**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

**Before the Commission**

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| In the Matter of | ) Docket Nos. | 110-05711 (Import) |
| | ) | 110-05710 (Export) |
| ENERGY*SOLUTIONS*, LLC | ) | |
| | ) | |
| (Radioactive Waste Import/Export Licenses) | ) July 10, 2008 | |

**ENERGY*SOLUTIONS*' ANSWER OPPOSING THE STATE OF UTAH'S REQUEST FOR A HEARING AND PETITION FOR LEAVE TO INTERVENE**

## I. INTRODUCTION

Pursuant to 10 CFR 110.83, Energy*Solutions*, LLC ("Energy*Solutions*") hereby files this timely Answer to the "State of Utah's Request for a Hearing and Petition for Leave to Intervene," dated June 10, 2008 ("Petition"). The State of Utah requests a hearing on three issues that, it claims, "are critical to the NRC's determination of license issuance or denial" for the above-captioned license applications.[1] For the reasons set forth below, the Commission should deny the request because, contrary to 10 CFR 110.84, Utah: (1) fails to establish an interest that may be affected; and (2) fails to show that a hearing would be in the public interest or that it can assist the Commission in making the required determinations.

The public health and safety require the United States to have commercially viable low-level radioactive waste ("LLRW") disposal companies such as Energy*Solutions* that can safely and responsibly manage the recycling, processing and disposal of nuclear material. There is a global marketplace for nuclear services, including waste processing and disposal services,

[1] Petition at 4.

and the viability of U.S. commercial disposal companies is significantly enhanced by participation in this global market. Significant delay in the issuance of this routine import license could establish a climate of regulatory uncertainty that would be detrimental to the viability of the commercial LLRW disposal industry in this country.

## II. BACKGROUND

On September 14, 2007, Energy*Solutions* filed an application[2] with the NRC for a license to import up to 20,000 tons of LLRW into the United States from Italy under the provisions of 10 CFR Part 110. Most of the imported LLRW is to be processed for recycling and beneficial use at the Energy*Solutions* Bear Creek Facility in Oak Ridge, Tennessee (the "Bear Creek Facility").[3] The remaining material will be dispositioned as Class A LLRW at the Energy*Solutions* disposal site in Clive, Utah (the "Clive Facility").[4] Also on September 14, 2007, Energy*Solutions* filed an application under Part 110 for a license to export a portion of that waste in the unlikely event that it cannot be dispositioned at Energy*Solutions*' facilities in Utah.[5] Energy*Solutions* does not expect that there will be any need to export material back to Italy.

Energy*Solutions* applied for the import and export licenses to support a routine commercial transaction. The company provides LLRW services to the commercial nuclear sector and many other nuclear users, including hospitals, research facilities, the Tennessee Valley Authority, and the U.S. Departments of Energy and Defense. In addition to the safe disposition of domestic-generated LLRW, Energy*Solutions* has, pursuant to import licenses

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2 Application for Specific License to Import Radioactive Material (from Italy), Lic. No. IW023 (Sept. 17, 2007), *available at* ADAMS Accession No. ML072950080 ("Import Application").

3 *See id*. at 4; *see also* Energy*Solutions* Response to NRC Request For Additional Information Dated November 29, 2007 at 4 (Dec. 5, 2007) ("Initial RAI Response").

4 Import Application at 4; Initial RAI Response at 4-5.

5 Application for Specific License to Export Radioactive Material (from Italy), Lic. No. XW013 (Sept. 17, 2007), *available at* ADAMS Accession No. ML072950080 ("Export Application").

granted by the NRC, imported LLRW from numerous foreign countries for processing and ultimate disposition at the Clive Facility.[6] All of the material will be inspected prior to shipment from Italy to ensure it will meet the criteria for Energy*Solutions*' licenses at the Bear Creek Facility and Clive Facility.[7] Thus, the Italian material to be imported under the proposed import license would be, from a public health and safety perspective, indistinguishable from the domestic and international LLRW that Energy*Solutions* routinely receives, processes, and dispositions at its facilities.

The amount of waste expected to be ultimately dispositioned at the Clive Facility under the proposed licenses is very small in comparison to the capacity of the facility. During each year of the five-year duration of the importations, the proposed Italian import project will amount to less than one percent of the waste receipts at the Clive Facility.[8]

In accordance with the regulations in 10 CFR Part 110, the NRC solicited the views of the Executive Branch,[9] the states of Utah[10] and Tennessee,[11] the Southeast Compact Commission

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6 *E.g.*, Import License No. IW017 (Oct. 10, 2006), *available at* ADAMS Accession No. ML062860179 (authorizing importation of Class A LLRW from Canada for recycling and/or disposal); Import License No. IW018 (Dec. 14, 2007), *available at* ADAMS Accession No. ML080080262 (authorizing reimportation of Class A and C LLRW from France for disposal); Import License No. IW009 (Oct. 16, 2003), *available at* ADAMS Accession No. ML032960176 (authorizing importation of Class A LLRW from Germany for recycling and/or disposal).

7 Initial RAI Response at 3.

8 Testimony of R. Steve Creamer, Chairman and Chief Executive Officer, Energy*Solutions*, before the Energy and Air Quality Subcommittee, House Energy and Commerce Committee at 6 (May 20, 2008), *available at* http://energycommerce.house.gov/cmte_mtgs/110-eaq-hrg.052008.Creamer-Testimony.pdf ("Creamer Testimony").

9 Letter from S. Dembek, NRC, to R. DeLaBarre, U.S. Dep't of State, (Oct. 25, 2007), *available at* ADAMS Accession No. ML072980277.

10 Letter from S. Dembek, NRC, to D. Finerfrock, Utah Dep't of Envtl. Quality ("DEQ"), "Application for NRC Import License (IW023)" (Feb. 19, 2008), *available at* ADAMS Accession No. ML080500111.

