

September 30, 2022

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High-Level Waste Repository)

Docket No. 63-001-HLW

**NRC STAFF ANSWER IN OPPOSITION TO NEVADA'S REQUEST TO LIFT THE
SUSPENSION OF THE ADJUDICATORY PROCEEDING FOR LIMITED PURPOSES**

INTRODUCTION

On September 20, 2022 eleven years after this proceeding was suspended, the State of Nevada moved to lift the suspension of this proceeding. Nevada argues that resuming this proceeding is now required by *Aiken County*,¹ fundamental fairness, and Commission precedent.² Nevada further argues that its contemplated motions for summary disposition would resolve key issues and have the potential to conclude the adjudicatory proceeding with a dispositive decision on the merits.³

As discussed below, Nevada's motion should be denied. As a threshold matter, the motion is untimely. Further, consideration of Nevada's proposed motions for summary disposition are not required by *Aiken County*, fairness, or *Hydro Resources*. Instead, Nevada's motions would rapidly consume extremely limited remaining funds, would not make meaningful progress in the proceeding, and would preclude consideration of other parties' views on the

¹ *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013).

² *Nevada Request to Lift the Suspension of the Adjudicatory Proceeding for Limited Purposes*, at 1 (Sept. 20, 2022) (Motion).

³ *Id.* at 5

direction of the proceeding. Following *Aiken County*, the Commission declined to resume this adjudicatory proceeding because available funds, then in excess of \$10 million, were grossly insufficient to make meaningful progress in the adjudicatory proceeding, let alone resolve it.⁴ That rationale applies here even more strongly, with less than \$300,000 available.⁵

BACKGROUND

On September 9, 2011, the Commission announced that it was evenly divided as to whether the Commission should review, and reverse or uphold, the fourth Construction Authorization Board's (CAB-04 or the Board) denial of the U.S. Department of Energy's (DOE) motion to withdraw its construction authorization application.⁶ The Commission directed the Board to "complete all necessary and appropriate case management activities, including disposal of all matters currently pending before it and comprehensively documenting the full history of the adjudicatory proceeding."⁷ Consistent with the Commission's direction, the Board suspended the adjudicatory proceeding on September 30, 2011, documenting the proceeding's history and citing fiscal constraints.⁸

At the time the proceeding was suspended, fifteen parties had been granted intervention in the proceeding, two counties had been admitted as interested governmental participants, and one organization had been permitted to participate as *amicus curiae*.⁹ In addition, the Board noted that 288 contentions were pending and would be ripe for adjudication at evidentiary hearings after the completion of discovery, issuance of the four remaining safety evaluation

⁴ CLI-13-8, 78 NRC 219, 227, 233 (2013); *see also Aiken County*, 725 F.3d at 269 ("No one disputes that \$11 million is wholly insufficient to complete the processing of the application.") (Garland, C.J., dissenting). ⁵ "U.S. Nuclear Regulatory Commission Nuclear Waste Fund Expenditures" (July 2022) (ADAMS accession no. ML22206A045).

⁶ CLI-11-7, 74 NRC 212 212 (2011).

⁷ *Id.*

⁸ LBP-11-24, 74 NRC 368, 368-70 (2011).

⁹ *Id.* at 369. The Florida Public Service Commission was participating as *amicus curiae*. *See* LBP-10-11, 71 NRC 609, 649 (2010).

report (SER) volumes, which were then in various states of completion, and any needed supplementation of the DOE environmental impact statement (EIS).¹⁰ Discovery was in progress although no depositions had been held.¹¹ Due to the lack of budgeted funds, the Licensing Support Network (LSN)¹² was shut down, and consistent with Board orders, all participants other than the NRC staff (whose LSN collection resided in the NRC's Agencywide Documents Access and Management System (ADAMS)), delivered electronic copies of their LSN collections to the Secretary.¹³

