UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	License Nos. IW023 and XWO13
	)	Docket No. 11005711 (import)
ENERGYSOLUTIONS	)	and No. 11005710 (export)
(Radioactive waste import/export	)	
licenses for Italian waste)	)	July 21, 2008

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

The State of Utah hereby timely replies, in accordance with 10 C.F.R. § 110.84, to EnergySolutions' July 10, 2008, twenty-five page "Answer Opposing the State of Utah's Request for a Hearing and Petition for Leave to Intervene" (Answer). EnergySolutions' Answer contains many inaccuracies and contradictions. Most striking, EnergySolutions calls its application to import low level radioactive waste (LLRW) from Italy "routine." Answer at 2, 3 and n.87. At last count, the NRC had received 2,871 public comments on EnergySolutions' import application, the vast majority in opposition to the application.[1] Moreover, legislation has been introduced in Congress to ban the importation of most LLRW. These facts belie the assertion that EnergySolutions' application is "routine." Furthermore, EnergySolutions' Answer makes the contradictory claim on the one hand that "the viability of U.S. commercial disposal companies is significantly enhanced by participation in [the] global market" and on the other that "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." Answer at 1-2 and 18. A way to reconcile these contradictory statements is that EnergySolutions intends to routinely import foreign waste as part of its international nuclear

[1] *See* http://ehd.nrc.gov/EHD_Proceeding/home.asp (the count of 2,871 public comments assumes NRC has sequentially numbered the comments received).

disposal business and turn the Clive disposal site into a global dumping ground for the detritus from past foreign nuclear activities.

Utah's Reply shows, contrary to EnergySolutions' Answer, that standing for a sovereign state differs from the precepts of organizational standing for a non-state entity. In addition, Utah has raised substantive issues that support the Commission's exercise of its discretionary authority to grant a hearing. Utah's Reply also refutes EnergySolutions' claims that there is sufficient and accurate factual information in its application and elsewhere in the record for the Commission to approve its application. Finally, Utah will address EnergySolutions' legal arguments, including its position that the Northwest Interstate Compact does not have jurisdiction over the Clive, Utah LLRW disposal facility. In sum, EnergySolutions has not met its burden to show the Commission it is entitled to a license to import LLRW from Italy for disposal in the United States.

I. Legal Standards

The State takes exception to EnergySolutions' claim that the Commission derives congressional authority over import licensing proceeding from the Nuclear Non-Proliferation Act of 1978 (NNPA). EnergySolutions misquotes the export license case, CLI–04-17,[2] and improperly claims the NNPA gave the Commission discretion to hold public hearings, or not, on **import** license applications. Answer at 6. The full quote from CLI-04-17 is as follows:

> Section 304(b) of the NNPA provides that the Commission shall allow "public participation in **nuclear export licensing proceedings** when the Commission finds that such participation will be in the public interest and will assist the Commission in making the statutory determinations … including such public hearings and access to information as the Commission deems appropriate." Section 304(c) of the NNPA then provides that the procedures established pursuant to section 304(b) "shall constitute the exclusive basis for hearings in **nuclear export licensing proceedings** before the Commission … and shall not require the Commission to grant any person

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

an on-the-record hearing in such a proceeding."[3]

NNPA Section 304, Pub.L 95-242, 92 Stat. 120 (March 10, 1978), amended Chapter 11 of the 1954 Atomic Energy Act by adding section 126, "Export Licensing Procedures." It is obvious from the title of section 126, and from the quoted language above, that the NNPA only addresses **export licenses**, as does CLI-04-17. EnergySolutions cannot claim, if in fact it does, that the Commission derives discretion from § 306 of the NNPA not to hold a hearing on an **import** application when an entity has established standing. 10 C.F.R. §§ 110.82 and 110.84 set out the standing requirements.

The State also takes exception to EnergySolutions' claim that 10 C.F.R. § 2.3(b) requires the State to "demonstrate standing under the same principles as any other potential party." Answer at 11. Section 2.3, "Resolution of conflict," provides in its entirety:

> (a) In any conflict between a general rule in subpart C of this part and a special rule in another subpart or other part of this chapter applicable to a particular type of proceeding, the special rule governs.
> (b) Unless otherwise specifically referenced, the procedures in this part do not apply to hearings in 10 C.F.R. parts 4, 9, 10, 11, 12, 13, 15, 16, and subparts H and I of 10 C.F.R. part 110.

EnergySolutions reads too much into Section 2.3. There is no "conflict" between Part 2 and the State's ability to represent its citizens. EnergySolutions' sweeping claim that the State represents its citizens in the same manner as any other potential organizational representative ignores the ability of a state to act in its *parens patriae* capacity to protect the interests of its citizens. *See* Utah Petition at 7. The doctrine of *parens patriae* – rooted initially in the "royal prerogative" and later in the traditional common law role of state as sovereign and guardian of persons under legal disability – is now a recognized judicial basis for state standing when the state is acting in its quasi-sovereign capacity.[4] The U.S. Supreme court described the concept thus:

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[3] Plutonium Export, 59 NRC at 366 (*emphasis added*).

[4] Alfred L. Snapp & Son v. Puerto Rico, 458 U.S. 592, 600 (1982).