11 Letter from S. Dembek, NRC, to J. Graves, Tenn. Dep't of Env't and Conservation ("DEC"), "Application for NRC Import License (IW023)" (Feb. 19, 2008), *available at* ADAMS Accession No. ML080500338.

for Low-Level Radioactive Waste Management ("Southeast Compact"),[12] of which the State of Tennessee is a member, and the Northwest Interstate Compact on Low-Level Radioactive Waste Management ("Northwest Compact"),[13] of which the State of Utah is a member.

All but one of the agencies or compacts consulted concurred with the legality of the proposed action. The U.S. Department of State informed the NRC that "the proposed import and export would appear consistent with [the Joint Convention on Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management] guidelines."[14] The Tennessee DEC found "no technical reason to prohibit" the proposed action.[15] The Utah Radiation Control Board, DEQ, requested that the NRC deny the license for policy reasons.[16] The Director of the Utah Division of Radiation Control (a member of the Utah Radiation Control Board), however, informed the NRC that Utah's rules "do not prohibit the disposal of low-level radioactive waste from foreign generators."[17] The Southeast Compact did not oppose the import or export license.[18] Only the Northwest Compact proposed a legal objection, alleging that its rules prohibit disposal of foreign LLRW at the Clive Facility.[19]

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[12] Letter from S. Dembek, NRC, to K. Haynes, Southeast Compact, "Application for NRC Import License (IW023)" (Feb. 19, 2008), *available at* ADAMS Accession No. ML080500349.

[13] Letter from S. Dembek, NRC, to M. Garner, Northwest Compact, "Application for NRC Import License (IW023)" (Feb. 19, 2008), *available at* ADAMS Accession No. ML080500204.

[14] Letter from R. Stratford, U.S. Dep't of State, to S. Dembek, NRC (Apr. 25, 2008), *available at* ADAMS Accession No. ML081190551 ("Stratford Letter").

[15] Letter from J. Graves, Tenn. DEC, to S. Dembek, NRC, "Applications for NRC Import License IW023 and NRC Export License XW013" (Mar. 4, 2008), *available at* ADAMS Accession No. ML080770097.

[16] Letter from Governor J. Huntsman, Utah, to Chairman D. Klein, NRC, "Importation of Foreign Low-Level Radioactive Waste" enclosure (Mar. 13, 2008), *available at* ADAMS Accession No. ML080810290 ("Gov. Huntsman Letter").

[17] E-mail from D. Finerfrock, Utah DEQ, to S. Dembek, NRC, "License Application IW023" (Mar. 26, 2008), *available at* ADAMS Accession No. ML080870476 ("Finerfrock E-mail").

[18] Letter from K. Haynes, Southeast Compact, to S. Dembek, NRC, "Applications for NRC Import License (IW023) and Export License (XW013)" (Mar. 24, 2008), *available at* ADAMS Accession No. ML080840341. The Southeast Compact did ask the NRC to "examine the extent to which the disposal of foreign waste at Clive would impact the long-term disposal capacity for commercial low-level radioactive waste." *Id.* Responsibility for addressing the country's long-term LLRW disposal needs, however, rests with the states and the

The NRC also published notices of receipt of these applications in the *Federal Register* on February 11, 2008.[20] In response, the NRC has received two requests for hearings on the applications. This Answer responds to the Petition from the State of Utah.[21] The Petition attempts to establish an affected interest and raises three issues that Utah seeks to litigate at a hearing: (1) "whether importing waste from Italy constitutes an unreasonable risk to public health and safety"; (2) "whether granting [the licenses] presents 'special circumstances' such that the 10 C.F.R. Part 110 categorical exclusion to NEPA does not apply"; and (3) "whether an appropriate facility has agreed to accept the foreign waste . . . for management or disposal."[22]

## III. LEGAL STANDARDS

### A. Standards for Hearings on Export and Import Licenses

1. *Hearing Request or Intervention Petition.*

To request a hearing in an import or export licensing proceeding under 10 CFR 110.82:

(b) Hearing requests and intervention petitions must:

(1) State the name, address and telephone number of the requestor or petitioner;
(2) Set forth the issues sought to be raised;
(3) Explain why a hearing or an intervention would be in the public interest and how a hearing or intervention would assist the Commission in making the determinations required by § 110.45.

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Department of Energy ("DOE"), not the NRC. Letter from Chairman D. Klein, NRC, to Representative B. Gordon, U.S. House of Representatives, at 2 (Apr. 9, 2008), *available at* ADAMS Accession No. ML080440443.

19 Letter from M. Garner, Northwest Compact, to S. Dembek, NRC, "Application for NRC Import License (IW023)" (May 15, 2008), *available at* ADAMS Accession No. ML081480331.

20 Request for a License to Export Radioactive Waste, 73 Fed. Reg. 7764 (Feb. 11, 2008); Request for a License to Import Radioactive Waste, 73 Fed. Reg. 7765 (Feb. 11, 2008).

21 *See* Petition. The other petition, the "Request from Multiple Organizations for Hearing in Middle Tennessee" (June 10, 2008) is addressed in Energy*Solutions*'s separate Answer to that petition.

22 *See* Petition at 4-8.

(4) Specify, when a person asserts that his interest may be affected, both the facts pertaining to his interest and how it may be affected with particular reference to the factors in §110.84.[23]

2. *Commission Action on a Hearing Request or Intervention Petition.*

Under "the Nuclear Non-Proliferation Act of 1978 (NNPA), Congress gave the Commission discretion to hold public hearings [on export and import license applications], or not, 'as the Commission deems appropriate.'"[24] 10 CFR 110.84 lists the factors that the Commission will consider in determining whether to grant a hearing request. For the instant petition, the relevant factors are:

> (a) In an export licensing proceeding, or in an import licensing proceeding in which a hearing request or intervention petition does not assert or establish an interest which may be affected, the Commission will consider:
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> (1) Whether a hearing would be in the public interest; and
> (2) Whether a hearing would assist the Commission in making the statutory determinations required by the Atomic Energy Act.
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> (b) If a hearing request or intervention petition asserts an interest which may be affected, the Commission will consider
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> (1) The nature of the alleged interest;
> (2) How that interest relates to issuance or denial; and
> (3) The possible effect of any order on that interest, including whether the relief requested is within the Commission's authority, and, if so, whether granting relief would redress the alleged injury.
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> (d) Before granting or denying a hearing request or intervention petition, the Commission will review the Executive Branch's views on the license application and may request further information from the petitioner, requester, the Commission staff, the Executive Branch or others.
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> (e) The Commission will deny a request or petition that pertains solely to matters outside its jurisdiction.