On August 13, 2013, the U.S. Court of Appeals for the District of Columbia Circuit granted a writ of mandamus, directing the NRC to resume the licensing process.¹⁴ On August 30, 2013, the Commission invited participants in the proceeding to provide their views as to how the agency should continue with the licensing process.¹⁵

On November 18, 2013, the Commission ordered that the adjudicatory proceeding remain suspended and that the NRC staff should work to complete the remaining SER volumes and monitor the status of DOE developing a supplemental EIS for NRC consideration and adoption.¹⁶ In a subsequent order, the Commission reiterated that the adjudicatory proceeding remain suspended, and that limited agency resources should be focused instead on activities that "are intended to advance the process 'in a manner that is constructive and consistent with the court's decision and the resources available.'"¹⁷ In addition, the Commission noted that, because the adjudication would remain suspended, it did not consider various adjudication-

¹⁰ See LBP-11-24, 74 NRC at 369.

¹¹ See CAB Case Management Order #2, at 3, 7 (Sept. 30, 2003) (unpublished).

¹² See 10 C.F.R. § 2.1001 (defining "Licensing Support Network").

¹³ CLI-11-13, 74 NRC 635, 637-38 (2011).

¹⁴ *Aiken County*, 725 F.3d at 267.

¹⁵ Order of the Secretary, at 1 (Aug. 30, 2013) (unpublished).

¹⁶ CLI-13-8, 78 NRC at 221.

¹⁷ CLI-14-1, 79 NRC 1, 3 (2014).

related requests from the parties.¹⁸ Instead, the Commission stated that participants will have the opportunity to resubmit requests associated with the conduct of the proceeding if the proceeding resumes.¹⁹ Since the suspension of the adjudicatory proceeding in 2011, the NRC staff has issued the remaining volumes of its SER²⁰ and published a supplement to DOE's EIS.²¹

On September 20, 2022, Nevada filed the instant motion before the Commission. Nevada asks that "the Commission lift the current suspension of the Yucca Mountain adjudicatory proceeding for the limited purpose of considering three Nevada motions for summary disposition, and depending on how the Commission rules on the summary disposition motions, a motion to disapprove the issuance of the construction authorization."²² Nevada states that the summary disposition motions would relate to land ownership and controls, military aircraft flight restrictions, and human-induced climate change.²³ Nevada claims that "both DOE and the NRC Staff have conceded that the [license application] fails to comply with NRC regulations applicable to these three safety matters."²⁴

DISCUSSION

As described below, Nevada's motion is untimely, consideration of its proposed motions for summary disposition is not compelled by the authorities it cites, would not make meaningful

¹⁸ *Id.* at 3.

¹⁹ *Id.* (citing CLI-13-8, 78 NRC at 233-34).

²⁰ See "Safety Evaluation Report Related to Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada," NUREG-1949, vol. 1 (Aug. 2010) (ML102440298), vol. 2 (Jan. 2015) (ML15022A146), vol. 3 (Oct. 2014) (ML14288A121), vol. 4 (Dec. 2014) (ML14346A071), vol. 5 (Jan. 2015) (ML15022A488).

²¹ See "Supplement to the U.S. Department of Energy's Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada" (Final Report), NUREG-2184 (May 2016) (ML16125A032).

²² Motion at 1. While Nevada filed this motion before the Commission, CAB-04 issued the order suspending the proceeding. See LBP-11-24, 74 NRC at 369.

²³ Motion at 1-2.

²⁴ *Id.* at 2.

progress in or resolve this proceeding, and would be an imprudent use of extremely limited remaining resources.

I. Nevada's Motion Is Not Timely

After *Aiken County* and consideration of the many parties' views on how to proceed, the Commission opted not to resume the adjudicatory proceeding, noting that available funds (then in excess of \$10 million) were not nearly sufficient to make significant progress in the hearing.²⁵ Now that the proceeding has been suspended for eleven years, Nevada argues that the NRC regulations governing the timeliness of motions do not apply here.²⁶ In the alternative, Nevada argues that Congress' decision not to appropriate resources from the Nuclear Waste Fund to the NRC in the current fiscal year (or in the last ten) gives rise to the current motion, and that the passage of time *without change* makes its motion timely, especially given the "risk that the NRC would have insufficient money left in its Nuclear Waste Fund appropriation to consider Nevada's motions."²⁷ These arguments fail to meet the NRC's pleading requirements, as discussed below.