> The State must express a quasi-sovereign interest.[5] Although the articulation of such interests is a matter for case-by-case development – neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract – certain characteristics of such interests are so far evident. First, a State has a quasi-sovereign interest in the health and well-being --both physical and economic -- of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.[6]

In addition, a state may obtain standing based on its proprietary or sovereign interests.[7]

The Commission may choose to go directly to discretionary intervention and not address standing as of right, as it did in Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station, CLI-93-12, 37 NRC 355 (1993) ("SMUD"). In SMUD, the Commission focused on the public interest in resolving the issues presented:

> ECO [Petitioner] presented several difficult questions which, if resolved in its favor, would support standing. . . .
>
> The decision to grant ECO intervention, without resolving the question of standing as of right, rested on our discretionary authority to hold hearings and to permit participation in our proceedings . . . .
>
> The standing issue posed questions of first impression in the context of a Staff decommissioning order . . . [I]n this instance we have determined that it is in the public interest to resolve the particular matters raised by the Petitioner rather than to expend any further resources resolving the difficult questions regarding ECO's standing as of right. . . .[8]

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[5]"Quasi-sovereign interests . . . are not sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party. They consist of a set of interests that the State has in the well-being of its populace. . . ." Id. at 602.

[6]Id. at 607.

[7]Private Fuel Storage LLC (Independent Fuel Storage Installation), LBP-98-07, 47 NRC 142, 169 (1997)("The State's asserted health, safety, and environmental interests relative to its citizens living, working, and traveling near the proposed facility and in connection with its property adjoining the reservation and the proposed transportation routes to the facility are sufficient to establish its standing in this proceeding.").

[8]SMUD, 37 NRC at 358-59. The Commission rejected the licensee's assertion that in granting discretionary standing the Commission ignored its own standards and precedents, including Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). The Commission decided otherwise: "As we stated in Pebble Springs, it was expected that the practice of granting discretionary intervention should develop "not through precedent, but through attention to the concrete facts of particular

II. ARGUMENT

A. Utah has Standing Based on an Interest That May Be Affected.

EnergySolutions claims the mere fact that the Clive facility is located in Utah "is insufficient to establish that Utah has an interest in this proceeding" or that the "proximity presumption used in reactor licensing proceedings provide a basis for supporting Utah's claim of an interest in this proceeding." Answer at 13 and n.54. Utah has the right to protect its proprietary and sovereign interest in its lands, waters, wildlife, and other natural resources. The State of Utah owns thousands of acres of school trust lands, granted to the State at statehood, in Tooele County. In addition, the State is the Trustee for all the surface and groundwater in the State[9] and the trustee for natural resources for damage recovery actions under the CERCLA, 42 U.S.C. § 9607(f). As such, the State has a direct interest in the material that will be disposed of at the Clive facility. Moreover, numerous employees from the State and County are on site at the Clive disposal facility during the work week (*e.g.*, State of Utah LLRW, hazardous waste and OSHA inspectors, and County building and fire inspectors), as are EnergySolutions' contractors, suppliers and workers. Utah has a right to protect the physical and economic health and well-being of these citizens under the doctrine of *parens patriae*. Utah's interests extend to whether its citizens and resources will needlessly be at risk from the disposal of waste that was not generated in this country, whose benefits did not flow to the citizens of this country, and whether Utah's business interests will be impaired from being located in a state that may become the global dumping ground for foreign radioactive waste.

EnergySolutions also claims that there is no causal link between Utah's alleged injuries and

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situations." SMUD, 37 NRC at 358 (*citing* Pebble Spring, 4 NRC at 617).

[9] *See* Utah Code Ann. § 73-1-1 ("All waters in this state, whether above or under the ground, are hereby declared to be the property of the public, subject to all existing rights to the use thereof"); J.J.N.P. Co. v. State Div. of Wildlife Resources, 655 P.2d 1133, 1136 (Utah 1982) ("The State regulates the use of the water, in effect, as trustee for the benefit of the people.").

the capacity of the Clive site because Utah, as a member of the Northwest Compact, must dispose of its LLRW at the Richland Compact site and not at the Clive site. Answer at 13; *see also* id. at 19. EnergySolutions is incorrect. If the Northwest Compact Richland disposal facility is forced to shut down, Utah (as well as other states) would need to dispose of their LLRW elsewhere. If the NRC grants EnergySolutions a license to import foreign waste in defiance of the Compact's unequivocal position that the waste cannot legally be disposed of at Clive, the potential that the Richland site will be forced to close is very real. A lease provision for the Richland disposal site provides that the lease will terminate (and the disposal facility effectively shut down) if the Northwest Compact loses its ability to exercise its exclusionary authority over the import of waste into the Compact region.[10] Accordingly, Utah, as a Compact member, has an interest in this proceeding.