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[23] 10 CFR 110.82(b).

[24] *U.S. Dep't of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 366 (2004) ("*Plutonium Export*").

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(g) After consideration of the factors covered by paragraphs (a) through (f), the Commission will issue a notice or order granting or denying a hearing request or intervention petition. Upon the affirmative vote of two Commissioners a hearing will be ordered. A notice granting a hearing will be published in the Federal Register and will specify whether the hearing will be oral or consist of written comments. A denial notice will set forth the reasons for denial.[25]

Under Section 110.84, the Commission has "traditionally applied the judicial concepts of standing to determine whether a potential intervenor has an 'interest [that] may be affected' within the meaning of section 189a of the AEA."[26] Section (B), below, explains in detail the judicial standing concepts as they apply to this proceeding under Section 110.84(b).

3. *Issuance or Denial of Licenses*

The Commission will issue an export license if, after soliciting and receiving the views of the Executive Branch regarding the proposed export, it finds that the applicable criteria in Section 110.42 are met.[27] The Commission will issue an import license if it finds that (1) the proposed import will not be inimical to the common defense and security; (2) it will not constitute an unreasonable risk to the public health and safety; (3) NEPA requirements are met; and (4) an appropriate facility has agreed to accept the waste for management and disposal.[28]

## B. Standing

1. *Applicable Legal Standards and Relevant NRC Precedent*

To determine whether a petitioner's "interest" provides a sufficient basis for intervention in an export or import license proceeding, the Commission relies on "current judicial concepts of

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25 10 CFR 110.84

26 *Plutonium Export*, CLI-04-17, 59 NRC at 363.

27 *See* 10 CFR 110.45(a).

28 *See* 10 CFR 110.45(b).

standing."[29] To demonstrate standing, a petitioner thus must allege: (a) a particularized injury within the zone of interests protected by the relevant statute ("injury-in-fact"), (b) that is fairly traceable to the challenged action ("causation") and (c) is likely to be redressed by a favorable decision ("redressibility").[30] The purpose of these standing requirements is to require a petitioner to allege "such a personal stake in the outcome of the controversy as to demonstrate that a concrete adverseness exists which will sharpen the presentation of issues."[31]

To establish injury-in-fact, a petitioner must assert injuries that are "distinct and palpable, particular and concrete, as opposed to being conjectural or hypothetical."[32] For example, "unsupported general references to radiological consequences are insufficient to establish a basis for injury" for purposes of standing.[33] Further, some courts require a showing of "*both* (i) a *substantially* increased risk of harm and (ii) a *substantial* probability of harm with that increase taken into account."[34]

The injury-in-fact analysis requires that the petitioner's interests fall "within the zone of interest protected or regulated by the statute at issue."[35] The Commission has noted that its "principal concern is to ensure that parties participating in [NRC] adjudicatory proceedings have

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29 *Plutonium Export*, CLI-04-17, 59 NRC at 363; *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998) (*citing Portland Gen. Elec. Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976)), *aff'd sub nom. Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999).

30 *Quivira Mining*, CLI-98-11, 48 NRC at 6 (*citing Cleveland Elec. Illuminating Co*. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992)).

31 *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994) (internal quotation marks omitted (*quoting Duke Power Co. v. Carolina Envtl. Study Group, Inc*., 438 U.S. 59, 72 (1978)).

32 *Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 (1998) (*citing Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 103 (1998); *Warth v. Seldin,* 422 U.S. 490, 508-09 (1975); *see also Sequoyah Fuels*, CLI-94-12, 40 NRC at 72 (citations omitted).

33 *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 130 (1992).

34 *Pub. Citizen, Inc., v. Nat'l Highway Traffic Safety Admin.*, 513 F.3d 234, 237 (D.C. Cir. 2008) (emphasis in original).

35 *Quivira Mining*, CLI-98-11, 48 NRC at 11.

interests that are cognizable" under the applicable statutes – such as the Atomic Energy Act ("AEA") or National Environmental Policy Act ("NEPA").[36] "Merely because one may be injured by a particular agency action . . . 'does not necessarily mean one is within the zone of *interests to be protected by a given statute*.'"[37] The zone of interests test for standing in NRC proceedings, however, "does not encompass economic harm that is not directly related to environmental or radiological harm."[38] As such, the "bare mention[] of health and safety cannot be used to establish standing when the essence of [the petitioner's] concern is economics, not safety."[39]

Next, to establish causation, a petitioner must establish that the injuries alleged are "fairly traceable to the proposed action"[40]—in this case, NRC issuance or denial of an import and export license. Specifically, "the assertion of an injury without also establishing the causal link to the challenged [agency action] is insufficient to establish . . . standing."[41]

Finally, to establish redressibility, a petitioner must show that "its actual or threatened injuries can be cured by some action of the tribunal."[42]

2. *Standing Based On Geographic Proximity to the Facility*

In evaluating standing based on geographic proximity, the burden falls on the petitioner to demonstrate that the "licensing action raises an 'obvious potential for offsite

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36 *Id.* at 6 n.2.

37 *Id.* at 11 (*citing Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 523-24 (1991)).

38 *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 336 (citations omitted).

39 *Id.* at 337 (*citing and comparing with Private Fuel Storage*, *L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999)).

40 *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75.