First, Nevada argues that 10 C.F.R. § 2.323, which requires that motions be made no later than ten days after the circumstance from which the motion arises, does not apply here.²⁸ Specifically, Nevada claims that this motion is "inextricably connected" to its contemplated motions for summary disposition, which are not governed by 10 C.F.R. § 2.323.²⁹ But to file a motion for summary disposition, Nevada properly identified the need to *first* move to lift the suspension in this proceeding. Nevada makes this precise point in its message to the parties appended to its motion: "At this time, your views should focus on the motion to lift the

²⁵ CLI-13-8, 78 NRC at 233.

²⁶ Motion at 8.

²⁷ *Id.* at 9.

²⁸ *Id.* at 8.

²⁹ *Id.* at 10. Under subpart J, 10 C.F.R. § 2.1025 governs motions for summary disposition.

suspension because the other motions *cannot* be filed unless and until the Commission allows Nevada to file them.”³⁰ In the same message, Nevada makes clear that it is consulting with the parties *pursuant to* 10 C.F.R. § 2.323: “The Commission’s Rules of Practice at 10 C.F.R. § 2.323(b) provide that, before any motion such as this is filed, the moving party must make a sincere effort to contact other parties in the proceeding and resolve the issues raised in the motion.”³¹ The present motion is likewise not captioned as a motion for summary disposition (nor is it one), but as a request to “lift the suspension of the adjudicatory proceeding.” Thus, as Nevada has explicitly acknowledged in the consultation process, 10 C.F.R. § 2.323 applies here by straightforward application of the NRC’s rules of practice.

Nevada claims in the alternative that an increasing burden over time makes its motion timely. Nevada states that because of this burden, it cannot be held to the “ten-day clock” of 10 C.F.R. § 2.323,³² and that the increasing risk that the NRC may not have sufficient Nuclear Waste Funds³³ to consider its proposed summary disposition motions justifies their consideration now.³⁴ But this argument ignores NRC requirements. As Nevada notes, “approximately eleven years has elapsed since the proceeding was suspended and [since] Congress appropriated money for the proceeding.”³⁵ Thus, it is not clear to the NRC staff why Nevada’s motion would be timely now, versus earlier or later, because there is no change in circumstances.

³⁰ Motion, Ex. 1 at 1 (emphasis added).

³¹ *Id.*

³² Motion at 9.

³³ As the Commission previously noted, “the existence of a specific appropriation for Yucca Mountain-related licensing activities (i.e., appropriations from the Nuclear Waste Fund) prevents the NRC, under well-settled principles of appropriations law, from using its general appropriations for Yucca-related activities.” CLI-13-8, 78 NRC at 235.

³⁴ Motion at 9.

³⁵ *Id.*

In addition, Nevada argues that insufficient Nuclear Waste Funds present a risk that the Commission will have insufficient resources to consider its summary disposition motions in the future. But the Commission is aware of the potential burden on all parties when it suspends a proceeding.³⁶ As discussed further in Section II.A below, Nevada’s argument also erroneously elevates Nevada’s claims above those of other parties.³⁷

II. *Aiken County* and *Hydro Resources* Do Not Compel Granting Nevada’s Request

Nevada argues that granting its motion to lift the suspension in this proceeding, but only for the purpose of considering its motions for summary disposition, “is required [by *Aiken County*], fundamental fairness, and Commission precedent.”³⁸ As discussed below, Nevada is incorrect on each point. The suspension of this proceeding reflects the reality of the matter: the NRC’s Nuclear Waste Fund resources are ever-dwindling, while significant issues—including issues implicated by the proposed summary disposition motions—are far from resolved. Nevada is not entitled to resolution of its claims any more than any other party, especially where, as here, its proposal would not meaningfully move the proceeding forward.

