert or show that the Commission has full-time equivalent staff—one of the criteria used by the Board when suspending the adjudicatory proceeding in 2011[49]—available to address these matters.

Additionally, this scant amount of money that the Commission has ignores the money or resources needed for DOE to respond to the Motion or any subsequent motions for summary disposition. As DOE presently relies on outside legal counsel for this proceeding, as well as multiple national laboratories and contractors for technical support, responding to such motions would most likely be an extremely expensive task.

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[46] *Id.* at 4.
[47] *Id.* at 1-2.
[48] *Id.* at 5 n.5.
[49] LBP-11-24, 74 N.R.C. at 369-70.

Nevada's accounting also does not include funds for the LSN. Nevada brazenly claims that resources are not needed for the LSN because no discovery is needed to consider and decide its planned dispositive motions.[50] This is purportedly because "the facts are indisputable and supported by unambiguous admissions by both DOE and NRC Staff."[51] Nevada's claims here are wild speculation about motions it has yet to file. Moreover, the only thing not in dispute here is that Nevada's position would violate Commission rules. Under NRC regulations, any party that would respond to Nevada's planned summary disposition motions is entitled to have access to information on the LSN to support its position.[52]

Lastly, the Commission has stated that following completion of the SER and all necessary environmental impact statements, the next substantial task to resume would be completion of discovery in the adjudication.[53] Moving forward with dispositive motions without discovery or access to the LSN materials, as Nevada proposes to do, would violate the Commission's policy. Indeed, that is why (as previously summarized) the NRC's adjudicatory schedules provide for summary disposition after the close of discovery.[54] Proceeding participants are entitled to determine for themselves, based on available information obtained through discovery, whether factual issues are in dispute. They are not required to take Nevada's word for it.

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[50] *Id.* at 5 n.6.

[51] *Id.* at 11.

[52] 10 C.F.R. §§ 2.1001 (defining Licensing Support Network); 2.1003 (requiring certain information be made available on the Licensing Support Network); and 2.1018(a)(1) (permitting proceeding parties to access documentary material made available pursuant to Section 2.1003).

[53] CLI-13-08, 78 N.R.C. at 227.

[54] *See, e.g.,* 10 C.F.R. Part 2 Appendix D.

For these reasons, the Commission should deny the Motion because lifting the adjudicatory suspension now would result in a waste of limited resources, which are also insufficient for all the tasks at hand.

C. Nevada's Remaining Arguments Do Not Support the Relief Sought in the Motion

The Commission should also reject Nevada's Motion because its remaining arguments do not support the relief sought in the Motion.

Nevada argues that "fundamental fairness requires that this proceeding be ended if possible."[55] Nevada goes on to state that an indefinite suspension of the Yucca Mountain adjudicatory proceeding imposes an unacceptable and unfair burden on Nevada and other parties,[56] but Nevada presents no evidence of being subject to an unacceptable or unfair burden. Per the motions rule, 10 C.F.R. § 2.323(b), motions are to be supported by any affidavits or other evidence relied on by the moving party. Nevada included no such affidavits or other evidence with its Motion.

Nevada states that "[it] should be able to devote its resources to other matters besides the proposed Yucca Mountain repository,"[57] yet makes no mention or accounting of what specific resources it currently devotes to the Yucca Mountain project, let alone how those unspecified resources are depriving Nevada of its ability to address other equally unspecified matters. Similarly, Nevada complains that "contingent future planning" requires Nevada to spend "time and resources" on various tasks to support its position in the Yucca Mountain proceeding.[58] But nowhere in the Motion does Nevada allege what time and resources it has actually been spending

[55] Motion at 6.
[56] *Id*. at 8.
[57] *Id*. at 6.
[58] *Id.*

to carry out these tasks during the adjudicatory suspension. And if Nevada has not been carrying out these tasks to present, it is unclear why they would need to start expending time and resources now.

Nevada claims that the Commission's decision in *Hydro Resources* is "key" precedent in an attempt to bolster its argument that the Yucca Mountain adjudicatory proceeding imposes upon it an unacceptable and unfair burden.[59] But Nevada's reliance on *Hydro Resources* is inapt for multiple reasons.[60] In fact, Nevada walks back its reliance on *Hydro Resources*, apparently realizing that if the Commission were to grant here the same relief it did in *Hydro Resources*, that would mean "a resumption of the adjudicatory hearing process for all contentions" for which insufficient funds have been appropriated.[61] Nevada thus lays bare its motive: Nevada wants preferential treatment for the issues it seeks to litigate, and there is (allegedly) just enough money to do only that. One can only imagine what Nevada's reaction would be were a proponent of the Yucca Mountain repository to seek the same preferential treatment. Suffice it to say that the Commission's rules of practice do not permit such unequal treatment of parties in adjudications.