41 *Northeast Nuclear Energy Co*. (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC 149, 155 (1998).

42 *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 14 (2001).

consequences.'"[43] Otherwise, the "standing inquiry reverts to 'traditional standing' analysis of whether the petitioner has made a specific showing of injury, causation, and redressability."[44]

Under the "proximity presumption," an individual petitioner, or a member of an organization, may assert standing based solely upon a showing that his or her residence is within the geographical area that might be affected by an accidental release of fission products from a facility or other source of radioactivity. As a "rule of thumb," the NRC generally has applied a presumption of standing in initial power-reactor construction permit and operating license proceedings for individuals who live within 50 miles of a plant.[45]

In other proceedings, however, including export and import proceedings such as this one, the Commission has held there is no proximity presumption "[a]bsent situations involving such obvious and clear potential for offsite consequences [as the construction and operation of the reactor itself]."[46] Instead, the Commission "determine[s] on a *case-by-case basis* whether the proximity presumption should apply, considering the 'obvious potential for offsite [radiological] consequences,' or lack thereof, from the application at issue, and specifically 'taking into account the nature of the proposed action and the significance of the radioactive source.'"[47] Furthermore, the smaller the risk of offsite consequences, the closer the petitioner must reside to

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43 *Exelon Generating Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 581 (2005).

44 *Id.*

45 *See Sequoyah Fuels*, CLI-94-12, 40 NRC at 75 n.22.

46 *Plutonium Export*, CLI-04-17, 59 NRC at 364.

47 *Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007) (*quoting Peach Bottom*, CLI-05-26, 62 NRC at 580-81); *see also Ga. Inst. of Tech*. (Georgia Tech. Research Reactor), CLI-95-12, 42 NRC 111, 116-17 (1995); *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75 n.22; *Armed Forces Radiobiology Inst*. (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 154 (1982); *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 43 n.1, 45 (1990).

be realistically threatened.[48] For example, a Board held that a distance of 43 miles from a spent fuel pool facility, coupled with generalized claims of injury from radiation, was insufficient to establish standing in a spent fuel pool license amendment case.[49] In so ruling, the Board stated that "we note that we know of no scenario under which the radiation attributable to the fuel pool could affect a residence 43 miles distant from the fuel pool; and petitioner has not informed us of any such scenario."[50]

3. *Standing of State and Local Government Entities*

In this proceeding under 10 CFR Part 110, state and local government entities must demonstrate standing under the general principles of standing and may not take advantage of any presumption of standing. The Commission's General Rules of Practice in 10 CFR Part 2 include provisions that a state or local governmental body need not address standing requirements in a proceeding for a facility located within its boundaries.[51] However, this rule does not apply in this proceeding, because 10 CFR 2.3(b) directs that: "unless otherwise specifically referenced, the procedures in this part do not apply to hearings in . . . subparts H and I of 10 CFR Part 110." Part 110 does not provide for automatic standing for states or local government bodies. Thus, states or other government entities must demonstrate standing under the same principles as any other potential party.

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48 *See*, *e.g.*, *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 427, *recons. denied*, LBP-02-25, 56 NRC 467, 474-76 (2002) (in a proceeding for a license to construct and operate an ISFSI at an operating reactor, granting standing to petitioners who lived within 17 miles of the facility, but denying standing to a petitioner who lived 20 miles from the facility); *Tenn. Valley Auth.* (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 25 (2002) (allowing for the proximity presumption to apply to an organization's members who lived within 17 miles of the Sequoyah and Watts Bar reactors at which "TVA propose[d] to add tens of millions of curies of highly combustible radioactive hydrogen gas" to the reactors' core inventory).

49 *Boston Edison Co*. (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 99 (1985).

50 *Id*.

51 10 CFR 2.309.

## IV. ARGUMENT

The Petition provides no valid justification for the Commission to hold a hearing. As explained below, all of the relevant factors in 10 CFR 110.84 weigh against Utah. It fails to demonstrate standing, contrary to Section 110.84(b), and it fails to show that a hearing on the issues raised will be in the public interest or that a hearing would assist the Commission, contrary to Section 110.84(a). Independent of the foregoing, as explained in Section II above, the Executive Branch has expressed the view that the proposed export license would be consistent with the Joint Convention on Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management guidelines.[52] Thus, the relevant factors weigh against Utah's request, and the Commission should deny the request for hearing.

### A. Utah Fails to Establish an Interest that May be Affected

Utah fails to demonstrate a cognizable interest in this proceeding supporting its request for hearing. In support of its claim of an interest that may be affected by this proceeding, Utah asserts: (1) the disposal facility is located within Utah; (2) there is limited disposal facility capacity for Class A waste; (3) import of foreign waste requires a different analysis from domestic waste; and (4) economic harm will result from the perception that Utah is a radioactive waste dumping ground.[53] However, as demonstrated below, none of these interests is sufficient to establish standing to intervene in this proceeding.

As explained in Section II above, the fact that the disposal facility is located within Utah's borders is insufficient, by itself, to establish an interest in this proceeding, because there is no provision in 10 CFR Part 110 excusing a State from complying with the pertinent requirements of 10 CFR 110.82(b)(4) or creating a presumption that a State automatically has

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[52] *See* Stratford Letter.