A. *Aiken County*

In the first paragraph of its argument, Nevada asserts that the Commission is *required* to spend its remaining resources to resume the adjudicatory proceeding, arguing that *Aiken County* requires nothing less where it directs that “unless and until Congress authoritatively says otherwise or there are no appropriated funds remaining, the Nuclear Regulatory Commission must promptly continue with the legally mandated licensing process.”³⁹ But in the next

³⁶ See *NRC Staff Response to August Huí Commission Order*, at 11-12 (Sept. 30, 2013); *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, N.M. 87174), CLI-01-4, 53 NRC 31, 38-40 (2001)).

³⁷ Indeed, the rationale for maintaining the suspension in this proceeding was that remaining resources were insufficient to make any meaningful progress in the proceeding. See CLI-13-8, 78 NRC at 233 (“In view of funding constraints, discovery activities likely would draw to an abrupt halt before significant progress can be made.”).

³⁸ Motion at 1.

³⁹ *Id.* at 4 (quoting *Aiken County*, 725 F.3d at 267).

paragraph of its argument, Nevada concedes that this would serve little purpose, stating that “merely restarting the adjudicatory proceeding from the point where it stopped—beginning deposition discovery—would not be prudent at this time because no meaningful progress could be made given the limited resources that are available.”⁴⁰ Nevada attempts to reconcile this tension by limiting its motion to lift the suspension as solely for the purpose of considering its contemplated motions for summary disposition. But such a limitation ignores past Commission decisions in this matter and conflates two distinct considerations: 1) whether to lift the suspension, and 2) if lifted, and with an opportunity for input from all parties, how to proceed. Nevada seeks to deprive other parties of this opportunity with its approach, contrary to previous Commission statements on this matter.

In CLI-13-8, the Commission concluded that completion of the SER and supplemental EIS were the most reasonable use of available funds, given that remaining resources were far short of what would be needed for the NRC to complete its consideration of the application.⁴¹ In that decision, the Commission explicitly considered and rejected proposals to resume the adjudicatory proceeding, noting that

[r]esuming the adjudication now likely would result in resuspension of the case in the near term without completion of meaningful—or substantial—adjudicatory activities. . . . In addition, the record reflects that some of the less well-funded participants do not have the resources to participate fully in the adjudication at this time. . . . Because we have decided not to restart the adjudication, we decline to consider the participants’ various adjudicatory requests today. *Should we lift the suspension in the future, participants will have the opportunity to resubmit requests associated with the conduct of the proceeding at that time.*⁴²

Nevada seeks to circumvent this opportunity and consume the limited remaining resources of the NRC (and other parties) only for the purpose of considering its contemplated motions for summary disposition. But Nevada is no more entitled to the consideration of its claims than any

⁴⁰ *Id.* at 5.

⁴¹ CLI-13-8, 78 NRC at 231-33.

⁴² *Id.* at 233 (emphasis added). In fact, multiple parties with admitted contentions in this proceeding did not even respond to Nevada’s consultation request. Motion at 13.

other party.⁴³ Indeed, in the same decision, the Commission critically observed that given limited resources, prudence requires that the NRC “consider the amount of funding available not as a means of determining *whether* to proceed on the license application (an inquiry that the mandamus order forecloses), but in determining *how* to proceed (an inquiry that the mandamus order does not address and that prudent fiscal management requires us to consider).”⁴⁴ This is why the Commission chose not to resume the adjudicatory proceeding when only \$13 million were available,⁴⁵ and why the Commission should likewise choose not to do so here, where only a small fraction of that amount—less than \$300,000—remains.

