

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	
)	
U.S. DEPARTMENT OF ENERGY)	Docket No. 63-001
)	
(High Level Waste Repository))	March 29, 2010

**ANSWER OF THE STATE OF NEVADA TO
THE STATE OF SOUTH CAROLINA'S PETITION TO INTERVENE**

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**ANSWER OF THE STATE OF NEVADA TO
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On February 26, 2010, the State of South Carolina ("South Carolina") petitioned for leave to intervene in this proceeding. For the reasons set forth below, the State of Nevada opposes South Carolina's petition. This Answer by Nevada is adopted in its entirety by the Native Community Action Council ("NCAC").

I. SOUTH CAROLINA LACKS STANDING TO INTERVENE

South Carolina has not established standing to intervene, for the reasons set forth below.

For standing, South Carolina relies primarily on the proposition that it would be harmed if the Yucca Mountain application is withdrawn because it would then be on the list of candidate replacement sites. Petition at 3-4, 15-17. There is no such list. The Nuclear Waste Policy Act of 1982, as amended ("NWPA"), requires Congressional action before a replacement site may even be studied. 42 U.S.C. § 10172a (a). Thus, South Carolina's harm depends entirely on speculation about future Congressional action. Such speculation does not constitute any injury. *See, e.g., Whitmore v. Arkansas*, 495 U.S. 149, 158-59 (1990); *Sequoyah Fuels Corporation (Gore, Oklahoma Site)*, CLI-94-12, 40 NRC 64, 72 (1994). Moreover, South Carolina's injury will occur only in the future, when and if Congress authorizes characterization of a site in South Carolina. Such allegations of a future injury are insufficient to establish standing. *Whitmore v. Arkansas*, *supra* at 158.

South Carolina also alleges that it will suffer from the "continuing potential hazard of the onsite storage at the seven commercial reactors, the storage of foreign spent fuel at the Savannah River Site ("SRS"), and the need to have emergency preparedness and transportation plans in place in connection with that spent fuel." Petition at 4. However, South Carolina fails to articulate exactly what this "continuing potential hazard" might be or how South Carolina's

interests would be affected. South Carolina also fails to show how the continuation of the Yucca Mountain licensing proceeding would redress these alleged injuries. This is an especially glaring defect, because South Carolina will need to have emergency preparedness and transportation plans in place to address operating reactors and continued storage, regardless of whether Yucca Mountain is licensed and, if Yucca Mountain is licensed, it will need transportation plans related to the shipment of materials to Yucca Mountain for disposal.

In sum, South Carolina's very general allegations of harm fall far short of the required demonstration of one or more distinct and palpable harms that that can be traced fairly to the challenged action and that are likely to be redressed by a continuation of the licensing proceeding. See *Public Service Company of New Hampshire (Seabrook Station Unit 1)*, CLI-91-14, 34 NRC 261 (1991). Indeed, South Carolina's arguments in support of standing are no better than the ones rejected in *International Uranium (USA) Corporation (White Mesa Uranium Mill)*, LBP-01-15, 53 NRC 344, *affirmed*, CLI-01-21, 54 NRC 247 (2001). In *White Mesa* petitioner's alleged harms included a "significant potential for undetected seepage discharge from the [mill's] tailing cells to groundwater, and thus, to the 'waters of the state.'" The Licensing Board rejected the contention pointing out, among other things, that there was no explanation how the alleged impacts would arise from the proposed licensed activities as opposed to past activities not in issue. 53 NRC 344, slip op. at 3-4. In affirming the Board's decision, the Commission also noted that the contention failed to include any allegation with respect to pathway or mechanism that would lead to contamination. 54 NRC 247, slip op. at 3. Like the petitioner in *White Mesa*, South Carolina fails to explain how abandoning Yucca Mountain would give rise to impacts beyond those already present, and fails to describe any exposure or contamination pathways.

