March 29, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

Before Administrative Judges:
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

In the Matter of	)	Docket No. 63-001
U.S. DEPARTMENT OF ENERGY	)	ASLBP No. 09-892-HLW-CAB04
(High-Level Waste Repository)	)	

U.S. DEPARTMENT OF ENERGY'S RESPONSE TO PETITIONS TO INTERVENE OF THE STATE OF WASHINGTON, THE STATE OF SOUTH CAROLINA, AIKEN COUNTY, THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, AND THE PRAIRIE ISLAND INDIAN COMMUNITY

Three State governmental entities -- the States of South Carolina and Washington, and the County of Aiken, South Carolina -- have filed Petitions to Intervene in this proceeding.[1] The National Association of Regulatory Utility Commissioners ("NARUC") and the Prairie Island Indian Community also filed Petitions to Intervene.[2] Each of these Petitioners has said its intended participation is solely to oppose the Department of Energy's ("DOE") March 3, 2010

1 PETITION OF THE STATE OF SOUTH CAROLINA TO INTERVENE, February 26, 2010 , March 3, 2010 [South Carolina Pet.]; STATE OF WASHINGTON'S PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING [Washington Pet.]; PETITION OF AIKEN COUNTY, SOUTH CAROLINA, TO INTERVENE, March 4, 2010 [Aiken Pet.].

2 NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS PETITION TO INTERVENE, March 15, 2010 [NARUC Pet.]; PETITION TO INTERVENE OF THE PRAIRIE ISLAND INDIAN COMMUNITY, March 15, 2010 [PIIC Pet.].

Motion to Withdraw its license application ("Motion to Withdraw").[3] DOE is confident that its Motion to Withdraw is consistent with all governing law. Nevertheless, DOE believes that States and State subdivisions, affected tribes, and NARUC should be able to present their differing view of the law on this issue in this unique proceeding.

Each of these petitioners has stated that its opposition to the Motion to Withdraw is based solely on legal grounds and does not involve disputed issues of material fact.[4] Moreover, each of these petitioners has proffered contentions that consist purely of legal arguments opposing the Motion to Withdraw.[5] This suggests that they may be permitted to intervene without causing any

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[3] Washington states that it "seeks intervention to oppose an anticipated motion by [DOE] to dismiss with prejudice its application for a construction authorization to proceed with a deep geologic repository for high-level radioactive waste and spent nuclear fuel at Yucca Mountain, Nevada." Washington Pet. at 1. It further declares: "Washington's intervention will not broaden issues. Washington will merely oppose such withdrawal." *Id.* at 13. South Carolina states: "The purpose of the requested intervention is to oppose, as a matter of law, the anticipated motion of [DOE] to withdraw, with prejudice, the application in this case." South Carolina Pet. at 2. Aiken County states that it "moves to intervene in these proceedings in the same manner as set forth in the Petition to Intervene of the State of South Carolina dated February 26, 2010, which this petition incorporates by reference." Aiken Pet. at 3. NARUC states that it "seeks leave to intervene as a party to contest the recently filed DOE motion to withdraw the license application for a permanent geologic repository at Yucca Mountain with prejudice." NARUC Pet. at 3. PIIC asserts that it seeks "to oppose the March 3, 2010 motion by the Department of Energy (DOE) to dismiss with prejudice" its application, that PIIC's "participation will not broaden the issues herein," and that its opposition will be based "on legal grounds." PIIC Pet. at 2, 13, 14.

[4] Washington Pet. at 17, 20, 23 (stating that the issues raised in the proffered contentions are "exclusively" or "primarily legal in nature" and " not factual."), 23, 25-26 (asserting "genuine dispute" as to whether DOE "has satisfied NEPA as a procedural prerequisite", thus raising inherently legal arguments); South Carolina Pet. at 18 (stating that South Carolina's proffered contentions "are not anticipated to involve any contested issues as to any material fact and would involve only legal argument."), 23, 25, 27 ("there is no disputed material issue of fact of which South Carolina is presently aware, given that DOE clearly intends to seek withdrawal of the application. Equally clear, however, is the existence of a material issue of law, that is, the question of whether DOE has the power to withdraw the application"); Aiken Pet. at 3 (stating that Aiken seeks to intervene "in the same manner as set forth in the Petition to Intervene of the State of South Carolina."); NARUC Pet. at 27, 31, 34, 38 (stating that "[t]he issues raised in this pleading are exclusively legal in nature," and that there are "no factual issues " or that they "are not anticipated"); PIIC Petition at 21, 23, 26, 29, 34 (stating, as to each contention, that the issue(s) raised are "primarily legal" and that, to the extent they may rely on factual matters, they rely either on the existing record or on an attached affidavit of Ronald C. Callen).