Additionally, Nevada argues that a departure from the adjudicatory hearing schedule to allow consideration of its summary disposition motions would serve to maximize progress in the overall Yucca Mountain process, and therefore be clearly warranted.[62] However, as a general

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[59] *Id.* (citing*, Hydro Res., Inc.,* (P.O. Box 15910, Rio Rancho, N.M. 87174), CLI-01-04, 53 N.R.C. 31 (2001) ("CLI-01-04").

[60] In *Hydro Resources,* the Licensing Board suspended the adjudicatory proceeding because the applicant made a business decision to not pursue additional mining "due to fluctuating market conditions", and because the company was acting "indecisive". CLI-01-04, 53 N.R.C. at 42. The Commission lifted the suspension, finding that the intervenors had waited long enough to litigate the rest of their concerns. *Id.* at 34. However, the situation here is wholly different. Here, it is not a simple business decision which has delayed the adjudicatory process, but an insurmountable lack of congressional funding (for which Nevada would take great credit).

[61] Motion at 8.

[62] *Id.* at 10.

matter, summary disposition at this time would make little sense, as the facts on which Nevada's proposed dispositive motions would be based will not be known until sometime in the future. Furthermore, the applicable summary disposition rule states, in part, that such motions are to be based on material facts for which the moving party contends there is no genuine issue to be heard.[63] Longstanding case law holds that facts are to be construed in the light most favorable to the nonmoving party, and any doubt about the existence of a genuine issue of material fact is to be resolved against the moving party.[64] In short, summary disposition may be granted only if the truth is clear.[65]

While Nevada contends that there is no genuine dispute on any material issue related to its three planned dispositive motions,[66] this is an unsupported assumption, to say the least. While it is not the Opposing Parties' purpose in this response to argue the substance of Nevada's planned motions, the discussion that follows makes clear that lifting the suspension to file these three specific motions would be a complete waste of time and resources because they are not as "simple," "straightforward," or "uncontested" as Nevada claims them to be.[67]

Regarding its first planned dispositive motion, Nevada contends that DOE has not yet complied with NRC regulations at 10 C.F.R. § 63.121(a) that require the Yucca Mountain repository operations area be located in and on lands that are either acquired lands under the

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[63] 10 C.F.R. § 2.710(a). Section 2.1000 of the "Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository" (10 C.F.R § 2.1000 (Scope of subpart J)) incorporates by reference the adjudicatory procedures in subpart G, including the rule governing motions for summary disposition promulgated at Section 2.710(a).

[64] *Advanced Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 N.R.C. 98, 102 (1993); *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.,* (Pilgrim Nuclear Power Station), CLI-10-11, 71 N.R.C. 287, 297 (2010).

[65] *Progress Energy Florida, Inc.* (Levy Cnty. Nuclear Power Plant, Units 1 and 2), LBP-10-20, 72 N.R.C. 571, 579 (2010) (citing *Poller v. Columbia Broad. Sys. Inc.*, 368 U.S. 464, 467 (1962).

[66] Motion at 11.

[67] *See* Motion at 2.

jurisdiction and control of DOE, or lands permanently withdrawn and reserved for its use.[68] This issue depends on facts not yet determined. But even if such facts were known, and assuming that DOE has not yet complied with those requirements, that regulation does not specify by when that land withdrawal must occur, let alone require that it be accomplished right now.[69]

For its second planned dispositive motion, Nevada argues that the proposed above-ground facilities containing high-level radioactive wastes (including spent fuel storage facilities) must be designed to withstand aircraft crashes unless the crash probability is less than one in ten thousand before permanent closure, referencing 10 C.F.R. § 63.2.[70] Nevada contends that DOE and the NRC Staff assumed that the crash probability was sufficiently low only by relying on flight restrictions that are not currently in place.[71] However, the need for and types of flight restrictions for these facilities depend on facts yet to be determined, and there is no provision in the regulation that the applicable restrictions must be in place now.