B. *Hydro Resources, Burden, and Fairness*

Nevada next claims that “fundamental fairness” requires that the NRC grant its request and consider its motions for summary disposition. Noting the costs associated with retaining experts, document preservation, and retention of counsel, Nevada cites the Commission’s decision in *Hydro Resources* as requiring this outcome.⁴⁶ The NRC staff does not doubt that Nevada has expended significant resources associated with this proceeding and that holding any proceeding in suspension for such a long period of time burdens all parties. But the current posture of this proceeding is a consequence of budgetary limitations, not traditional case management considerations.⁴⁷ In the Staff’s submission to the Commission providing its views on how to proceed after *Aiken County*, the Staff discussed the potential resumption of the

⁴³ For example, the Commission deferred consideration of the Timbisha Shoshone Tribal Council’s request for recognition, stating that “should this adjudicatory proceeding recommence in the future, the Tribal Council may renew its request.” CLI-13-8, 78 NRC at 234.

⁴⁴ CLI-13-8, 78 NRC at 227.

⁴⁵ The apparent discrepancy in remaining Nuclear Waste Funds discussed in CLI-13-8 is because, at the time, approximately \$11 million were available in unobligated carryover funds, with an additional \$2.5 million in obligated, unexpended funds that would become available if these funds were found eligible for subsequent deobligation. See CLI-13-8, 78 NRC at 228 & n.35.

⁴⁶ Motion at 6 (citing *Hydro Resources*, CLI-01-4, 53 NRC 31).

⁴⁷ CLI-11-7, 74 NRC at 212; CLI-13-8, 78 NRC at 227 & n.34.

proceeding at length, including a discussion of *Hydro Resources*.⁴⁸ Absent extraordinary circumstances, the Commission's policy is that licensing proceedings should be conducted as promptly as practicable.⁴⁹ The Commission's adjudicatory policies and procedures are intended to (1) provide a fair hearing process to avoid unnecessary delays in the NRC's review and hearing process, and (2) to produce an informed adjudicatory record that supports agency decision making.⁵⁰ To this end, the Commission's longstanding practice is to limit orders delaying proceedings to the duration and scope necessary to promote the Commission's dual goals of public safety and timely adjudication,⁵¹ and the Commission endeavors to complete hearings and reach a final decision "within a reasonable time."⁵² Critically, however, the Commission has drawn a distinction when going forward would be a waste of resources,⁵³ which is the case here.

Nevada claims that *Hydro Resources* requires the Commission to grant its request, asserting that the circumstances that give rise to its claims here are even more egregious than in *Hydro Resources*.⁵⁴ But then Nevada concedes that the relief provided in *Hydro Resources*, a prompt and thorough hearing, *cannot* be granted because of the insufficiency of funds.⁵⁵ But

⁴⁸ *NRC Staff Response to August Huí Commission Order*, at 11-12 (Sept. 30, 2013).

⁴⁹ See *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, N.M. 87174), CLI-04-14, 59 NRC 250, 254 (2004); see also *Hydro Resources*, CLI-01-4, 53 NRC at 38 (the Commission has a "long-standing commitment to the expeditious completion of adjudicatory proceedings") (quoting *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 24 (1998)).

⁵⁰ *Hydro Resources*, CLI-01-4, 53 NRC at 38-43 (postponing the conclusion of a hearing for the convenience of the applicant (to save resources) is not warranted given that a delay of years (due to project indecision based on market conditions) to resume proceeding on a voluminous record would require parties to have to begin virtually from scratch to reacquaint themselves with case details; fairness to the parties, including intervenor's concern that expert affidavits could grow stale and previously retained experts could become unavailable, dictate resumption of delayed portion of litigation).

⁵¹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 381 (2001).

⁵² *Id.* (quoting 5 U.S.C. § 558(c)).

⁵³ *Id.* at 383 (where delay was warranted because of a state ruling blocking construction of a facility).

⁵⁴ Motion at 7.