[53] Petition at 7-8.

standing to participate in a proceeding. Therefore, the mere fact that the disposal facility is located within its boundaries is insufficient to establish that Utah has an interest in this proceeding.[54]

As there is no automatic presumption regarding a State's interest in an export or import proceeding, Utah must show a concrete and particularized injury that is fairly traceable to the challenged action and that can be redressed by granting the requested relief. However, Utah fails to demonstrate a causal link between its alleged injuries and its claims regarding capacity limitations for Class A waste on the disposal facility. Generally, LLRW generated in Utah (or in any other Northwest Compact State) is required to be disposed of at the regional compact facility for waste generated within the states in the Northwest Compact, which is operated by U.S. Ecology and located at the Hanford site in Richland, Washington ("Richland Facility").[55] As such, in general, LLRW generated in Utah may not be disposed of at the Clive Facility.[56] Thus, as a matter of law, the proposed action creates no conflict with respect to the use of a resource that is available to Utah or its citizens. Accordingly, Utah has failed to show that it will suffer any harm from potential capacity limitations at the Clive Facility that is fairly traceable to the issuance or denial of the Energy*Solutions* export or import licenses.[57]

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[54] Nor would the proximity presumption used in reactor licensing proceeding provide a basis for supporting Utah's claim of an interest in this proceeding. The Commission has held that the proximity presumption does not generally apply in other 10 CFR Part 110 proceedings. *See Plutonium Export*, CLI-04-17, 59 NRC at 364. Utah has not pointed to any information supporting the proposition that there is an "obvious" and "clear potential for offsite consequences" of a magnitude similar to the construction and operation of a nuclear power reactor. *See id.*

[55] *See, e.g.*, "Minutes of the Utah Radiation Control Board Meeting, September 7, 2001," at 5 ("all low-level waste generators . . . are currently required to ship waste to the Northwest Compact site at Hanford, Washington [*i.e.*, the Richland Facility]"), *available at* http://www.radiationcontrol.utah.gov/Board/sep01min.pdf.

[56] Mixed waste, DOE waste, NARM and uranium mill tailings are exceptions to the general rule.

[57] Furthermore, even if it had some recognizable interest in the disposal capacity at the Clive Facility, Utah has not provided any information suggesting that the proposed action would adversely impact that capacity. On the contrary, as explained above, the imported material at issue in this proceeding would represent less than one percent of the material that is disposed of at Clive each year. Furthermore, assuming future receipts are

Utah also fails to explain how its claimed interest in the performance of a "different analysis" for foreign waste is related to this proceeding. Utah does not explain why it believes that, from a health and safety perspective, the imported waste is any different from domestic waste.[58] Nor does it show how foreign waste creates some unique risk to the public. Nor could Utah make such a claim. The March 10, 2008 letter from the Chairman of the Utah Radiation Control Board, DEQ, to Chairman Klein concedes that "the materials do not represent any incremental risk to the public health and safety." The NRC's Fact Sheet on "EnergySolutions' Proposal to Import Low-Level Radioactive Waste From Italy" also explains that, "[i]n most cases, there is no significant difference" between domestic and foreign LLRW.[59] Furthermore, any waste transported to the facility will be required to meet the applicable waste acceptance criteria. Likewise, the disposal of any such waste must be in accordance with Utah's regulations and the Clive license. Thus, Utah has failed to specify the facts necessary to support its allegations regarding this interest.[60]

Finally, Utah fails to show that the purported harm to its economic interests is within the "zone of interests" protected by any relevant statute. The Commission has repeatedly held that economic injuries do not fall within the zone of interest protected by the AEA.[61] Utah's claim of economic harm stemming from the perception that it may be viewed as a "dumping ground" for foreign waste conflicts with this settled Commission case law holding that economic harms alone

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equal to those in 2007, the Clive Facility has sufficient remaining disposal capacity for at least the next 30 years. Creamer Testimony at 3.

58 Much less does Utah show how the Italian waste presents a *substantially* increased risk of harm to its citizens. *See Pub. Citizen*, 513 F.3d at 237.

59 *Available at* ADAMS Accession No. ML081000101.

60 Utah also presents no analysis to support its claim that the State considered only domestic waste when it approved the Clive license. Instead, Utah's own documents show that the disposal of imported waste at the facility is permitted under Utah regulations. Finerfrock E-mail.

61 *See*, *e.g.*, *Diablo Canyon*, CLI-02-16, 55 NRC at 336.

are not within the zone of interest protected by the AEA. Therefore, Utah's economic interests fail to satisfy the requirement of identifying an interest in this proceeding that falls within the "zone of interests" protected by the AEA. Moreover, the suggested harm is speculative and unrealistic given the small volume of waste involved relative the waste disposed at the Clive Facility each year.

Thus, Utah has failed to demonstrate a sufficient interest in this proceeding to support its request for a hearing.

### B. Discretionary Intervention Would Not Assist The Commission Or Be In The Public Interest

Utah fails to show that a hearing on the issues it raises would be in the public interest, or that a hearing would assist the Commission in making its required findings, contrary to 10 CFR 110.82 and 110.84. The issues Utah raises are primarily issues of law that are fully addressed below. As also explained below, the remaining claims are issues of fact that are fully addressed in the Import and Export License Applications, Energy*Solutions*' RAI Responses, and other materials in the record. Utah has failed, however, to establish that a hearing on these matters would materially assist the Commission. Thus, Utah's desire for additional information, beyond that required for the Commission's determination under 10 CFR 110.45, is irrelevant.

#### 1. *There Is No Unreasonable Risk To the Public Health and Safety*

The first issue Utah seeks to raise is "[w]hether importing waste from Italy constitutes an unreasonable risk to public health and safety."[62] Utah alleges that the "radioactive content of the material has not been quantified" and that the export license, which is intended to permit the return of waste in the unlikely event that a portion of the material cannot be dispositioned in the United States, is "inadequate" to demonstrate that the proposed import poses no unreasonable

[62] Petition at 4

risk to the public health and safety.[63] Utah also suggests that Italy may refuse to accept any returned waste.[64]

Utah's allegation that the "radioactive content of the material has not been quantified" is contrary to the record. This information is available in the Import Application and in Energy*Solutions*' Initial and Supplemental RAI Responses.[65] To the extent that Utah desires more specific information, it fails to explain why such additional information is required for the Commission to make its determinations under 10 CFR 110.45.

Further, as explained above, the public health and safety analysis for imported waste and domestic waste are identical. Utah presents no evidence to show why there is a distinction, and there is none. Nor does Utah present any evidence to explain why the contingency plan to return to Italy any waste that cannot be dispositioned in the United States is "inadequate" to protect the public health and safety.