EnergySolutions sees Utah's position that a different analysis should pertain to foreign waste than to domestic waste as irrelevant. Answer at 14. Utah is not alone in adopting this position. The State of Washington's position on importing radioactive waste is,

> based on the **equitable distribution and shared responsibility for the burden of low-level radioactive waste disposal** . . . founded on the state's commitment to the protection of public health, and compliance with all laws and regulations. Washington State supports the [1980 and 1985 federal legislation]. As host state to the Northwest Compact and through agreement with the Rocky Mountain Compact, Washington State currently provides LLRW disposal capacity to 11 states. By doing so, Washington State is **doing its fair share** while at the same time limiting the importation of additional wastes as legally allowed.[11]

Like Washington, and unlike the rest of the nation, Utah shoulders its fair share of the burden of

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[10] *See e.g.*, GAO, *Report to the Chairman, Committee on Energy and Natural Resources, U.S. Senate: Low-level Radioactive Waste Disposal Availability Adequate in the Short Term, but Oversight Needed to Identify Any Future Shortfalls,* GAO-04-604 (June 2004) at 38 (hereafter "GAO-04-604").

[11] Final Environmental Impact Statement, Commercial Low Level Radioactive Waste Disposal Site, Richland Washington, DOH Pub. 320-031, May 28, 2004, Vol 1, at 51 (*emphasis added*), http://www.doh.wa.gov/ehp/rp/waste/final-eis.htm.

disposal of domestic LLRW. The equitable distribution and shared responsibility for the burden of domestic LLRW disposal should require a different risk calculus when it comes to the disposal of foreign waste produced by the nuclear industry in Italy.[12]

Contrary to EnergySolutions' claim Utah has established standing as of right and its alleged injuries will be redressed by the Commission's denial of EnergySolutions' application.

B. Granting Utah Discretionary Standing will Assist the Commission and be in the Public Interest.

While a hearing may not be in EnergySolutions' best interest, a hearing on the factual and legal matters at issue in this proceeding are critical to the public interest and will assist the Commission in making its decision. EnergySolutions says Utah's issues are "primarily issues of law" and its "remaining claims are issues of fact that are fully addressed in the Import and Export License Applications, EnergySolutions' RAI [NRC Staff's Request for Additional Information] Responses, and other materials in the record." Answer at 15. As discussed in detail below, a myriad of the factual and legal issues remain unaddressed by the existing record in this proceeding.

1. EnergySolutions' "Generic" License Application to Import Foreign Waste for Disposal Presents Precedential Legal and Safety Questions.

EnergySolutions rejects Utah's allegation that the "radioactive content of the material has not been quantified" saying "[t]his information is available in the Import Application and in Energy-Solutions' Initial and Supplemental RAI Responses." Answer at 16. It also states, "[m]ost of the imported LLRW is to be processed for recycling and beneficial use" and the remainder disposed of

[12] *See* Utah Petition at 7. *See also* U.S. Dept. of Energy and Nat'l Aeronautics and Space Admin. (Galileo Mission), DD-89-7, 30 NRC 215, 217 (1989), where NRC recognized that any risk from the release of plutonium-238 during the launch of the Galileo spacecraft was in furtherance of scientific advancement. Conversely, here Utah's position is that the import of waste from shut-down Italian nuclear operating facilities produces risks without any national societal benefits.

as Class A waste at Clive.[13] EnergySolutions' application contains generalities and gives neither the NRC nor the public information sufficient to ascertain the classification or characterization of the waste intended to be imported if License No. IW023 were issued. In addition, EnergySolutions' initial and supplemental RAI responses describing disposition pathways and waste quantities are qualified by the phrase "these values are best estimates and are not a committed maximum."[14] NRC's printed export license form states the import is authorized "in accordance with the statements and representations made by the licensee in the application referenced below."[15] Here, EnergySolutions' qualified RAI responses will place few, if any, restrictions on the quantity and type of wastes it may import from Italy. And those qualified responses cannot be relied upon to show that "most" of the waste will be recycled or put to beneficial use – especially when the application requests import of 20,000 tons of radioactive waste "primarily for processing and/or disposal in accordance with EnergySolutions' existing Utah disposal license." Import License Appl. at 4.

In reality, EnergySolutions is requesting a general license under the guise of a specific license application. EnergySolutions admitted as much when it included the following language in its import license application: "This is a request for a **generic license** to allow the importation of up to approximately 20,000 tons of radioactively contaminated material . . . ."[16] NRC regulations

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[13]Answer at 2 *(citing* to Import Appl. at 4 and Initial RAI Response to Question 7).

[14]*See* Jan. 11, 2008 Supplementary RAI Responses to: Question 2 (referring back to estimating disposition pathways percentages in response to initial RAI Question 7, says these values were best estimates and are not a committed maximum); Question 5 (after repeating approximate percentages of material in each waste stream from its Initial RAI response, concludes, "As stated in Question 2, these value were best estimates are not a committed maximum."); and Question 6 (Before providing estimated disposition pathways and quantity of the different waste types, says, "These values are best estimates and are not a committed maximum."). ADAMS Accession (Acc.) No. ML080150374.

[15]*See e.g.*, AREVA Import License No. IW018, Dec 17, 2007. ADAMS Acc. No. ML080080262.

[16]Import License Appl. (IW023) NRC Form 7 at 2, block 15 (*emphasis added*).

authorize a general license for import of byproduct, source or special nuclear material to an authorized consignee as specific in 10 C.F.R. § 110.27(a). However, a general license does not allow the import of radioactive waste.[17] Information required in the specific license application, NRC Form 7, is enumerated in 10 C.F.R. § 110.32.[18] EnergySolutions' failure to furnish the required information does not provide an adequate legal basis for license approval.

a. EnergySolutions' Refusal to Classify the Waste until after Waste Receipt and Processing Presents Grounds to Deny the Application.