Finally, South Carolina seeks to intervene in order to assert an alleged procedural right that the Yucca Mountain license application be considered fully on its merits. In such a procedural right case, a petitioner must establish that the procedural right at stake is designed to protect its concrete interests in the outcome of the agency proceedings.¹ For example, in *Electric Power Supply Ass'n v. FERC*, 391 F.3d 1255 (D.C. Cir. 2004), the Court held that an association of energy marketers had standing to challenge an agency rule permitting illegal *ex parte* communications in its hearings because the association's members had concrete financial interests at stake and were participating as parties in hearings where the rule applied.

Even if South Carolina had established that it had some concrete interest that would be affected if Yucca Mountain is not licensed, it has not sought to advance any of those interests by filing substantive contentions. If South Carolina's procedural right is vindicated, the proceeding will continue, but South Carolina will disappear from the scene, and any concrete interests it may otherwise have possessed will be entirely at the mercy of the other parties who South Carolina claims cannot represent its interests. Petition at 14. South Carolina's interests (if any) may still exist but, insofar as the NRC proceeding is concerned, its interests will exist only in the abstract, subject to rejection or redefinition at the discretion of the NRC and the remaining parties. South Carolina will no longer have the "concrete interest in the outcome of the proceeding" that the law on standing requires. In short, South Carolina's injury is purely a procedural one, and the assertion of a pure procedural interest is not sufficient for standing. *See Lujan v. Defenders of*

¹ If this is not treated as a procedural rights case, then South Carolina would be required to satisfy the redressability element of standing. To the extent that South Carolina's injuries can be defined with any precision at all, it would appear that they could be redressed only if Yucca Mountain is licensed. Therefore, South Carolina would be required to show that if the application proceeds, there is a substantial likelihood the outcome will be favorable and the license will be issued. *See Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 78 (1978). Such a showing would be impossible to make.

Wildlife, 504 U.S. 555, 572-73 (1992). *See also, Guerrero v. Clinton*, 157 F.3d 1190, 1194 (9th Cir. 1998).

II. DISCRETIONARY INTERVENTION

South Carolina requests that it be permitted to intervene as a matter of discretion under 10 C.F.R. § 2.309 (e) if it is not permitted to intervene as a matter of right. Petition at 18. As support, South Carolina refers to its arguments supporting late intervention under 10 C.F.R § 2.309 (c)(ii) through (c)(viii). However, as explained below, South Carolina fails to make a favorable showing on any of the factors favoring discretionary intervention in 10 C.F.R § 2.309 (e)(1)(i)-(iii). Moreover, all of the factors weighing against discretionary intervention are present, with the possible exception of one factor in 10 C.F.R § 2.309 (e)(2)(ii) (the extent to which South Carolina’s interests will be represented by existing parties). Discretionary intervention is an “extraordinary procedure” that cannot not be granted “unless there are compelling factors in favor of such intervention.” 69 Fed. Reg. 2182, 2201 (January 14, 2004). South Carolina’s weak case falls far short.

III. TIMELINESS

South Carolina’s petition is untimely.

It is axiomatic that petitions to intervene must be timely filed. The Notice of Hearing in this proceeding, 73 Fed. Reg. 63029 (October 22, 2008), required that all petitions to intervene in this proceeding be filed no later than December 22, 2008, almost one and one-half years ago. Nevertheless, South Carolina claims that its petition is timely because it was filed within 30 days of the date when new and material information became available.² The alleged new and material

² Case Management Order No. 2, January 29, 2009, provides for a 30-day standard rather than a 10-day standard for judging the timeliness of motions under 10 C.F.R. § 3.323. It does not change the due date for petitions for leave to intervene under 10 C.F.R. § 2.309.

information consists of “[t]he Administration decision, announced as early as January 29, 2010, that the Department would seek to withdraw the application,” “on February 1, 2010, the Department filed a motion with this Board announcing that it would soon seek to withdraw the application,” and “also on February 1, 2010, the Administration’s budget was announced, in which the President directed the Department to discontinue the present application.” Petition at 5-6. South Carolina claims that all this information was completely new and unanticipated. *Id.* South Carolina explains further that it had no specific reason to seek to participate in this proceeding before these dates “because its general interests in public health and safety, and other matters under review by the Board, were being adequately protected by the existing parties.” Petition at 7.

