UNITED STATES OF AMERICA
NUCLEAR REGULATOR COMMISSION

Before the Commission

In the Matter of:		
	June 26, 2009	
Energy*Solutions*, LLC		
Radioactive Waste Import/Expert Licenses	**Docket Nos.**	**110-05711 (Import)**
		110-05710 (Export)

ENERGY*SOLUTIONS*' REPLY TO UTAH'S AND THE VARIOUS ORGANIZATIONS' FILINGS IN RESPONSE TO THE COMMISSION'S MAY 20, 2009 ORDER

Pursuant to the Commission's Order of May 20, 2009 ("May 20 Order"), Energy*Solutions*, LLC ("Energy*Solutions*") hereby files this Reply to the State of Utah's Views on How the Commission Should Proceed ("Utah Brief") and to the Hearing Petitioners' Response to Commission Order Requesting Views on How to Proceed after Federal District Court Decision on EnergySolutions v. Northwest Compact ("Petitioners' Brief"), both filed on June 19, 2009.

As explained below, although both Utah and the Petitioners express the desire for further delay, they present no valid reason for the Commission to continue holding this proceeding in abeyance. Instead: (1) Utah speculates about an eventual reversal of the decisions of the United States District Court for the District of Utah;[1] (2) Utah assumes the validity of its original challenges to Energy*Solutions*' import and export License Applications ("Applications") as a

[1] Memorandum Decision & Order Granting in Part & Denying in Part Motions for Partial Summary Judgment, *EnergySolutions, LLC v. Nw. Interstate Compact on Low-Level Radioactive Waste Mgmt.*, No. 2:08-CV-352, slip op. (D. Utah May 15, 2009) ("District Court Order"; Attachment 1 to Energy*Solutions*' Brief in Response to the Commission's May 20, 2009 Order (June 19, 2009) ("Energy*Solutions*' Brief")); *see* Utah Brief at 4-5.

purported basis for postponing any adjudication of those challenges;[2] and (3) although the organizational Petitioners "encourage" the NRC to continue to delay this proceeding, their brief does not provide any valid justification for continued delay.[3] Instead, the Petitioners reiterate earlier challenges and raise new issues that these groups appear to seek to litigate. Neither brief articulates any imminent, irreparable harm that might be a justification for further delay. As a result, and as explained in Energy*Solutions*' Brief, the Commission should lift the order holding the review of the Applications and this proceeding in abeyance and issue a ruling on the pending hearing requests as expeditiously as practicable.

The Commission also received two letters in response to the May 20 Order, one from "HEAL Utah" and one from the Northwest Interstate Compact on Low-Level Radioactive Waste Management ("Northwest Compact").[4] Neither HEAL Utah nor the Northwest Compact are "potential parties" to this proceeding, so these are unauthorized filings.[5] The Northwest Compact Letter also appears to be misleading. First, the letter suggests that the district court had not yet entered final judgment,[6] when, in fact, final judgment had been entered two days before the Northwest Compact Letter.[7] Second, the letter states that the District Court Order "does not resolve the entire lawsuit."[8] This statement ignores the district court's Order Granting Energy*Solutions*' Motion for Entry of Judgment on Count I under Rule 54(b) and to Stay

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2 *See* Utah Brief at 5.

3 *See generally* Petitioners' Brief.

4 Letter from Christopher Thomas, Policy Director, HEAL Utah, to the Office of the Secretary (June 18, 2009); Letter from Mike Garner, Executive Director, Northwest Interstate Compact, to the Commissioners (June 19, 2009) ("Northwest Compact Letter").

5 *See* May 20 Order at 1.

6 *See* Northwest Compact Letter ("EnergySolutions has filed a motion . . . to obtain a judgment . . . .").

7 *See* Energy*Solutions*' Brief at 3-4.

8 Northwest Compact Letter.

Proceedings on Counts II and III.[9] This order granting motion for entry of judgment, also issued two days before the Northwest Compact's letter, explains that the District Court Order "renders unnecessary the relief sought" by Energy*Solutions* in the remaining counts in the district court action.[10]

I. UTAH'S SPECULATION ABOUT THE POTENTIAL FOR REVERSAL OF THE DISTRICT COURT DOES NOT JUSTIFY FURTHER DELAY

Utah first argues that "there is just cause for the Commission to continue holding the proceeding in abeyance" because there is a "reasonable potential for the district court to be reversed on appeal."[11] In support, Utah contends that the district court allegedly "struggled with how to resolve the legal issue presented,"[12] announces its intent to appeal to the U.S. Court of Appeals for the Tenth Circuit,[13] and observes that the District Court Order is subject to a *de novo* standard of review.[14] In other words, Utah asks the Commission to continue to delay this proceeding indefinitely based on speculation that Utah and its co-defendants to the district court action will ultimately be successful in an appeal. Utah presents no legal authority in support of this request.