Paragraph (f)(5) of 10 C.F.R. § 110.32, specific to the import of LLRW, requires classification of the waste in accordance with 10 C.F.R. § 61.55 (*i.e.*, NRC regulatory classification scheme for Class A, Class B, Class C and Greater than Class C (GTCC) radioactive waste). The import license application does not comply with paragraph (f)(5) because EnergySolutions refuses to classify the waste until after it has been processed at EnergySolutions' Tennessee plant. Import Appl. at 4. As a consequence, EnergySolutions may claim that, after processing the Italian waste, it

[17]10 C.F.R. § 110.27(c) ("Paragraph (a) of this section does not authorize the import under general license of radioactive waste . . . .").

[18]Some of that information required in 10 C.F.R. § 110.32(f) includes:

> (f) Description of the equipment or material including, as appropriate, the following:
> (1) Maximum quantity of material in grams or kilograms (terabequerels or TBq for byproduct material) and its chemical and physical form.
> . . . .
> (5) For proposed exports or imports of radioactive waste, and for proposed exports of incidental radioactive material--the volume, classification (as defined in § 61.55 of this chapter), physical and chemical characteristics, route of transit of shipment, and ultimate disposition (including forms of management) of the waste.
> (6) For proposed imports of radioactive waste--the industrial or other process responsible for generation of the waste, and the status of the arrangements for disposition, e.g., any agreement by a low-level waste compact or State to accept the material for management purposes or disposal.
> (7) Description of end use by all consignees in sufficient detail to permit accurate evaluation of the justification for the proposed export or import, including the need for shipment by the dates specified.

has become domestically generated waste and may be disposed of at Clive. The Compact has lately become aware of this potential[19] and has issued a resolution clarifying its position that any previous approval given for access to the Clive site "does not serve as an arrangement for disposal of low-level radioactive wastes generated in foreign countries – including foreign-generated waste that is characterized as domestic generated waste by another compact or unaffiliated state."[20]

EnergySolutions asserts that pursuant to other NRC import licenses it has "imported LLRW from numerous foreign countries for processing and ultimate disposition at the Clive Facility." Answer at 3. Two of the three import licenses cited by EnergySolutions are distinguishable. Import License No. IW018 issued to AREVA allowed the import of waste from France that resulted from decontaminating a reactor coolant pump from a U.S. reactor (Surry). License No. IW009 issued to a Siemens' operation (Framatome ANP) for the recovery of uranium through incineration of contaminated materials (containing up to 5% uranium) imported from Germany. The Compact allowed waste from the genuine recycling operation to be disposed of at its disposal site but was emphatic "that all non-incinerable items received from Seimen's Lingen facility are not eligible for disposal at the U.S. Ecology facility."[21]

The third import license, No. IW017 issued October 10, 2006 to Duratek (now owned by EnergySolutions), has no tie to domestic operations, as does IW018 and, similar to IW009, required

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[19] *See* March 3, 2008 letter from Mike Garner, Northwest Interstate Compact to Stephen Dembeck, NRC, advising NRC that EnergySolutions' proposal to ship Italian waste to Clive that cannot be processed for other uses, is different from previous import requests submitted to the Compact for approval. Previous Compact approvals required that "all materials that cannot be decontaminated and recycled must be returned to the organization and country in which the [LLRW] was generated." ADAMS Acc. No. ML080720375.

[20] Northwest Interstate Compact, *Resolution Clarifying the Third Amended Resolution and Order*, May 12, 2008. Adams Accession No. ML081480331. *See* discussion *infra*, section 3.a.

[21] Michael Wilson, Washington Dept. of Ecology letter to Loren J Maas, Siemen's Power Corp., Feb. 26, 1999. ADAMS Acc. No. ML003673039 (p.5).

imported materials "that are not released or processed in accordance with the licensee's domestic licenses, or that are wastes not deemed to be licensee's waste under its domestic licenses, will be returned to Canada under NRC export license XW010."[22] Unlike the case in License No. IW009, EnergySolutions in its Answer (at 3 and n.6) says it is disposing of the Canadian waste at Clive. However, Duratek's artful responses to NRC written enquiries about quantity, type and disposition to date of the Canadian waste state otherwise: "**No material directly attributed to IW017** has been [or will be] disposed as Low Level Radioactive Waste [at Clive, Utah]." (*emphasis added*).[23] EnergySolutions may have actually disposed of some LLRW at Clive by attributing the resultant waste from processing the Canadian waste to its operations in Tennessee. Now, with the Northwest Compact's *Resolution Clarifying the Third Amended Resolution and Order*, such disposal is clearly illegal. As such, even if EnergySolutions attributes Italian waste to its Tennessee operations, it still cannot be disposed of at Clive. Moreover, if NRC does not require EnergySolutions to comply with 10 C.F.R. 110.35(f)(5) and in its application classify all wastes it intends to receive, the Commission will be ill-informed whether it is approving EnergySolutions to import Class B, C or GTCC waste.[24]

b. Waste May Become Stranded in the United States.