This argument suffers from two fatal flaws. First, a petitioner has an obligation to uncover and apply publicly available information in a timely manner. *Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 2)*, CLI-93-4, 37 NRC 156, 164-65 (1993); *Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Units 1 and 2)*, CLI-92-12, 36 NRC 62, 69-73 (1992); *Kansas Gas & Electric Company (Wolf Creek Generating Station, Unit 1)*, LBP-84-17, 19 NRC 878, 886 (1984). Before petitions were due on December 22, 2008, it was well known that President Obama was committed to abandoning the repository at Yucca Mountain. *See e.g.*, a September 25, 2008 New York Times article quoting then-candidate Obama as saying that “the nuclear waste disposal efforts at Yucca Mountain [in Nevada] have been an expensive failure and should be abandoned,” and the December 3, 2008 testimony of a Vice President of South Carolina Electric and Gas Company before the South Carolina Public Service Commission that Yucca “appears dead.” *See Exhibits 1 and 2.* Abandoning the Project would logically include a motion for withdrawal of the license

application. Thus, South Carolina failed to uncover and apply information, publicly available before December 22, 2008, that the Administration (which necessarily includes the Department of Energy (“DOE”)) would seek to withdraw the license application. This information was more than sufficient to put South Carolina on notice that it should seek to participate in the proceeding in order to protect its interests if not within the established deadline, then at least as soon as possible thereafter.

It is not relevant that DOE’s motion to withdraw was not actually filed until many months after the President’s position became generally known. The Commission held in *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI-83-19, 17 NRC 1041, 1045 (1983) that “the institutional unavailability of a licensing related document does not establish good cause for filing a contention late if information was available early enough to provide the basis for the timely filing of that contention.” *Catawba* was followed in *Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1)*, LBP-83-42, 18 NRC 112 (1983), *affirmed*, ALAB-743, 18 NRC 387 (1983). The analysis in *Shoreham* is instructive. In *Shoreham* an organization filed an untimely petition to intervene to support the application and the applicant’s emergency plan, which had been prepared and filed following the local government’s repudiation of an emergency plan prepared by the applicant on its behalf and subsequent announcement that it would not prepare a new government plan. The petitioner argued that its duty to file promptly upon receipt of new and material information arose only with the filing of the applicant’s plan, the actual licensing document. The Licensing Board and Appeal Board both disagreed and denied the late petition, holding that the event triggering the petitioner’s duty was the local government’s earlier announcement that it would not prepare its own plan. That announcement signaled that the applicant would be filing its own plan and provided adequate

information to support petitioner's intervention and contentions. As in *Shoreham*, South Carolina's duty to file within a reasonable time was triggered not by the formal filing of licensing related documents (DOE's formal filing of the motion and its earlier formal notice that such a motion would be filed), but rather by earlier public announcements that clearly signaled what would follow.

Second, South Carolina argues that its failure to intervene by December 22, 2008, was justified by its belief that "its general interests in public health and safety, and other matters under review by the Board, were being adequately protected by the existing parties." Petition at 7. However, long-standing and well-settled Commission precedent clearly holds that a petitioner may not justify intervening after the established deadline by claiming it was lulled into inaction by the participation of other parties. *Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir. 1990), *affirming Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Units 1 and 2)*, CLI-88-12, 28 NRC 605, 609 (1988); *Gulf States Utilities Company (River Bend Station, Units 1 and 2)*, ALAB-444, 6 NRC 760, 795-98 (1977). In the latter case, the Union of Concerned Scientists attempted to replace the State of Louisiana after the State decided to withdraw from the proceeding, arguing that the organization and its members had been "lulled into inaction" by the State's previous participation. 6 NRC at 796. The Appeal Board rejected that argument, holding that the belated petitioners assumed the risk that the previous litigant's degree of involvement would not fulfill their expectations and that "a foreseeable consequence of the materialization of that risk was that it would no longer be possible to undertake [themselves] the vindication of [their] interests." 6 NRC at 760, *82. *See also Easton Utilities Commission v. AEC*, 424 F.2d 847, 852 (D.C. Cir. 1970).