⁵⁵ *Id.* at 8.

the Commission was aware of its own precedent in *Hydro Resources* when, ten years later, the Commission first directed that this proceeding be suspended,⁵⁶ as well as when it later chose not to resume the adjudicatory proceeding after *Aiken County* based upon the presence of special circumstances (that is, insufficient resources).⁵⁷ Those same circumstances are present now, only far more acutely, with less than \$300,000 available,⁵⁸ compared to over \$13 million in 2013,⁵⁹ and an estimate of over \$300 million for the NRC to complete the licensing process.⁶⁰

Therefore, neither *Aiken County*, “fundamental fairness,” nor *Hydro Resources* require or even suggest the granting of Nevada’s motion to lift the suspension or consider its motions for summary disposition. Instead, and as discussed in detail in Section III below, consideration of Nevada’s motions would rapidly consume limited funds without purpose or prospect of progress.

III. Nevada’s Motions Would Not Resolve Major Issues or Conclude This Proceeding

Coupled to Nevada’s procedural claims for resuming this adjudication are its claims that its motions would resolve key issues and have the “potential to conclude the adjudicatory proceeding with a dispositive decision on the merits.”⁶¹ But Nevada is incorrect. Nevada misreads applicable requirements and makes incorrect assertions about the necessary steps in the NRC’s decision making process in this matter.

NRC regulations do not allow the Commission to reach a decision on the DOE application until completion of (1) the NRC staff’s safety and environmental reviews, (2) formal discovery (including depositions, interrogatories, and requests for admissions), (3) litigation,

⁵⁶ See CLI-11-7, 74 NRC at 212.

⁵⁷ See CLI-13-8, 78 NRC at 226-27.

⁵⁸ As of July 31, 2022, the NRC had \$294, 812 in Nuclear Waste Funds remaining. “U.S. Nuclear Regulatory Commission Nuclear Waste Fund Expenditures” (July 2022) (ML22206A045).

⁵⁹ CLI-13-8, 78 NRC at 228.

⁶⁰ See, e.g., U.S. Government Accountability Office, GAO-17-340, “Commercial Nuclear Waste: Resuming Licensing of the Yucca Mountain Repository Would Require Rebuilding Capacity at DOE and NRC, Among Other Key Steps,” at 31-33 (April 2017) (<https://www.gao.gov/products/gao-17-340>).

⁶¹ Motion at 5.

including a hearing, on admitted contentions and any new contentions, and (4) Commission review of contested and uncontested issues.⁶² Or as the Commission noted in CLI-13-8, “[c]onsistent with our rules, before a final decision approving *or disapproving* a construction authorization application may be reached, not only must the Staff complete its safety and environmental reviews but a formal hearing must be conducted, and our own review of both contested and uncontested issues must take place.”⁶³ Thus, Nevada’s claim that consideration of these motions even has the potential to resolve the pending matter is incorrect.⁶⁴

IV. The NRC Does Not Have Sufficient Resources to Resume the Adjudication

Consideration of available resources has featured prominently in the Commission’s past decision making in this matter and the NRC staff’s arguments in this response. The Commission’s guiding principle in steering the Yucca Mountain review and adjudicatory activities to their current posture has been to prioritize the prudent stewardship of the NRC’s remaining

⁶² See 10 C.F.R. Part 2, Appendix D; 10 C.F.R. §§ 2.103; 2.1023; see *also* 10 C.F.R. § 2.1025(c) (“[I]n any proceeding involving a construction authorization for a geologic repository operations area, the procedure described in this section [for disposing of certain issues on the pleadings] may be used only for the determination of specific subordinate issues and may not be used to determine the ultimate issue as to whether the authorization must be issued.”) (providing that motions for summary disposition cannot be used to determine the ultimate issue—authorization of construction).

⁶³ CLI 13-8, 78 NRC at 226 (emphasis added).