For its third planned dispositive motion, Nevada alleges that DOE has conceded that its license application does not explicitly consider human-induced climate change, as doing so would "involve speculation."[72] And according to the draft order that accompanied the Motion, Nevada purportedly would seek summary disposition on "DOE's alleged refusal to include an analysis of human-induced climate change in the license application."[73] But that is not what

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[68] *Id*. at 11.
[69] *See* 10 C.F.R. § 63.121(a).
[70] Motion at 11.
[71] *Id.*
[72] *Id.* at 11-12.
[73] *Id.*, Appendix A at 2.

happened, as even a cursory review of DOE's answer to the NRC Staff request for additional information (RAI) on this issue referenced in the Motion[74] reveals.

The NRC Staff RAI requested that DOE describe how certain analyses include the effect of climate change caused by elevated carbon dioxide levels, which information was needed to evaluate compliance with 10 C.F.R. §§ 63.114(a) (1), (2), (5), and 63.305(a) (b), (c). It is true that the DOE RAI Response states in the first sentence that "[a]ttempting to predict human-induced emissions of greenhouse gases and their potential to effect climate change would involve speculation, and, as a result, introduce inherently large uncertainties in prediction of the future global population behavior and resulting consequences."[75] But the DOE RAI Response then goes on to explain over five pages of text how its analyses encompassed potential anthropogenic effects.[76] Thus, while Nevada claims the issues involved are indisputable and purportedly supported by "unambiguous admissions," the reality here is far different. It is easy to predict that resolution of Nevada's anticipated dispositive motion would require additional discovery and considered evaluation of whether DOE's analyses meet applicable requirements.

All of Nevada's planned dispositive motions are further belied by its own assertion that NRC Staff-recommended license conditions employed to address purported violations "do not

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[74] *Id.* at 12, citing DOE's response to RAI 3.2.2.1.3.5-001, Response Tracking Number: 00388-00-00, *available at* NRC Accession No. ML091830071 (the "DOE RAI Response"). Even if DOE's license application lacked information Nevada contends should have been included in it, the DOE RAI response contained the purportedly missing information, and such responses are a "standard and ongoing part of NRC licensing reviews." *See Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 349 (1998). *See also* 10 C.F.R. § 2.102(a) ("During review of an application by the NRC staff, an applicant may be required to supply additional information.").

[75] DOE RAI Response, Enc. 8 at p. 1 of 8.

[76] *See, e.g.*, *Id.*, Enc. 8 at p. 6 of 8 ("It is conservatively assumed that the present day climate is the driest. Only wetter climates that could cause increased infiltration could have an impact in a negative way on repository performance. However, such negative impacts are bounded by future climate states in the analysis.").

represent a lawful option for curing the violations cited in its [anticipated] motions for summary disposition."[77] Whether a potential license condition would cure a perceived or actual flaw in a license application is a question of fact, in addition to the significant questions of law Nevada anticipates here.

Finally, the NRC has long recognized that the licensing process is dynamic, and license applicants are permitted to amend their applications to address any perceived or actual flaw.[78] By whatever period of time it may take for Congress to restart Yucca Mountain funding, the purported factual support for Nevada's planned motions will almost certainly have changed. Nevada's plans to lift the Commission's suspension in order to pursue its three summary disposition motions is surely a waste of time and effort.

IV. CONCLUSION

For all of the foregoing reasons, the Commission should deny Nevada's motion.

Respectfully submitted,

/executed in accord with 10 C.F.R. 2.304(d)/
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[77] Motion at 12 n.12.

[78] *See Curators of the Univ. of Missouri* (TRUMP-S Project), CLI-95-08, 41 N.R.C. 386, 395 (1995) ; *see also Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-04-33, 60 N.R.C. 749, 753 (2004).

/executed in accord with 10 C.F.R. 2.304(d)/
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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 copies of the foregoing "The Joint Opposition of the Nuclear Energy Institute; Nye County, Nevada; the National Association of Regulatory Utility Commissioners; and the State of South Carolina to the State of Nevada's Motion to Lift the Suspension of the Adjudicatory Proceeding for the Yucca Mountain Construction Authorization" dated September 30, 2022, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the captioned proceeding, this 30th day of September 2022.

Respectfully submitted,

/electronically signed by Timothy J.V. Walsh/
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