EnergySolutions' retort that the Italian Government says the proposed transaction is allowed by Italian law or that other import licenses provide for return shipments, Answer at 16, offers no

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[22] *See* License No.IW017, End Use. ADAMS Acc. No. ML062860179.

[23] Philip Gianutsos, Duratek, letter to Margaret Doane, NRC, June 27, 2008, responds to NRC question 5 (how much "residual radioactive material" from processing the imported material such as floor sweepings, booties, etc. has been disposed of under IW017 and at which facility(ies)?); question 6 (of the material imported under IW017, how much has been disposed of at the Clive facility?); and question 7 (how much additional material imported under IW017 will be disposed of at Clive, Utah) in all three instances with the misleading phrase "no material directly attributed to IW017 . . ." ADAMS Acc. No. ML081890265.

[24] EnergySolutions has not satisfactorily answered Initial RAI question No. 4 as to how incinerating Class B or Class C waste will result in the incinerator ash being Class A waste.

assurance the waste will be returned to Italy. Moreover, there is no justification for NRC to issue an **import license** if, in fact, the waste is Class B, Class C or GTCC waste that cannot be processed and must be exported back to Italy.[25]

EnergySolutions further argues Utah did not show that a contingency plan, to return waste to Italy if it cannot be disposed of at the Clive facility, is inadequate. Answer at 16. Of the 20,000 tons of LLRW EnergySolutions requested to be imported, it requested only 1,000 tons of LLRW to be exported. Export Appl. at 3. According to EnergySolutions, the imported waste will include about 7,000 tons of metals, 5,000 tons of DAW, and 8,000 tons of liquids.[26] However, because EnergySolutions failed to calculate the mass of waste remaining after processing, the record is devoid of any evidence to demonstrate its 1,000 ton request is adequate to export all non-conforming wastes back to Italy. Further, if any processed waste exceeds Class A limits, the waste could be orphaned in the U.S., rather than being returned to the Italian generator, if the waste activity exceeds the much lower activity limits requested in the export license (*i.e.*, ten percent of the maximum activity requested for imported waste). Export Appl. at 4.

c. <u>As EnergySolutions Has Not Substantiated That the Imported Waste Will Be the Same as the Domestic Waste it Handles, or That it Has a Reliable Sampling Plan, NRC Cannot Assess Risk to Health and Safety</u>.

EnergySolutions argues that the imported Italian waste would be "indistinguishable from the domestic and international LLRW" it handles and "the public health and safety analysis for imported waste and domestic waste are identical." Answer at 3, 16. In an attempt to improperly shift the burden, EnergySolutions says "Utah presents no evidence to show why there is a distinction"

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[25] *See* Response to Initial RAI Question 4 ("EnergySolutions cannot process most waste from reactor operations classified as Class B or Class C waste.").

[26] Response to Initial RAI Question 8.

between domestic and imported waste. Id. at 16. Utah does not bear that burden. In the absence of data and complete characterization of the proposed waste streams, the burden is on Energy-Solutions to provide the "physical and chemical characterization" of the vast range of potential radioactive waste streams that may be imported from Italy.[27] 10 C.F.R. § 110.32(f)(5). Whether the Italian waste is indistinguishable from domestic waste has not been shown because EnergySolutions has not characterized the waste, in contravention of section 110.32(f)(5). Moreover, the imported waste will come from different types of reactors and facilities and, without characterization, EnergySolutions' claim that this waste will be the same as domestic waste cannot be substantiated.

In the import application, Energy Solutions lists eight different "Foreign Consignees" and a scant description of the nuclear operations they conducted. Import Appl. at 3. However, the application and RAI responses omit differentiating between wastes generated from the various operations: commercial nuclear power plants, MOX facilities, fuel fabrication facilities, and pilot reprocessing plants.[28] EnergySolutions plans to import operational wastes, including resins, filters, graphite, and sludges. Import Appl. at 4. Such operational wastes may include "wet waste such as filter sludge, ion-exchange resins, evaporator bottoms, and dry wastes."[29] Sludges and resins generated from the treatment of decommissioning waste may have other characteristics because, at

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[27]Those wastes were produced by admittedly "unknown generators" and identified Foreign Consignees. Import Appl. at 3-4. If generators are unknown, waste from unknown generators cannot be adequately characterized to provide a sufficient basis to issue a license. This is not a trivial issue because Italy has 26 nuclear facilities. *Joint Convention Report on the Safety Spent Fuel Management and the Safety of Radioactive Waste Management,* Italy, 2006 at 34.

[28]*See e.g., Decommissioning of Nuclear Installations in Italy*, Nuclear Energy Agency (Jan 2006). http://www.nea.fr/html/rwm/wpdd/italy.pdf (hereafter "NEA")(*describing* Italian nuclear facilities and, for example, noting that of the four shutdown commercial reactors, one was a graphite reactor.)