⁶⁴ While such motions would not result in meaningful progress in or resolution of this proceeding even if Nevada’s descriptions prove accurate (see *infra* Section IV), the topics Nevada identified for its proposed motions for summary disposition are disputed, as Nevada seems to concede at least in part. See Motion at 12, nn.11-12. Nevada states that its motions for summary disposition will be “simple, straightforward, and based on clearly uncontested facts,” and that no discovery is needed because, “as the motions will demonstrate, the facts are indisputable and supported by unambiguous admissions by both DOE and NRC Staff.” Motion at 2, 11. While the NRC staff appreciates Nevada’s sensitivity to agency and party resources in not submitting its proposed motions for summary disposition with its motion to lift the suspension, the NRC staff does not agree with Nevada’s characterizations. Indeed, while Nevada asserts its motions will be simple and straightforward, it also previews its “serious problems” with the evaluation and conclusions in the NRC’s staff’s SER, as well as with the legal sufficiency of aspects of the NRC staff’s proposed regulatory approach. Motion at 12, nn.11-12.

Whether any of the nearly 300 pending contentions (from Nevada or other parties) could be appropriate for summary disposition with little additional discovery is unknown. Given extremely limited resources, the Commission should not grant Nevada’s motion to lift the suspension because it “likely would result in resuspension of the case in the near term without completion of meaningful—or substantial—adjudicatory activities,” (CLI-13-8, 78 NRC at 233), and would, in essence, be directing the parties to expend resources on “a useless thing.” See *Aiken County*, 725 F.3d at 268-69 (Garland, C.J, dissenting) (citing *United States ex rel. Sierra Land & Water Co. v. Ickes*, 84 F.2d 228, 232 (D.C. Cir. 1936)).

Nuclear Waste Fund resources, ensuring that they are used to accomplish the completion of meaningful activities.⁶⁵ In advancing its proposal to lift the suspension in this unprecedented, complex, multi-party litigation, Nevada attempts to minimize any concerns regarding the scarcity of remaining Nuclear Waste Fund resources by asserting that “the NRC could spend 1000 hours reviewing, responding, and ruling on Nevada’s filings without exceeding it[s] budget.”⁶⁶ But while Nevada presumes its own successful prospects, its calculus is unfounded and discounts the burdens that would ultimately fall upon the NRC and the parties.

The NRC staff cannot predict how long remaining Nuclear Waste Funds will last if the Commission grants Nevada’s motion. However, it is likely that they will be insufficient to support full and fair consideration of Nevada’s proposed motions, nor would consideration of those motions be a productive use of resources, as discussed at length above. The consequences of exhausting the agency’s Nuclear Waste Fund resources during litigation, however, are predictable. Sudden stoppage of the proceeding during active litigation would create complications for preserving a record of party positions, result in even more significant burden on the parties, and would have wasted the parties’ and the NRC’s resources on a process that led to no resolution (that is, “a useless thing”). With no resources available to it, the NRC would also be challenged to perform appropriate recordkeeping and administrative support functions going forward.

CONCLUSION

After over a decade without a significant change in circumstances, the State of Nevada moved to lift the suspension in this proceeding. Nevada’s motion is untimely, and neither *Aiken County*, *Hydro Resources*, nor “fundamental fairness” support granting Nevada’s request.

⁶⁵ See, e.g., CLI-13-8, 78 NRC at 232-34.

⁶⁶ Motion at 5 n.5. Nevada is correct, however, that the NRC’s remaining Nuclear Waste Fund resources must support *all* agency Nuclear Waste Fund activities, not just NRC staff. This includes the Commission, the Atomic Safety and Licensing Board Panel, and many other offices. See CLI-13-8, 78 NRC at 235 & n.82; Nuclear Waste Policy Act § 302(d), 42 U.S.C. § 10222(d).

Further, consideration of Nevada's proposed motions for summary disposition would rapidly consume agency and party resources for no meaningful purpose. Therefore, Nevada's motion should be denied.

/Signed (electronically) by/

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Dated in Atlanta, GA
this 30th day of September 2022

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

U.S. Department of Energy
(High-Level Waste Repository)

Docket No. 63-001-HLW

Certificate of Service

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing NRC STAFF ANSWER IN OPPOSITION TO NEVADA'S REQUEST TO LIFT THE SUSPENSION OF THE ADJUDICATORY PROCEEDING FOR LIMITED PURPOSES, 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.

/Signed (electronically) by/

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Dated in Atlanta, GA
this 30th day of September 2022