Utah's argument is contrary to Commission precedent.[15] When considering a request to hold a licensing proceeding in abeyance, the Commission considers whether delaying the

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9 *EnergySolutions, LLC v. Nw. Interstate Compact on Low-Level Radioactive Waste Mgmt.*, No. 2:08-CV-352, slip op. (D. Utah June 17, 2009) ("Attachment 3 to Energy*Solutions*' Brief").

10 *See* Attachment 3 to Energy*Solutions*' Brief at 2.

11 Utah Brief at 4

12 *Id*.; *see also id*. at 3.

13 *See id*. at 4.

14 *See id*.

15 Utah's effective request for a stay pending appeal is also submitted in the wrong forum. Utah should seek such a stay from the courts, rather than from the NRC. *See* Fed. R. App. P. 8 (a)(1) ("A party must ordinarily move first in the district court for . . . a stay of the judgment or order of a district court pending appeal").

proceeding will result in a fair and efficient adjudication.[16] Under this analysis, the Commission considers its obligation to achieve expeditious decisionmaking, and its "longstanding practice . . . to limit orders delaying proceedings to the duration and scope necessary to promote the Commission's dual goals of public safety and timely adjudication."[17] Statements by the district court that might be construed to acknowledge the complex thinking involved in reaching a correct decision do not obviate the weight of the definitive ruling that has been issued, and it is the ruling that is the binding interpretation of the law.

Contrary to this precedent, Utah requests that the Commission hold this proceeding in abeyance for years based solely upon speculation about the eventual success of a future judicial appeal of a declaratory judgment. As explained above and in Energy*Solutions*' Brief, however, Commission precedent cuts against Utah's argument.[18] Now that the district court has confirmed that, as a matter of law, the Northwest Compact lacks authority to impede the use of Energy*Solutions*' Clive Facility to dispose of the waste to be imported under the proposed licenses, there is no basis for further delay of this proceeding.[19]

Moreover, Utah identifies no specific errors in the analysis contained in the District Court Order.[20] This deficiency confirms the speculative nature of Utah's statements regarding the

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16 *See*, *e.g.*, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 381-83 (2001) ("*PFS*"); *see also* Energy*Solutions*' Brief at 5.

17 *PFS*, CLI-01-26, 54 NRC at 381; *see also* 10 CFR 2.342(e)(3) & (4) (specifying consideration of the balance of harms and the public interest in evaluating a stay request).

18 *See* Energy*Solutions*' Brief at 5-6 (*citing Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 899-900 (1985), *rev'd on other grounds,* CLI-86-13, 24 NRC 22 (1986)).

19 *See also Hydro Res., Inc.* (P.O. Box 15910 Rio Rancho, NM 87174), CLI-04-14, 59 NRC 250, 254 (2004) ("absent extraordinary reasons for delay, the NRC acts as promptly as practicable on all applications it receives").

20 *See* 10 CFR 2.342(e)(1) (specifying that the proponent of a stay must make a strong showing that it is likely to prevail on the merits)

alleged "reasonable potential" for reversal on appeal.[21] Thus, Utah fails to present to the Commission any substantive reason to doubt Energy*Solutions*' position: that it is clear as a matter of law that the waste Energy*Solutions* proposes to import may lawfully be disposed at the Clive Facility.[22]

II. UTAH CANNOT RELY UPON THE PRESUMED VALIDITY OF THE ISSUES RAISED IN ITS PETITION TO JUSTIFY FURTHER DELAY

Utah next points to Energy*Solutions*' purported failure to "provide[] new or supplemental material information to the NRC Staff" to address Utah's allegations in its July 21, 2008 Reply as "[a]nother just cause for continuing to hold the proceeding in abeyance."[23] This argument presumes that the issues Utah proffered in its Initial Petition[24] and July 21, 2008 Reply are meritorious and that Energy*Solutions* is under the obligation to amend its Applications to address the issues raised in Utah's pending request for hearing. Based on this assumption, Utah asks the Commission to delay indefinitely any adjudication of the very issues it has raised. Notably, if the Commission were to accept this argument, the resolution of Utah's challenge to Energy*Solutions*' Applications would be delayed until Energy*Solutions* abandoned its right to dispute Utah's claims. Thus, Utah's argument is fundamentally circular. This argument is also irrelevant to the original reason the Commission held this proceeding in abeyance.