IV. **LATE INTERVENTION PURSUANT TO 10 C.F.R. § 2.309 (c).**

Alternatively, if its petition is untimely, South Carolina asks that it be permitted to intervene based on the balancing of factors in 10 C.F.R. § 2.309 (c). This request must be denied.

A. **Factor (i) (Good Cause for Failure to File On Time)**

As discussed above, South Carolina does not establish any good cause for its late intervention. This means that South Carolina must make a compelling showing on the remaining factors. *Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Units 1 and 2)*, CLI-88-12, 28 NRC 605, 609 (1988), affirmed in *Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir. 1990). No compelling case is or could be made here.

B. **Factor (ii) (Nature of Petitioner's Right to Be Made a Party)**

On factor (ii), the nature of South Carolina's interests, South Carolina fails to establish a cognizable interest sufficient for standing. Most of South Carolina's arguments here repeat its arguments for standing, which are insufficient for the reasons discussed above. However, South Carolina adds a few additional arguments. It argues that it is "essentially a neighboring landowner to the Savannah River Site, whose property is at risk of environmental damage from the DOE activities at SRS." Therefore, according to South Carolina, it "has a concrete [quasi-sovereign] interest that NEPA [and the NWPA] were designed to protect." Petition at 9-10. South Carolina may well have concrete sovereign interests in assuring that particular activities at the Savannah River Site do not contaminate the grounds, groundwater, and highways that it owns nearby. But this case is not about South Carolina's standing to challenge particular DOE activities at the Savannah River Site, as in the case South Carolina cites (*Hodges v. Abraham*, 300 F. 3d. 432 (4th Cir. 2002)), but about South Carolina's interest and standing to challenge activities that will take place in Nevada, over two thousand miles away from Savannah River.

South Carolina fails to establish with any specificity how withdrawal of Yucca Mountain will lead to any distinct and palpable harm to its grounds, groundwater, and highways near Savannah River, or how any of its interests in the grounds, groundwater, and highways near Savannah River will be saved from harm by a continuation of the Yucca Mountain licensing proceeding.

Next, South Carolina argues that it has cognizable interests based in the interests of its citizens who paid fees (presumably through electric power rates) for development of a repository and who derive various benefits from the natural environment of the region surrounding the Savannah River Site. Petition at 10. These very general allegations not only suffer from the defects discussed above, but they also constitute an invalid effort by South Carolina to assert a *parens patriae* interest on behalf of its citizens before a federal tribunal. *Alfred L. Snapp & Sons, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n. 16 (1982). In any event, the NRC cannot redress any grievance any citizen or licensee may have about payment of fees into the Nuclear Waste Fund.

C. Factor (iii) (Nature and Extent of Petitioner's Other Interests).

South Carolina here identifies its general interest in insuring that the Yucca Mountain proceedings continue “so that the spent fuel and other nuclear materials now being temporarily stored in South Carolina will be safely placed in the Yucca Mountain repository.” Petition at 11. This factor cannot bear any weight here because it has yet to be determined whether in fact the spent fuel and other nuclear materials now being temporarily stored in South Carolina can be disposed of safely at the proposed Yucca Mountain repository. It is equally plausible to assert that safety will be better served by leaving these nuclear materials in South Carolina until a better repository site is selected.

DOE's application may be denied on its merits or granted only on terms and conditions unfavorable to South Carolina's interests. And, because South Carolina declined to intervene on a timely basis to support the license application on its merits, and to press its case before the NRC that DOE's discussion of the no-action alternative understated impacts to South Carolina, its interests will be entirely at the mercy of the other parties even if DOE's motion to withdraw is denied.