[5] South Carolina has proffered three contentions, all alleging violations of the Nuclear Waste Policy Act ("NWPA"). Washington has proffered four contentions, alleging violations of the NWPA, general federal standards for dismissal with prejudice, the National Environmental Policy Act and the Administrative Procedures Act. Aiken County has not proffered any contentions, but has stated that it "seeks to intervene in the same manner as set forth in the Petition to Intervene of the State of South Carolina." Aiken Pet. at 3. By that statement, Aiken appears to adopt and be limited to the contentions filed by the State of South Carolina. NARUC has proffered four contentions akin to those raised by the State of Washington. PIIC has proffered five

undue delay. Finally, three petitioners are State or local governmental entities entitled to participate as such under 10 C.F.R. § 2.315(c), even without petitioning formally to intervene.[6] A fourth is a federally recognized Indian tribe and host to an NRC-licensed facility, similarly entitled to participate under 10 C.F.R. § 2.315(c); and the fifth is the national organization of state utility commissioners.[7] All of the petitions are timely relative to the filing of the Motion to Withdraw.

Accordingly, DOE does not oppose the intervention of these five petitioners to allow them to make their legal arguments in opposition to the Motion to Dismiss. To avoid delay and to promote efficiency, DOE respectfully submits that the Board should permit their intervention on the following terms:

1. The petitioners are allowed admission as intervenors under 10 C.F.R. § 2.309, with the scope of their intervention limited to opposition to the Motion to Withdraw;

2. The petitioners' contentions are to be resolved through a briefing process that the Board establishes for the Motion to Withdraw and any argument that the Board allows regarding that motion. The petitioners may raise their objections to the Motion to Withdraw without amending their proffered contentions.

3. The Board should establish the following briefing schedule to address the Motion to Withdraw and objections to that motion by these petitioners and any existing parties: (i) all briefs in opposition to the Motion to Withdraw are to be filed within 21 days after the order granting the petitioners' intervention; and (ii) DOE's consolidated reply to the briefs in opposition and the replies of any other parties aligned with DOE on the Motion to Withdraw are to be filed within 21 days after the last brief in opposition is filed.

DOE does not of course concede the merits of the petitioners' proffered contentions or any other matter that they have pleaded, and expressly reserves its right to contest all of these

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contentions, four of them akin to those raised by the State of Washington and NARUC, and the fifth proposing certain "conditions on any future consideration of DOE's Motion" (PIIC Pet. at 29).

[6] Aiken requests this form of participation in the alternative to intervention. Aiken Pet. at 3.

[7] *See* NARUC Pet. at 3-5 for NARUC's recitation of its previous involvements in nuclear matters.

petitioners' substantive arguments on the merits.[8] DOE also does not consent to any later attempt by petitioners to broaden the proposed scope of their participation or to modify the process for resolution of the Motion to Withdraw as it may be established by this Board.[9]

Counsel for South Carolina, Washington, Aiken County and PIIC have informed DOE that they are agreeable to the intervention terms and the briefing schedule proposed above. Counsel for NARUC has informed DOE that it does not agree with the terms proposed by DOE.

DOE has solicited the views of the existing parties about the proposed terms. The following have informed DOE that they do not agree with them: State of Nevada, Clark and Nye Counties, NAAC. DOE has not received responses from any other parties.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

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[8] DOE also reserves the right to oppose admission of any further contentions by Petitioners (Washington, having filed on March 3 without seeing DOE's Motion, purports to reserve the right to advance further contentions, Washington Pet. at 14.).

[9] DOE reserves the right to object to participation by any further petitioner for intervention, not matching all the attributes or circumstances of the instant Petitioners, on this or any other issue.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the **U.S. DEPARTMENT OF ENERGY'S RESPONSE TO PETITIONS TO INTERVENE OF THE STATE OF WASHINGTON, THE STATE OF SOUTH CAROLINA, AIKEN COUNTY, THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, AND THE PRAIRIE ISLAND INDIAN COMMUNITY** have been served on the following persons on this 29th day of March 2010 through the Nuclear Regulatory Commission's Electronic Information Exchange.

CAB 04
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