As to Utah's argument that Italy may refuse to accept any returned waste, such speculation is contrary to the Italian Government's statement that the proposed transaction is "allow[ed]" under Italian law.[66] This includes both the import of the material and export back to Italy if necessary.[67] Utah's argument also ignores the fact that the cross-border shipment of LLRW for processing, followed by return of the waste to the country of origin is common

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63 *Id*.

64 *Id*.

65 *See generally*, Import Application; Initial RAI Response at 4-5; Energy*Solutions* Response to NRC Supplemental Request For Additional Information Regarding License Applications: IW023 & XW013, at 3-5 (Jan. 11, 2008) ("Supplemental RAI Response").

66 Stratford Letter, enclosure (Letter from S. Beltrame, Italian Embassy, to R. DeLaBarre, U.S. Dep't of State, "U.S. Nuclear Regulatory Commission Application for Import and Export Licenses IW023 and XW013 from EnergySolutions for authorization to Import Low-Level Radioactive Waste from Italy for Processing *and Possible Return to Italy of Disposal Residues*" (Apr. 8, 2008) (emphasis added)).

67 *See* Stratford Letter.

practice in the commercial nuclear industry,[68] and Utah cites no evidence to support its speculation that the Italian government will interfere in this transaction and refuse to accept the waste. Finally, it is highly unlikely that any material will need to be returned to Italy because Energy*Solutions* will thoroughly inspect and characterize the material in Italy to ensure that it will meet the requirements of the Bear Creek and Clive Facility licenses.

2. *No Additional NEPA Analysis Is Required*

Next, Utah questions "[w]hether granting an import and export license for foreign-generated radioactive waste presents 'special circumstances' such that the 10 C.F.R. Part 110 categorical exclusion to NEPA does not apply."[69] As a result, Utah claims that an environmental assessment ("EA") or environmental impact statement ("EIS") is required.[70] Utah's "special circumstances" claim appears to rest in part on an alleged "conflict with the use of an available resource," *i.e.*, "limited disposal capacity" for low-level radioactive waste.[71] Utah also raises NEPA segmentation claims, because this is allegedly "the first of many future requests to dispose of foreign-generated waste."[72]

It should be noted that export licenses are not covered by a "categorical exclusion" to which any exception might apply. Instead, the regulations in Part 51 simply "do not apply to

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68 *E.g.*, Import License No. IW017 (Oct. 10, 2006), *available at* ADAMS Accession No. ML062860179 (authorizing importation of Class A LLRW from Canada for recycling and/or disposal and specifying that nonconforming material will be returned to Canada under an appropriate export license); Import License No. IW022 (Sept. 25, 2007), *available at* ADAMS Accession No. ML072750266 (authorizing importation of Class A LLRW from Canada for recycling and specifying that nonconforming material will be returned to Canada under an appropriate export license); Import License No. IW009 (Oct. 16, 2003), *available at* ADAMS Accession No. ML032960176 (authorizing importation of Class A LLRW from Germany for recycling and/or disposal, and specifying that certain byproducts will be returned to Germany under an appropriate export license).

69 Petition at 4.

70 *See id*.

71 *See id*. at 7.

72 *Id*. at 4-5.

export licensing matters within the scope of part 110."[73] There are no exceptions to this rule. Thus, Utah's "special circumstances" argument is inapplicable to the export license application. In addition, 10 CFR 51.22(b) and (c)(15) provide a specific categorical exclusion from the requirements for NEPA analyses for an import license.[74] Section 51.22 permits exceptions in special circumstances, including for example, "where the proposed action involves unresolved conflicts concerning alternative uses of available resources."[75]

Utah's alleged "conflict" over resources, however, is unsupportable. The Clive Facility is not in any danger of running out of available disposal capacity.[76] Moreover, as explained in Section II above, the effect of this additional waste will be trivial, given that it would represent less than one percent of the amount of waste disposed of at the Clive Facility each year.[77]

Energy*Solutions* has also offered to impose a voluntary limit on the disposal of international material to five percent of the remaining capacity at the Clive Facility, and has committed to the U.S. Congress that it "will not under any circumstances use Clive in a manner that will adversely affect its capacity to fully serve our United States customers, either now or in

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73 10 CFR 51.1; *see also Natural Res. Def. Council v. NRC*, 647 F.2d 1345, 1366 (D.C. Cr. 1981) (finding that "NEPA does not apply to NRC nuclear export licensing decisions").

74 *See* 10 CFR 51.22(c) (identifying the "[i]ssuance . . . of licenses for import of nuclear facilities or materials pursuant to part 110 of this chapter" as "categorically exclu[ded]" from environmental analysis requirements).

75 10 CFR 51.22(b).

76 *See* Creamer Testimony at 2 ("Clive has enough capacity to take all of the Class A waste from the 104 domestic nuclear plants, from both on-going operations and the ultimate decommissioning of every plant, and still have approximately 50 million cubic feet of capacity remaining."); *see also id*. at 3 ("The Clive facility has disposal capacity for at least the next 30 years, assuming future receipts are equal to 2007."); GAO Testimony before the Subcommittee on Energy and Air Quality, Committee on Energy and Commerce, House of Representatives: Low-Level Radioactive Waste Disposal (May 20, 2008) at 3, *available at* http://www.gao.gov/new.items/d08813t.pdf (estimating that the Clive Facility will reach capacity in approximately 30 years at current rates of receipts).

77 Creamer Testimony at 6.

the future."[78] Thus, any alleged conflict over resources based on the speculative effect of future import projects is also misplaced.