D. Factor (iv) (Effect on Petitioner's Interests).

South Carolina argues that it should be admitted as a party because otherwise it may not be able to sue the Commission. Petition at 11-12. South Carolina deserves an A+ for chutzpah. Why, on earth, would the NRC "shoot itself in the foot" by exercising its discretion to grant party status to a petitioner just to enable the petitioner to sue the agency.

E. Factor (v) (Availability of Other Means to Protect Petitioner's Interests).

South Carolina here repeats its argument that it should be admitted as a party because otherwise it may not be able to sue the Commission. Petition at 13. Moreover, South Carolina's implicit assumption that a lawsuit against the NRC and participation in the Yucca Mountain licensing proceeding to protest withdrawal of the license application would be the only means to protect South Carolina's interests is incorrect. As noted above, any new repository will require Congressional authorization, and South Carolina's concern that a site in South Carolina may be chosen as a replacement repository is more addressed to the Congress than the NRC.

F. Factor (vi) (Extent to Which Petitioner's Interests Will Be Represented By Existing Parties).

South Carolina argues that there is no State or other government unit admitted as a party that will protect its interests. Petition at 14. While that is correct, as far as it goes, South Carolina ignores NEI, which was granted standing precisely to protect interests closely related to

those of South Carolina – the interests of members of NEI who operate reactors and store spent reactor fuel in South Carolina. *U.S. Department of Energy (High-Level Waste Repository)*, LBP-09-06, 2009 NRC LEXIS 68, *12, May 11, 2009.

G. Factor (vii) (Extent to Which Petitioner's Participation Will Broaden the Issues or Delay the Proceeding).

While South Carolina promises to comply with established deadlines, it fails to address the other aspect of this factor – whether South Carolina's participation will broaden the issues. Petition at 14-15. A simple inspection of South Carolina's proposed contentions indicates that this will clearly be the case, for South Carolina seeks to inject into this proceeding not only the issue whether withdrawal of the application is permitted by the NWPAA, but also issues involving Constitutional separation of powers.

H. Factor (viii) (Extent to Which Petitioner's Participation May Assist in Developing a Sound Record).

South Carolina simply asserts that its participation will assist the Commission in construing the NWPAA. Petition at 15. This weighs against South Carolina, for it is a petitioner's ability to contribute sound evidence rather than its asserted legal skills that is of significance in evaluating and balancing this particular factor. *Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1)*, ALAB-671, 15 NRC 508, 513 n. 14 (1982); *Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1)*, LBP-84-17, 19 NRC 878, 888 (1984).

I. Summary.

As indicated above, South Carolina must make a compelling showing on factors (ii) through (viii) because it does not establish any good cause for its late intervention (factor (i)). It utterly fails to do so. Of the seven factors, only one even arguably weighs in South Carolina's favor – factor (vi) (the extent to which South Carolina's interests will be represented by existing parties). The other factors either count against South Carolina or are neutral. The Commission

has held that a favorable showing on factor (vi) does not overcome the adverse effect of not demonstrating good cause for late intervention (factor i). *Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic)*, CLI-94-7, 39 NRC 322, 329 (1994).

Moreover, in evaluating and balancing factors (i) and (vi), a petitioner's governmental status in and of itself cannot carry the day. *Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2)*, ALAB-339, 4 NRC 20 (1976).

V. SOUTH CAROLINA'S PETITION SHOULD BE DENIED BECAUSE IT HAS FAILED TO MEET THE LICENSING SUPPORT NETWORK REQUIREMENTS OF 10 C.F.R. PART 2, SUBPART J

A. The Regulatory Framework and the Licensing Board's Application Thereof.

Despite South Carolina's failure to petition to intervene in this proceeding in December 2008 as required by the Commission's October 2008 Notice of Hearing, it is obligated nonetheless to comply with the Licensing Support Network (LSN) requirements of 10 C.F.R. Part 2, Subpart J before it can be admitted as a party. As specified in 10 C.F.R. § 2.1012(b)(1):

A person, including a potential party given access to the Licensing Support Network under this subpart, may not be granted party status under § 2.309, or status as an interested governmental participant under § 2.315, if it cannot demonstrate substantial and timely compliance with the requirements of § 2.1003 at the time it requests participation in the HLW licensing proceeding under § 2.309 or § 2.315.