[29]CRS, *Radioactive Waste Streams: Waste Classification for Disposal*, Order Code RL32163, Anthony Andrews, Congressional Research Service, Updated Dec. 13, 2006 at CRS-17.

the Garigliano reactor, all operating wastes have been treated[30] and plans are underway to treat the Magnox sludge at the Latina plant.[31] Additionally, sludges from the bottom of spent fuel pools may contain heavy metals from the degradation of spent nuclear fuel rods and could be classified as mixed waste[32] and there is the possibility that asbestos, currently being removed at some Italian nuclear power plants,[33] may be included in the imported waste streams.

EnergySolutions has not met its burden of adequately characterizing the wastes as required by 10 C.F.R. § 110.32(f)(5). Therefore, the Commission cannot affirmatively determine, based on this inadequate record, that the proposed imported wastes do not constitute an unreasonable risk to public health and safety.

Another reason the Commission has an unsupportable record to make a health and safety determination is that EnergySolutions has not tied its waste acceptance criteria to procedures for waste sampling and analysis. EnergySolutions' RAI response says the waste will be subject to "extensive waste characterization" at the generator site; the customer must follow the Waste Acceptance Guidelines; and EnergySolutions will have "sample analyses performed at a U.S. laboratory."[34] Notwithstanding these declarations, Duratek's Waste Acceptance Guidelines (WAG) specify prohibited and maximum dose concentrations for different waste streams but the WAG contains no sampling and analyses procedures to ensure the waste, prior to shipment, will in fact

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[30]*IAEA, Country Nuclear Power Profile - Italy Report 2006*, http://www-pub.iaea.org/MTCD/publications/PDF/cnpp2007/countryprofiles/Italy/Italy2006.

[31]NEA, *supra* n. 28 at 11.

[32]Julia L. Tripp, *D &D Technologies for Pollution Prevention*, Idaho National Engineering and Environmental Laboratory, Feb. 2003 at 1.

[33]NEA at 11 (asbestos is being removed at the Trino, Caorso, and Garigliano nuclear power plants).

[34]Response to Initial RAI at Question 1.

meet the WAG or the limits specified in the application. The record before the Commission is devoid of data or procedures to ensure that before the LLRW is imported into the U.S. it will meet an acceptable sampling and analysis quality assurance program (*e.g.*, minimum number of samples per volume of a waste stream; sampling and analytical methodology; analytical laboratory qualifications; control procedures, etc.). Again, the Commission cannot affirmatively find that the proposed import license does not constitute an unreasonable risk to public health and safety.

2. Special Circumstances Warrant a NEPA Analysis.

Contrary to EnergySolutions' Answer, "special circumstances" warrant a NEPA analyses prior to importing uncharacterized and unclassified foreign radiological waste across 5,000 miles of ocean, when the environmental and socioeconomic impacts from this precedent-setting action have not been assessed. This is a precedent-setting license application because it is the test case for opening the door to the inflow of waste from nuclear cleanups and other nuclear operations from almost anywhere in the world (embargoed or restricted countries excepted).

EnergySolutions contends it promised Congress that foreign imports would not "adversely" impact LLRW disposal capacity available to its U.S. customers. Answer at 18. EnergySolutions' promise to Congress has not been analyzed,[35] is wholly unenforceable, and is irrelevant for purposes of this proceeding. EnergySolutions argues that this import license, if granted, is a "trivial" amount of its annual disposal volume, yet it also argues that providing waste processing and disposal services in the global marketplace "significantly enhance[s]" the viability of U.S. disposal companies like itself. Answer at 2-3, 18. A look at EnergySolutions' activities abroad suggests the sub-text of EnergySolutions' "viability" argument is that the Italian waste import is the beginning of a stream of

[35]EnergySolutions admits if it cannot convert its 11e(2) cell to a Class A LLRW cell then its projected capacity would be "materially" reduced and if disposal volumes increase beyond its expectations, then it also admits disposal capacity would not be available as planned. *EnergySolutions Form 10k*, March 31, 2008 at 11.

global waste it intends to import into the United States.

In addition to the Italian decommissioning and disposal contracts, EnergySolutions is currently decommissioning ten nuclear power plant sites in the United Kingdom.[36] Significantly, the U.K. is currently evaluating its radioactive waste management policy because the estimated LLRW that will be generated from decommissioning and cleaning up nuclear sites, currently under contract to EnergySolutions, would exceed the capacity of the U.K.'s only operating LLRW disposal facility.[37] Recent parliamentary proceeding reveals that EnergySolutions intimated that LLRW generated in Britain could be disposed of at Clive at "substantially lower costs with a significantly smaller repository for new-build waste and so save us [Britain] a great deal of money."[38]

The United Kingdom is not the only country with a dearth of LLRW disposal options. GAO found none of the 18 foreign countries it surveyed have disposal options for all of their LLRW.[39] At the same time, EnergySolutions is actively seeking nuclear contracts in Europe and Asia.[40] These circumstances lead to the conclusion that the issuance of this import license to EnergySolutions will be precedent setting because it paves the way to allow the global disposal of radioactive wastes at the Clive, Utah facility.

The Commission is unable to satisfy the applicable requirements of 10 C.F.R. Part 51,

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[36] *EnergySolutions 10K*, *supra* n. 35, at 1.

[37] *The United Kingdom's Second National Report on Compliance with the Obligations of the Joint Convention on the Safety of Spent Management and On the Safety of Radioactive Waste Management,* Department for Environment, Food, and Rural Affairs, 2006 at 71, 80, http://www.defra.gov.uk/environment/radioactivity/government/international/pdf/jointconreport06.pdf).

