The Secretary of Energy
Washington, DC 20585

January 3, 2014

The Honorable Joseph R. Biden
President of the Senate
Washington, DC 20510

Dear Mr. President:

In accordance with the November 19, 2013 decision and December 20, 2013 mandate of the United States Court of Appeals for the District of Columbia Circuit in *National Association of Regulatory Utility Commissioners v. United States Department of Energy* (Nos. 11-1066 and 11-1068; D.C. Cir. 2013), please find enclosed the Department of Energy's court-mandated proposal to adjust the current fee of 1 mill per kilowatt-hour for electricity paid by civilian nuclear power generators for disposal of their high-level radioactive waste or spent nuclear fuel to zero. 42 U.S.C. 10222(a). Please note that this proposal is not the result of and is not consistent with the determination I am required to make pursuant to the Nuclear Waste Policy Act (NWPA), as amended, 42 U.S.C. 10101 *et seq.*, regarding the adequacy of the statutorily-established fee. I have not determined, as required by the NWPA, that the fees being collected are in excess of those required to offset the costs of the program; nor have I determined that collecting no fee will "insure full cost recovery." 42 U.S.C. 10222 (a)(4). Thus, this proposal, mandated by the Court of Appeals, is not consistent with the process established in the NWPA for adjusting the fee charged to utilities.

Accordingly, the Department is submitting this proposal subject to any further judicial decision in the proceedings described above. Earlier today, the Department of Justice filed a petition for rehearing *en banc* by the full D.C. Circuit. Should the Court grant the petition, we will let you know promptly.

The NWPA provides that a proposal by the Secretary to adjust the fee shall be effective after a period of 90 days of continuous session has elapsed following the receipt of such transmittal unless during such 90-day period either House of Congress adopts a resolution disapproving the Secretary's proposed adjustment in accordance with the procedures set forth for congressional review of an energy action under section 551 of the Energy Policy and Conservation Act (42 U.S.C. 6421). The Supreme Court has found this type of one-House legislative veto provision unconstitutional. *INS v. Chadha*, 462 U.S. 919 (1983). Accordingly, the United States Court of Appeals for the Eleventh Circuit interpreted section 302(a)(4) of the NWPA, 42 U.S.C. 10222(a)(4), to require a 90-day "report and wait" congressional review period during which Congress could override "the Secretary's

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proposal by ordinary legislation meeting the requirements of presentment and bicameralism." *Alabama Power Co. v. United States Department of Energy*, 307 F.3d 1300, 1307 n.7 (11th Cir. 2002). So interpreted, the statute provides that the proposed adjustment to the fee will not be effective until after the congressional review period expires.

We look forward to working with you on this matter.

Sincerely,

Ernest J. Moniz

Enclosure

cc:

The Honorable Harry Reid
Majority Leader

The Honorable Mitch McConnell
Minority Leader

The Honorable Ron Wyden
Chairman, Senate Committee on Energy and Natural Resources

The Honorable Lisa Murkowski
Ranking Member, Senate Committee on Energy and Natural Resources

The Honorable Barbara Mikulski
Chairwoman, Senate Committee on Appropriations

The Honorable Richard Shelby
Ranking Member, Senate Committee on Appropriations

U.S. Department of Energy's

Proposal to Congress to Adjust the Fee

Established by Section 302(a)(2) of the Nuclear Waste Policy Act of 1982, as amended

Consistent with the mandate issued by the United States Court of Appeals for the District of Columbia Circuit in *National Association of Regulatory Utility Commissioners v. United States Department of Energy*, (Nos. 11-1066 and 11-1068; D.C. Cir. 2013), and notwithstanding the absence of the determination required to be made pursuant to the Nuclear Waste Policy Act of 1982 (NWPA), as amended, 42 U.S.C. 10222(a)(4), I hereby propose, subject to any further judicial decision in this proceeding, including with respect to the petition for rehearing *en banc* filed on January 3, 2014, to adjust the fee, established by Section 302(a)(2) of the NWPA, 42 U.S.C. 10222(a)(2), to zero.

Ernest J. Moniz

January 3, 2014

Date