For its part, § 2.1003(a)(1) requires the public availability on the LSN of "[a]n electronic file including bibliographic header for all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, a potential party, interested governmental participant or party."

The regulations in 10 C.F.R. Part 2, Subpart J (§ 2.1001) define the Documentary Material each entity must include in its LSN collection, including notably any information which it intends to cite or rely upon in support of its position; contrary information; and relevant reports

and studies prepared on its behalf whether the party intends to rely on them or not. Those regulations also specify the details which must be implemented by an entity in creating its LSN collection, including (1) designation of the official responsible for compliance; (2) establishment of procedures to implement the requirements of § 2.1003; and (3) the conduct of training of staff for the implementation of those procedures (§ 2.1009(a)). Most importantly, § 2.1009(b) requires that the designated responsible official “shall certify . . . that the procedures specified . . . have been implemented, and that to the best of his or her knowledge, the documentary material specified in § 2.1003 has been identified and made electronically available.”

In its May 11, 2009 Order (Identifying Participants and Admitted Contentions) the CAB quoted the foregoing § 2.1009 prerequisites to LSN compliance and added that the initial certification requirement referred to therein also embodied a good faith standard “that the parties or potential parties have made every reasonable effort to produce all their documentary material.” (*U.S. Department of Energy (High-Level Waste Repository)*, LBP-09-06, 2009 NRC LEXIS 68, at *26 (05/11/2009)). CAB went on to explain that the good faith standard applied as well to the establishment of procedures for the review and production, and to that review and production, as well. (*Id.* at *29).

B. Inadequacy of South Carolina LSN Compliance.

South Carolina has not filed an initial certification of LSN compliance in accordance with § 2.1009. South Carolina has not designated an official responsible for LSN compliance; has not established procedures for the implementation of its obligations to make documentary material publicly available pursuant to § 2.1003; has not conducted training of its staff regarding implementation of LSN procedures; and has not made publicly available on the LSN a single bit of information. Nevada challenges South Carolina’s LSN compliance on **each** of the foregoing grounds.

South Carolina suggests that it does not possess any documentary material, but then volunteers that if it does have any, it “is committed to making such material available” at some future time. There are several problems with this superficially cooperative attitude.

First of all, it does nothing to alleviate South Carolina’s regulatory non-compliance. A mere protestation of willingness to comply in the future in no way accomplishes the designation of a responsible official, the drafting of procedures, the training of staff, or the implementation of those procedures. A future promise does not satisfy the requirement of the **filing** of a certification of compliance.

Without the creation of procedures and their implementation, a statement by counsel (that the State of South Carolina does not possess **any** information which supports its position) is a hollow one. The assertion of “no documentary material” is incredible for other reasons. South Carolina attaches to its Petition an Unofficial Transcript of a DOE press conference and a Report for the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management. Both documents are relied upon by South Carolina in support of its position, and both appear to be documentary material, within the meaning of 10 C.F.R. § 2.1001. Beyond the documentary material which appears evident, there is that which must necessarily underpin many allegations made by South Carolina in its Petition. For example, South Carolina asserts a “palpable harm” (Petition at 3); it cites the Administration’s recommended FY 2011 Budget and recites its provisions (*id.* at 6); and it refers to South Carolina’s suddenly changed position “on the list of candidate states for a waste disposal or storage facility.” (*Id.* at 3-4) It claims enormous amounts of money that the citizens of South Carolina have paid for development of a storage site (*id.* at 10); it claims that there are “large quantities of spent fuel and high level nuclear waste” in the state (*id.* at 9); and it claims that the

state must “maintain certain emergency preparedness plans” (*id.*). All of these factual assertions are the very predicate for South Carolina’s effort to intervene, and obviously the information so cited (assuming it is truthful and does exist) is precisely the type of information defined as documentary material in § 2.1001. It is very likely that this information is provided in reports or studies done on behalf of South Carolina, which would qualify as “documentary material” whether South Carolina intended to rely on them or not.