Utah's claims regarding an alleged conflict of resources are also misguided, because LLRW generated in Utah generally cannot be disposed of at the Clive Facility. Instead, under Northwest Compact rules, Utah LLRW has to be disposed of at the Northwest Compact's Richland Facility. Utah's claim that the NRC's issuance of the proposed import license would be "at the risk of jeopardizing not only the viability of the Hanford site [*i.e.*, the Richland Facility], but also the entire compact system" makes no sense. The Richland Facility will continue to collect revenue from the disposal of Utah waste, and the disposal "resource" at the Clive Facility will not be available to Utah waste generators, without regard to whether disposal space is used for waste from Italy.

Utah's NEPA-segmentation claim, to the extent it is not purely based on speculation about the effect of additional imports, is also without merit. *All* imports of LLRW waste under Part 110 are covered by the exclusion in 10 CFR 51.22, including the cumulative effect of such imports.[79] The exclusion is based on a Commission "finding that the *category* of actions does not *individually or cumulatively* have a significant effect on the human environment."[80] Thus, because this type of import has no significant environmental effects, the analysis of such effects cannot be impermissibly segmented. Moreover, under the three prongs of the standard NEPA segmentation test,[81] (1) the granting of the pending import license for the Italian waste has substantial independent utility; (2) it would not foreclose the NRC from denying a future import

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78 *Id*. at 5.

79 *See* 10 CFR 51.22(a)

80 *Id*. (emphasis added).

81 *See*, *e.g.*, *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-43, 22 NRC 805, 810 (1985) (using this analysis to determine "whether an agency may confine its environmental analysis to the portion of the plan for which approval is being sought").

license; and (3) any potential plans regarding future imports are not sufficiently definite that they would need to be considered part of the current "plan" for purposes of NEPA segmentation analysis.

Thus, there is no real conflict of available resources. Utah's request to consider an exception to the categorical exclusion is contrary to law and unjustified. It does not warrant a hearing.

3. *An Appropriate Facility Has Agreed To Accept the Waste*

Finally, Utah questions "whether an appropriate facility has agreed to accept the foreign waste (whether or not it has been processed in the U.S.) for management and disposal."[82] Allegedly, if the NRC chooses to issue the license, "it is doing so with the understanding [that] there is no facility within the Northwest Compact region that is authorized to legally accept this waste for disposal."[83]

a. Disposal of the Waste Is Consistent With Utah Law and the Clive Facility License

As an initial matter, Utah has no authority to object to the disposal of this waste, and it has not even asserted that it has such authority.[84] Instead, its officials have acknowledged that Utah State regulations would permit disposal of the imported waste.[85]

The Utah state license for the Clive Facility requires Northwest Compact approval *only* for the disposal of waste that *originates* within the Northwest Compact:

> Licensee may receive . . . low-level radioactive waste. . . .
> Approval is required from the low-level radioactive waste *compact of origin* (including the Northwest Compact), or for states

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82 Petition at 5.

83 *Id*.

84 *Compare* Gov. Huntsman Letter *with* Finerfrock E-mail.

85 *See* Finerfrock E-mail

> unaffiliated with a low-level radioactive waste compact, the state of origin, to the extent a state can exercise such approval.[86]

Thus, the license does not require Energy*Solutions* to seek approval from the Northwest Compact for waste that originates outside the Northwest Compact, including foreign waste.[87]

Contrary to the terms of its own license, Utah now relies upon the Northwest Compact's alleged authority to exclude the waste.[88] This reliance is misplaced, however, because the compact lacks jurisdiction over the Clive Facility.

b. The Northwest Compact Lacks Jurisdiction Over the Clive Facility

The Low-Level Radioactive Waste Policy Act ("LLRWPA") permits States to "enter into such [interstate] compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste."[89] Utah is a member of the Northwest Interstate Compact on Low-Level Radioactive Waste Management ("Northwest Compact").[90]

The authority granted by the LLRWPA to restrict the flow of low-level radioactive waste ("LLRW") into and within the boundaries of a particular interstate compact is far from open-ended. In fact, such authority is ultimately derived from a single, narrowly focused provision of the LLRWPA authorizing each compact to "restrict the use of the *regional disposal facilities* under the compact to the disposal of low-level radioactive waste generated within the compact region."[91] In other words, a compact's authority does not extend to every low-level

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86 Utah Department of Environmental Quality, Division of Radiation Control, Radioactive Material License No. UT 2300249, at 3 (Jan. 25, 2008) (Condition 9A).

87 As explained above, foreign waste is routinely disposed of at the Clive Facility. *See* note 6, above. Neither Utah nor the Northwest Compact objected to the disposal of waste under previous import licenses.

88 Petition at 5.

89 42 U.S.C. § 2021d(a)(2).

90 *See* Utah Code Ann. § 19-3-201 *et seq.*

91 42 U.S.C. § 2021d(c) (emphasis added).

radioactive waste disposal facility within that compact's territory; rather, it extends only to "regional disposal facilities."

The LLRWPA states that "[t]he term 'regional disposal facility' means a non-Federal low-level radioactive waste disposal facility in operation on January 1, 1985, or subsequently established and operated under a compact."[92] The Clive Facility does not fit within that definition. The Clive Facility was not in operation on January 1, 1985; nor was it "subsequently established and operated under a compact." In fact, the Northwest Compact has acknowledged that "[t]he Compact *has no authority* and assumes no responsibility *for the licensing and operation* of the EnergySolutions facility."[93] The Clive Facility is not a "regional disposal facility," but an independent, privately operated business enterprise. Thus, the Northwest Compact arguably cannot restrict the waste the Clive Facility receives to "waste generated within the compact region."

The statute creating the Northwest Compact—which Congress approved several years after it enacted the LLRWPA—contains a much broader prohibition than that found in the LLRWPA.[94] The Northwest Compact Act provides that "[n]o facility located in any party state may accept low-level waste generated outside of the region comprised of the party states, except as provided in article V."[95] Utah could argue that because the Clive Facility is "located in [a] party state" it may not "accept low-level waste generated outside of the region comprised of the party states, except as provided [by the Northwest Compact's governing committee pursuant to] article V."

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92 *Id*. § 2021b(11).