In its Answer, Energy*Solutions* explained why Utah did not show that a hearing on its issues would be in the public interest or that it can assist the Commission in making its required

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21 Utah Brief at 4.

22 *See* Energy*Solutions*' Answer Opposing the State of Utah's Request for Hearing and Petition for Leave to Intervene at 25 (July 10, 2008) ("it is clear that the waste can be legally disposed at the Clive Facility") ("Energy*Solutions*' Answer").

23 Utah Brief at 5 (*citing* State of Utah's Reply to Energy*Solutions*' Answer to Utah's Request for a Hearing and Petition for Leave to Intervene (July 21, 2008) ("July 21, 2008 Reply")).

24 State of Utah's Request for a Hearing and Petition for Leave to Intervene (June 10, 2008).

determinations under 10 CFR Part 110.[25] In particular, Energy*Solutions* explained why the information already available in the Applications is sufficient for the Commission to make its required findings.[26] This dispute remains pending before the Commission.

The NRC held this proceeding in abeyance because "the dispute over the authority of the Northwest Compact" to exclude the proposed imported waste was pending before the district court.[27] Now that the court has resolved this dispute, it is time for the Commission to rule on the pending hearing requests and move forward in the interests of a "prompt yet fair resolution of contested issues in adjudicatory proceedings."[28]

III. THE TENNESSEE PETITIONERS PRESENT NO SUPPORT FOR THEIR DESIRE TO FURTHER DELAY THE PROCEEDING

The organizational Petitioners also "encourage" the Commission to delay this proceeding indefinitely: "[i]f NRC decides not to immediately deny the applications, we encourage NRC to wait until the conclusion of the appeal process to resume consideration of the applications."[29] In support, the Petitioners refer to their "understand[ing]" that the Northwest Compact will appeal.[30] This argument is addressed in Section I, above.

The Petitioners' Brief then presents a variety of substantive challenges to the Applications. In some cases, these claims reiterate previous arguments that these groups have

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25 *See generally* Energy*Solutions*' Answer.

26 *See id*. at 15-17.

27 *See* CLI-08-24, 68 NRC __, slip op. at 5-6 (Oct. 6, 2008).

28 *PFS*, CLI-01-26, 54 NRC at 381 (*citing Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998)).

29 Petitioners' Brief at 1.

30 *See id*.

made.[31] In other cases, however, the Petitioners present new and therefore untimely arguments. For example, the Petitioners state:

> Now that NRC has categorized DU (Depleted Uranium) as Class A waste, would Italy's DU from reprocessing (RepU), which is might be considered [sic] a form of DU, which is now stored in France be eligible to come directly to the US or via Italy to the US under this license or an amendment to it?[32]

The Petitioners, however, cannot raise new issues at this time, because under 10 CFR 110.82(c) and the Commission's Order of March 4, 2008 in this proceeding, requests for hearing and petitions for leave to intervene in this proceeding were due on June 10, 2008. The Petitioners present no explanation or justification for their lack of timeliness in raising new issues, so they may not do so.[33]

The Petitioners also state that, if the Commission were to "narrowly process" the Applications, then the "larger policy ramifications will not be reviewed and weighted [sic]."[34] They do not explain, however, why this particular adjudication is an appropriate forum for debating the alleged "larger policy ramifications" of the Commission's rules in 10 CFR Part 110.

In a related point, the Petitioners state that the NRC is "currently considering changing its Import Export application policy and procedures."[35] Although Petitioners provide no citation or

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[31] *Compare id.* ("We continue to seek a formal hearing, with a format that maximizes the ability of the public and the NRC to gain official information on the license applications including amounts and characteristics of the waste . . . .") *with* Request from Multiple Organizations for Hearing in Middle Tennessee at 1 (June 10, 2008) ("Among the issues that need to be addressed are – the amount and type of radioactive waste and material . . . ."). Notably, however, the Petitioners' Brief of June 19, 2008 appears to be the first time that the Petitioners have expressed specific desires with respect to the "formal[ity]" or "format" of their requested hearing.

[32] Petitioners' Brief at 2.

[33] *Cf. AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC __, slip op. at 32 (Apr. 1, 2009) ("[F]ailure to comply with our pleading requirements for late filings constitutes sufficient grounds for rejecting . . . intervention and hearing requests.") (*quoting Florida Power & Light Co., et al.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2, et al.), CLI-06-21, 64 NRC 30, 33 (2006)).