Because South Carolina has made no documentary material available on an LSN database in accordance with § 2.1003; because it has not created procedures, implemented them, conducted training of its staff or filed a certification of LSN compliance, all as required by § 2.1009; and because South Carolina inevitably does have in its possession “information it intends to rely on in support of its position in the licensing proceeding” (i.e., documentary material) the petition of South Carolina to intervene in this proceeding should be denied. Should intervention be granted, South Carolina should be precluded from relying (in any briefing or hearing) on any information not publicly available in its LSN database.

VI. CONTENTIONS

South Carolina offers three contentions, all of which relate to DOE’s withdrawal motion. Nevada offers the following with respect to the admissibility (but not the merits) of South Carolina’s contentions.

A. **SOC-MISC-01 – WITHDRAWAL OF APPLICATION WITHOUT
CONGRESSIONAL AUTHORITY**

Nevada does not object to the admissibility of this contention.

B. SOC-MISC-02 – WITHDRAWAL OF APPLICATION IN VIOLATION OF SEPARATION OF POWERS

South Carolina's contention that DOE seeks to determine matters already decided by Congress may be another way of arguing that DOE's withdrawal of the application would contravene a matter decided by Congress when it enacted the NWPA. If this is what South Carolina means, Nevada does not object to the admissibility of this contention, but notes that it duplicates SOC-MISC-01.

However, if South Carolina intends here to make some sort of separation of powers argument based on the premise that DOE intends to withdraw its application notwithstanding whatever the Congress may have provided in the NWPA, then Nevada objects to its admissibility as follows.

- a. Statement of Issue (10 CFR § 2.309(f)(1)(i))
No objection.
- b. Brief Statement of Basis (10 CFR § 2.309(f)(1)(ii))
No objection.
- c. Scope of the Proceeding (10 CFR § 2.309(f)(1)(iii))
No objection.
- d. Materiality (10 CFR § 2.309(f)(1)(iv))
No objection.
- e. Adequate Basis (10 CFR 2.309(f)(1)(v))
No objection.
- f. Genuine dispute (10 CFR § 2.309(f)(1)(vi))

South Carolina does not establish that there is a genuine dispute with DOE because nowhere in DOE's withdrawal motion is there even a remote suggestion that DOE seeks

to withdraw the application whatever the NWPA may provide. In fact, DOE's motion argues that withdrawal of its application is consistent with the NWPA. South Carolina may be trying to conjure up the kind of Constitutional controversy that would make dedicated members of the Federalist Society and certain Constitutional Law Professors green with envy, but before it can do so there must be a live case or controversy, and there is none here.

C. **SOC-MISC-03 – IF THE COMMISSION WERE TO GRANT DOE’S
ANTICIPATED MOTION TO WITHDRAW THE APPLICATION, THAT
GRANT WOULD EXCEED THE COMMISSION’S POWERS UNDER
THE NWPA**

Nevada does not object to the admissibility of this contention.

VII. CONCLUSION

Based upon the foregoing analysis of South Carolina's standing, timeliness, and LSN compliance, the Petition of South Carolina to intervene should be denied.

Respectfully submitted,

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Dated: March 29, 2010

Exhibit 1

SEPTEMBER 25, 2008, 11:13 AM

Obama's Science Quiz

By *JOHN TIERNEY*

The journal Nature managed to get answers to 18 questions about science policy from Senator Barack Obama, but not from Senator John McCain. You can read [the full text of Mr. Obama's answers here](#) along with summaries of what Mr. McCain has said in the past on these issues.