[38] Thomas Burr & Judy Fahys, *U.K. Waste Next in Line for Utah?*, Salt Lake Tribune, May 28, 2008 (*quoting* Lord Charles Patrick Fleeming Jenkin, Roding, May 21, 2008 Parliamentary proceedings).

[39] GAO Testimony of Gene Aloise, *Low-Level Radioactive Waste, Status of Disposal Availability in the United States and other Countries,* GAO-08-813T, May 20, 2008 at 6, http://www.gao.gov/new.items/d08813t. pdf

[40] *EnergySolutions 10K, supra* n. 35, at 10.

Subpart A, as it must, without conducting an assessment of the environmental and socioeconomic impacts that flow from this decision. *See* 10 C.F.R. § 110.43(c).

3. An Appropriate Facility Has Not Agreed to Accept the Waste.

In determining whether to issue a license to import low level radioactive waste, under its regulations, the Commission must determine whether "an appropriate facility has agreed to accept the waste for management or disposal." 10 C.F.R. § 110.43(d). EnergySolutions has proposed the Clive, Utah site as the exclusive facility for disposing of LLRW from processing the imported Italian waste. Therefore, if the Clive site cannot legally accept the waste, the Commission must deny EnergySolutions' application to import waste from Italy.

The issue is not whether the Italian waste falls within the permissible parameters of EnergySolutions' Utah low level radioactive waste license. The issue is whether EnergySolutions' Clive facility, as a disposal facility sited in the Northwest Compact region, may legally accept foreign waste, notwithstanding the Compact's resolution that EnergySolutions must obtain Compact approval before any foreign-generated waste (or such waste characterized as domestic waste by another compact or unaffiliated state) may have access to the Clive disposal site.

Contrary to EnergySolutions' Answer at 20-24, it has failed to meet its burden that there is an "appropriate facility." The Commission does not have the required legal basis to issue a license.

a The Northwest Interstate Compact Has Authority Over Out-of-Compact Access to the Clive Disposal Facility.

There are no inconsistencies between the Northwest Interstate Compact and the Low Level Radioactive Waste Policy Act, as amended ("Act"), as EnergySolutions claims. Answer at 21-23. Recently, the GAO succinctly described the purpose of the Act:

> The aim of the Act was to provide for more LLRW disposal capacity on a regional basis and to more equitably distribute responsibility for the management of LLRW

> among the states. As an incentive for states to manage waste on a regional basis, the Congress consented to the formation of interstate agreements, known as compacts, and granted compact member states the authority to exclude LLRW from other compacts or unaffiliated states.[41]

In order to relieve LLRW disposal capacity shortfall and give states time to develop new sites, Title I of the Low Level Radioactive Policy Amendment of 1985,[42] required the then existing disposal facilities for compact regions (*i.e.*, Barnwell, South Carolina; Richland, Washington; and Beatty, Nevada) to accept, up to a maximum specified volume, waste from nuclear reactors and other sources during a "transition" period from January 1, 1986 to December 21, 1992. 42 U.S.C. § 2021e. It also gave NRC authority to grant emergency access to existing disposal sites, id. § 2021f, and directed NRC or an agreement State to conduct expedited licensing review and authorized them to approve "an application for a disposal facility." Id. § 2021i. At the same time, Congress passed Title II of the Act, known as the "Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act" in which,

> The consent of the Congress to each of the compacts set forth in subtitle B [including the "Northwest Interstate Compact on Low-Level Radioactive Waste Management"] –
> (1) shall become effective on the date of the enactment of the Act;
> (2) is granted subject to the provisions of the Low-Level Radioactive Waste Policy Act, as amended; and
> (3) is granted only for so long as the regional commission, committee, or board established in the compact complies with all of the provisions of such Act.[43]

As Title I and Title II of the Act were passed by Congress at the same time, EnergySolutions' attempt to read language out of the Northwest Interstate Compact by relying on Title I of the Act cannot withstand scrutiny. Instead of harmonizing the language to give meaning to all words

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[41]GAO-04-604, *supra* n. 10 at 1.

[42]Pub L 99-0240, 99 Stat.1842 (Jan. 15, 1986)

[43]Pub L 99-240, Title II, § 212 (Jan. 15, 1986), 42 U.S.C. § 2021b note.

Congress approved in the Compact,[44] EnergySolutions reads out of the Compact the definition of "facility" under Article II of the Compact, and the requirement under Articles IV and V, for a facility located within the compact region to obtain approval from the Compact to receive waste for disposal from outside the Compact region. Rather, EnergySolutions argues Congress must have meant a "regional disposal facility", as defined in Title I of the Act, and not the term "facility", which Congress approved in the Compact as meaning,

> any site, location, structure, or property used or to be used for the storage, treatment, or disposal of low-level waste, excluding federal waste facilities.

See Northwest Interstate Compact Article II(1).[45] Only by erasing the definition of "facility" from the Compact can EnergySolutions claim it is not subject to operating its Clive facility in compliance with the Northwest Interstate Compact.[46] Clearly, the Clive facility fits squarely within the Compact definition of "facility."