[34] Petitioners' Brief at 4.

[35] *Id*.

basis for this statement, it may refer to the proposed rule changes to Part 110 discussed in SECY-09-0013[36] and approved by the Commission in a Staff Requirements Memorandum dated May 26, 2009. These proposed changes to Part 110 have now been published in the *Federal Register*.[37] The Petitioners do not explain, however, what aspect of this (or any other) rulemaking affects the specific issues they seek to raise in this proceeding. Nor do they explain why this pending rulemaking requires holding all "major applications" for imports or exports of radioactive material under Part 110 in abeyance until the rulemaking is concluded.[38] This demand is also contrary to Commission precedent, which holds that uncertainty as to the possible outcome of a regulatory review is not a valid reason to hold a licensing proceeding in abeyance.[39]

IV. NONE OF THE PETITIONERS HAVE ARTICULATED ANY IMMINENT IRREPARABLE HARM TO JUSTIFY FURTHER DELAY

Thus, neither Utah nor the Petitioners present any legal justification for further delay of this proceeding. In particular, neither brief articulates the type of imminent, irreparable harm that could conceivably justify further delay under the standards for emergency injunctive relief. Instead, as explained in Energy*Solutions*' Brief, now that a court of competent jurisdiction has ruled on the question of the Northwest Compact's authority, the original reason for holding this proceeding in abeyance is no longer present.[40]

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36 Review of Proposed Rule Package, "Export and Import of Nuclear Equipment and Material; Updates and Clarifications (10 CFR Part 110; RIN 3150-AI16)," SECY-09-0013 (Jan. 23, 2009).

37 Proposed Rule, Export and Import of Nuclear Equipment and Material; Updates and Clarifications, 74 Fed. Reg. 29,614 (June 23, 2009).

38 Petitioners' Brief at 4.

39 *See PFS*, CLI-01-26, 54 NRC at 383.

40 *See* Energy*Solutions*' Brief at 1; *see also PFS*, CLI-01-26, 54 NRC at 380 (finding that the absence of an "immediate threat to public safety" cut against a request to hold a licensing proceeding in abeyance); 10 CFR 2.342(e)(2) (specifying a showing of irreparable injury to obtain a stay).

In particular, rather than alleging any potential threat to the public health and safety, Utah articulates the following worst-case scenarios: "Italian waste awaiting disposal could become orphaned or may need to be placed in indeterminate storage in the United States" or "imported Italian waste already disposed of at Clive may need to be recovered and exported back to Italy."[41] This falls far short of any imminent, irreparable harm, because, as explained in Energy*Solutions*' brief, this scenario is not possible in the near term—or for many months to come.[42] Moreover, "even if the import and export licenses were granted and a court of appeals later reversed the district court, there would still be no irreparable injury because the waste could simply be returned to Italy."[43] Even if some amount of waste remained buried at the Clive Facility, the small amount of capacity used would have no effect on the disposition of waste generated in Utah or the Northwest Compact region, because all of this waste is disposed at the regional compact facility in Richland, Washington.[44]

Thus, none of the petitioners have articulated any imminent, irreparable harm that could conceivably justify further delay in this proceeding.

V. CONCLUSION

For the foregoing reasons, and for the reasons set forth in its Brief of June 19, 2009, Energy*Solutions* respectfully requests, in accordance with CLI-08-24, that the Commission lift

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41 Utah Brief at 5.

42 *See* Energy*Solutions*' Brief at 7-8 ("It will be many more months before: (1) the Staff completes its review; (2) the Commission could grant a license; (3) Energy*Solutions* could begin importing waste under the license; and (4) that waste could reach the Clive Facility."); *cf. PFS*, CLI-01-26, 54 NRC at 381 ("A site that currently contains no radiological materials and will not for at least 2 years cannot present an immediate threat to public safety.").

43 *See* Energy*Solutions*' Brief at 7-8. Neither Utah nor the organizational Petitioners explain why or how the material could become "orphaned."

44 *See id*., Attachment 1 at 16-17.

the order holding the review of the Applications and this proceeding in abeyance and issue a ruling on the pending hearing requests as expeditiously as practicable.

Respectfully submitted,

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Radioactive Waste Import/Expert Licenses	**Docket Nos.**	**110-05711 (Import)** **110-05710 (Export)**

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Energy*Solutions*' Reply to Utah's and the Various Organizations' Filings in Response to the Commission's May 20, 2009 Order have been served upon the following persons on this date through the Electronic Information Exchange.

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