One of the biggest differences that emerges in the Nature answers, as in [previous answers to ScienceDebate08](#), concerns nuclear power. While Mr. McCain has previously called for building 45 new nuclear reactors by 2030, Mr. Obama sounds much more cautious:

It is unlikely that we can meet our aggressive climate goals if we eliminate nuclear power as an option. However, before an expansion of nuclear power is considered, key issues must be addressed, including security of nuclear fuel and waste, waste storage and proliferation. The nuclear waste disposal efforts at Yucca Mountain [in Nevada] have been an expensive failure and should be abandoned. I will work with the industry and governors to develop a way to store nuclear waste safely while we pursue long-term solutions.

What does a “long-term solution” mean? If this means waiting until there's a form of storage that will be safe for thousands of years — the hope for Yucca Mountain — then when, if ever, might we expect to see new nuclear power plants?

Exhibit 2



1 of 2 DOCUMENTS

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The State (Columbia, South Carolina)

December 4, 2008 Thursday

SECTION: B; Pg. 0

LENGTH: 464 words

HEADLINE: Nuclear hearings: Storage of waste is a concern;
With Nevada storage site out, radioactive waste would have be kept in Jenkinsville

BYLINE: CHUCK CRUMBO, ccrumbo@thestate.com

BODY:

SCE&G would have to store radioactive waste produced by new reactors at its Jenkinsville nuclear plant until the federal government finds a place to bury it, a utility executive said Wednesday.

Steve Byrne, vice president of nuclear operations, said the plans for two new reactors the utility wants to build call for waste such as spent fuel rods to be stored above ground in concrete-enclosed casks.

Byrne offered his remarks to the state Public Service Commission, which is hearing an application submitted by South Carolina Electric & Gas and its partner, state-operated Santee Cooper, to build two 1,117-megawatt reactor units, costing \$9.8 billion, at the V.C. Summer Nuclear Station.

Where to store high-level radioactive waste has been a national issue since the first commercial nuclear plant in the United States went into operation in December 1957 in Pennsylvania.

In January 1998, the federal government said it planned to store spent fuel from the country's 104 commercial nuclear plants at the Yucca Mountain Repository. Those plans have been thwarted by a series of legal challenges, political pressure and concerns over how to transport the waste. The deal now appears dead because President-elect Barack Obama has repeatedly said he opposes using the Nevada site.

"We have a contract" for waste removal, Byrne said, but no place to put it. He added that there doesn't appear to be another plan besides using the Yucca Mountain repository.

Nuclear hearings: Storage of waste is a concern; With Nevada storage site out, radioactive waste would have to be kept in Jenkinsville The State (Columbia, South Carolina) December 4, 2008 Thursday

"That's like a lot of things about this proposal. There's a lot of uncertainty," said Meira Warshauer, of Columbia, a customer of SCE&G who has intervened in the case.

Byrne answered, "I believe the government will live up to their obligations."

Environmentalists are concerned about how much radioactive waste will be generated by the new reactors, and how and where the waste will be stored.

SCE&G's 966-megawatt reactor unit at the V.C. Summer Nuclear Station at Jenkinsville, which began operations in 1984, produces about 26 tons of high-level radioactive waste every 18 months, said utility spokesman Robert Yanity.

At that time, radioactive waste is removed from the reactors and new fuel is loaded.

Adding two more reactors would generate three times as much waste, utility officials said.

Waste presently is stored at the plant in canisters submerged in pools of water.

Byrne said waste from the new reactors would be stored above ground in concrete-encased casks that can withstand a direct hit from an aircraft.

State regulators must decide whether the plants are needed to meet future population growth, to provide reliable electric service, and to promote economic development.

The state hearings are expected to last through next week. The commission faces a late February deadline to issue a ruling.

Reach Crumbo at (803) 771-8503.

LOAD-DATE: December 4, 2008

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Answer of the State of Nevada to the State of South Carolina's Petition to Intervene has been served upon the following persons by the Electronic Information Exchange:

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