Utah does argue, as EnergySolutions suggests, that the Clive facility is located in a party

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[44]Hydro Resources Inc. (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-04-11, 63 NRC 483, 491 (2006)("Courts construe regulations in the same manner as they do statutes: by ascertaining the plain meaning of the regulation. A basic tenet of statutory construction, equally applicable to regulatory construction, is that a statute should be construed so that effect is given to all its provisions.")(*internal quotations and citations omitted*). *See also* Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988) ("Although administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation's language, its interpretation may not conflict with the plain meaning of the wording used in that regulation.").

[45]EnergySolutions attempts to distance Congress' concurrent approval of the Compact under Title II of the 1985 Act and its enactment of Title I of 1985 Act when it asserts that the statute creating the North-west Interstate Compact was approved by Congress "several years after it enacted the LLRWPA." Answer at 22. While Congress enacted the original Low Level Radioactive Policy Act in 1980, PL 96-573, 94 Stat. 3347 (Dec. 22, 1980), Title I, Section 102 of the 1985 Act struck sections 1, 2, 3 and 4 of the 1980 Act and inserted Sections 1 - 10 in lieu thereof. The definition of "regional disposal facility" did not appear in the 1980 Act.

[46]*See* Answer at 22 (the Clive facility was not operational on January 1, 1985, or later established and operated under a compact, ergo, it is not a regional disposal facility and not subject to the Compact).

state[47] and, under Article IV[48] of the Compact, the Clive facility may only accept LLRW from outside the Compact region by complying with Article V of the Compact. *See* Answer at 22. However, EnergySolutions fails to describe Article V, which states:

> Notwithstanding any provision of article IV to the contrary, the [Northwest Compact] committee may enter into **arrangements** with states provinces, individual generators, or regional compact entities outside the region comprised of the party states for access to **facilities** on such terms and conditions as the committee may deem appropriate.

42 U.S.C § 2021b note (*emphasis added*). EnergySolutions is a "facility" as that term is defined in the Compact, and therefore must obtain approval of "arrangements" from the Compact Commission before it may allow access to its Clive disposal facility. From its inception as a LLRW disposal site in 1991,[49] the licensee of the Clive facility has come to the Compact Commission to obtain approval of "arrangements" to allow LLRW from outside the Compact region to be disposed of at Clive, which the Compact Commission has given in the form of "Resolutions." Now EnergySolutions is unwilling to abide by the Compact's Resolutions.

On May 12, 2008, the Compact clarified its Third Resolution and Order stating that its approval of past "arrangements"

> does not serve as an arrangement for disposal of low-level radioactive wastes generated in foreign countries - including foreign generated waste that is characterized as domestic generated waste by another compact or unaffiliated state, and such an arrangement, as required by Articles IV and V of the Compact statutes, would need to be adopted by the Compact Committee prior to foreign generated

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[47] *I.e.*, the Clive disposal facility is located in Utah and, as Utah is a member of the Northwest Interstate Compact, it is a facility located in a party state.

[48] Article IV reads, in relevant part, "No facility located in any party state may accept low-level waste generated outside the region comprised of the party states, except as provided in article V."

[49] In 1991, the Utah granted an amendment to Envirocare's original 1988 naturally occurring radio-active material license to allow the disposal LLRW at Clive, subject to obtaining necessary approvals from the Compact. Envirocare, obtained Compact approval of an "arrangement" to dispose of LLRW at Clive.

low-level radioactive wastes being provided access to the region for disposal at EnergySolutions facility in Clive, Utah.[50]

Obviously, EnergySolutions does not have approval from the Compact to dispose of the Italian foreign LLRW at its Clive facility. Therefore "an appropriate facility has **not** agreed to accept the waste for disposal" and the Commission must deny EnergySolutions import application.[51]

III. Conclusion

The State of Utah requests the Commission grant its request for a hearing and petition for leave to intervene or alternatively deny EnergySolutions' request to import waste from Italy.

DATED this 21st day of July, 2008.

Respectfully submitted,

/signed electronically by Denise Chancellor/

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[50]Northwest Interstate Compact, *Resolution Clarifying the Third Amended Resolution and Order*, May 12, 2008. Adams Acc. No. ML081480331.

[51]10 C.F.R. § 110.43. *See also* 10 C.F.R. § 110.32(f)(6) and NRC Chairman Klein letter to Rep. Barton, Dec. 13, 2007, response to question 5 ("The NRC will only grant an import license for waste intended for disposal if it is clear that the waste will be accepted by a disposal facility, host State, and compact (where applicable)." ADAMS Acc. No. ML073330805.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSIONERS

In the Matter of:	)	License Nos. IW023 and XWO13
	)	Docket No. 11005711 (import)
ENERGYSOLUTIONS	)	and No. 11005710 (export)
(Radioactive waste import/export licenses for Italian waste)	)	June 10, 2008

CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S REPLY TO ENERGY*SOLUTIONS*' ANSWER TO STATE OF UTAH'S REQUEST FOR A HEARING AND PETITION FOR LEAVE TO INTERVENE was served on the persons listed below via the NRC Electronic Information Exchange E-Filing System (EIS), unless otherwise noted, this 21st day of July, 2008:

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