93 Northwest Compact Third Amended Resolution and Order, ¶ 4 (May 1, 2006) ("Resolution") (emphasis added).

94 *See* Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. 99-240, 99 Stat. 1859-1863 (1986) ("Northwest Compact Act").

95 *Id*. § 221, art. IV(2), 99 Stat. 1862.

That argument, however, overlooks Congress' express declaration that its approval of the Northwest Compact was "subject to the provisions of the [LLRWPA]," and that such approval was "granted only for so long as the regional commission, committee, or board established in the compact complies with all of the provisions of [the LLRWPA]."[96] In other words, where inconsistencies exist between the Northwest Compact Act and the LLRWPA, or between any action taken by the Northwest Compact and the LLRWPA, the conflict will be resolved in favor of the LLRWPA.[97]

Such a conflict exists here. The LLRWPA authorizes compacts to restrict the flow of waste only to a "regional disposal facility," and it does not authorize any compact to restrict the flow of waste to a destination that does not qualify as a "regional disposal facility" under the LLRWPA. To the extent the Northwest Compact Act can be read to suggest that the Northwest Compact possesses such authority, that reading cannot be reconciled with the LLRWPA. For that reason alone, any effort by the Northwest Compact to prohibit the Clive Facility from receiving Italian waste fails as a matter of law.

c. The Northwest Compact and the State of Utah Have Admitted that the Compact Lacks Jurisdiction

In fact, the Northwest Compact (and the State of Utah) conceded that the compact lacked jurisdiction over the Clive Facility in connection with a lawsuit filed more than fifteen years ago by U.S. Ecology, Inc.—the operator of the compact's regional disposal facility in Richland, Washington. In 1992, U.S. Ecology sued the Northwest Compact, the State of Washington, the State of Utah, and several other entities, contending (among other things) that the Northwest Compact and the States were violating the phase-in provisions of the LLRW Act by imposing

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96 *Id*. § 212, 99 Stat. 1860.

97 *See id*.

certain surcharges on LLRW received by the Richland Facility, while failing to impose similar surcharges on LLRW received by the Clive Facility, which was referred to in that litigation as the "Envirocare" site (reflecting the prior name of Energy*Solutions*).[98] In so doing, U.S. Ecology alleged that, "[u]nlike the Richland facility, . . . the Envirocare site is not a 'regional disposal facility' under the 1980 or 1985 Acts."[99] The Northwest Compact admitted that allegation in its answer.[100] Later, in connection with its motion to dismiss, the Northwest Compact explained that "the Envirocare facility is not a 'regional disposal facility' as defined under 42 U.S.C. § 2021b(11)."[101] To emphasize the point, the compact went on to explain that "[t]he Envirocare facility was not in operation on January 1, 1985, nor was it subsequently established and operated under a Compact."[102] The State of Utah made the same observation in its motion to dismiss.[103]

d. The Commission Has Sufficient Evidence to Make the Required Findings

To issue the import license under 10 CFR 110.43(d), the NRC must find that "an appropriate facility has agreed to accept the waste for management and disposal." In promulgating this rule, the Commission noted that it would "not grant an import license for waste intended for disposal unless it is clear that the waste will be accepted by a disposal facility,

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98 Complaint, at 22-23, ¶¶ 70-75 (filed March 10, 1992), *U.S. Ecology, Inc. v. Northwest Interstate Compact on Low-level Radioactive Waste Mgmt., et al.*, Case No. C92-5091B (W.D. Wash. dismissed Jan. 31, 1994) ("*U.S. Ecology*").

99 *Id*. at 15, ¶ 41.

100 *U.S. Ecology*, Answer filed by the Northwest Compact *et al*. at 6, ¶ 41 (filed April 20, 1992).

101 *U.S. Ecology*, Compact and Washington State Defendants' Memorandum in Support of Motion to Dismiss, at 18 n.7 (filed July 1, 1992).

102 *Id*.

103 *U.S. Ecology*, Memorandum in Support of Utah Defendants' Motion to Dismiss, at 9 (filed July 15, 1992) ("Envirocare is not a 'regional disposal facility,' as defined in 42 U.S.C. § 2021b(11) which fact is admitted by plaintiff in paragraph 41 of its Complaint.").

host State, and compact (where applicable)."[104] The imported waste will be accepted by the disposal facility and the host state, and, as explained immediately above, there is no "applicable" compact with authority over the disposal facility. Energy*Solutions* is seeking relief from the U.S. District Court in Utah, based upon a determination of this same legal issue.[105] Nevertheless, the NRC has its own jurisdiction regarding the disposition of import licenses, and it can make its own required findings now, because as a matter of law, it is clear that the waste can be legally disposed at the Clive Facility. No hearing is necessary to resolve this legal issue.

## V. CONCLUSION

For the foregoing reasons, Utah provides no valid reason for the Commission to hold a hearing, and the Petition should be denied in its entirety.

Respectfully submitted,

*Signed (electronically) by Raphael P. Kuyler*
John E. Matthews
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Counsel for Energy*Solutions*, LLC

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104 Final Rule, Import and Export of Radioactive Waste, 60 Fed. Reg. 37,556, 37,560 (July 21, 1995).

105 *EnergySolutions, LLC v. Northwest Interstate Compact on Low-level Radioactive Waste Mgmt., et al.*, Case No. 08-00352 (D. Utah filed May 5, 2008).

**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

**Before the Commission**

| | | |
|---|---|---|
| In the Matter of | Docket Nos. | 110-05711 (Import)<br>110-05710 (Export) |
| ENERGY*SOLUTIONS*, LLC | | |
| (Radioactive Waste Import/Export Licenses) | July 10, 2008 | |

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ENERGY*SOLUTIONS*' ANSWER OPPOSING THE STATE OF UTAH'S REQUEST FOR A HEARING AND PETITION FOR LEAVE TO INTERVENE have been served upon the following persons on July 10, 2008 through the Electronic Information Exchange.

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