March 29, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF ANSWER TO PETITION OF AIKEN COUNTY, SOUTH CAROLINA, TO INTERVENE

INTRODUCTION

On March 4, 2010, Aiken County, South Carolina ("Aiken County") filed a petition to intervene in this proceeding as a party pursuant to 10 C.F.R. § 2.309 or, alternatively, as an interested governmental participant, under 10 C.F.R. § 2.315(c). Petition of Aiken County, South Carolina to Intervene, dated March 4, 2010 ("Aiken County Petition") at 1-3. Aiken County also seeks to stay consideration of the Department of Energy's motion to withdraw its license application pending resolution of Aiken County's petition now pending before the U.S Court of Appeals for the D.C. Circuit. *Id.*

As set forth below, Aiken County's petition to intervene as a party, pursuant to 10 C.F.R. § 2.309, should be denied because it fails to establish Aiken County's standing in the proceeding and does not independently proffer an admissible contention. The request for a stay should also be denied. The Staff, however, does not oppose Aiken County's request to participate as an interested government participant.[1]

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[1] Participation as an interested government pursuant to 10 C.F.R. § 2.315(c) is not predicated on the submission of an admissible contention under 10 C.F.R. § 2.309(c). *See, e.g., Gulf States Utilities* (continued. . .)

BACKGROUND

On June 3, 2008, the Department of Energy (DOE) submitted the "Yucca Mountain Repository License Application," (LA) seeking authorization to begin construction of a permanent high-level waste repository at Yucca Mountain. *See* Yucca Mountain, Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008); corrected 73 Fed. Reg. 40,883 (July 16, 2008). On October 17, 2008, the Commission issued a "Notice of Hearing and Opportunity to Petition for Leave to Intervene," which provided that intervention petitions must be filed within 60 days. *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-08-25, 68 NRC 497 (2008); *see also* In the Matter of U.S. Department of Energy (High-Level Waste Repository); Notice of Hearing and Opportunity To Petition for Leave to Intervene on an Application for Authority To Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, 73 Fed. Reg. 63,029 (Oct. 22, 2008).

Timely requests for a hearing were received from twelve petitioners: the State of Nevada; the Nuclear Energy Institute (NEI); Nye County, Nevada; the Nevada Counties of Churchill, Esmeralda, Lander and Mineral, jointly ("Four Counties"); the State of California; Clark County, Nevada; the County of Inyo, California; White Pine County, Nevada; the Timbisha Shoshone Tribe; the Native Community Action Council (NCAC); the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation; and Caliente Hot Springs Resort, LLC; and two petitioners filed requests to participate as interested government participants: Eureka County, Nevada and Lincoln County, Nevada. *See U.S. Dept. of Energy* (High-Level Waste Repository), LBP-09-6, 69 NRC 367, 377-378 nn. 5-19 (2009). Three Construction

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(. . .continued)

Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 768 (1977).

Authorization Boards (CABs or Boards) designated to rule on the petitions granted 10 petitions to intervene, granted the interested governmental requests under § 2.315(c), and admitted all but 17 of the 318 proposed contentions. *See id*. at 499-500. Later, CAB-04 granted NCAC and the Joint Timbisha Tribal Group party status after both parties satisfied LSN certification requirements. Order (Granting Party Status to the Native Community Action Council), dated August 27, 2009 (unpublished) at 2; Order (Granting Party Status to the Joint Timbisha Shoshone Tribal Group), dated August 27, 2009 (unpublished) at 2.

Pursuant to "CAB Case Management Order #2," dated September 30, 2009 (unpublished), formal discovery began in the proceeding with the submission of initial witness disclosures by the parties on or before October 10, 2009. Discovery was limited to "Phase I" issues: contentions related the subject-matter of the first two volumes of the Staff's Safety Evaluation Report (SER) scheduled to be completed. Depositions were scheduled to begin on February 16, 2010. *Id*. at 7.

A DOE "Motion to Stay the Proceeding," filed on February 1, 2010 ("Stay Motion") stated that the President, in the proposed budget for fiscal year 2011, "directed that the Department of Energy 'discontinue its application to the U.S. Nuclear Regulatory Commission for a license to construct a high-level waste geologic repository at Yucca Mountain in 2010 . . . .'" Stay Motion at 1. The Stay Motion further stated that the proposed budget indicated that all DOE funding for Yucca Mountain would be eliminated in 2011.[2] *Id*. Therefore, DOE stated its intent to withdraw the license application by March 3, 2010, and requested a stay of the proceeding in order to avoid unnecessary expenditure of resources by the Board and parties. *See* Stay Motion at 2.

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[2] The Stay Motion referenced statements in the proposed budget prepared by the Office of Management and Budget for Fiscal Year 2011. Budget of the U.S. Government, Fiscal Year 2011, Appendix at 437 (available at http://www.whitehouse.gov/omb/budget/fy2011/assets/doe.pdf).

CAB-04 granted a stay of the proceeding on February 16, 2010.

On March 4, 2010, Aiken County, South Carolina filed the instant Petition, seeking admission as a party to the proceeding or, in the alternative, admission as an interested governmental participant, and requesting that the Board stay its consideration of the DOE withdrawal motion pending resolution of Aiken County's court challenge. Aiken County incorporated by reference South Carolina's Petition and did not proffer any contentions of its own. Aiken County Petition at 1-3. The Staff's answer to the petition is set forth below.[3]

DISCUSSION

In order to participate as a party in this proceeding, Aiken County must 1) establish standing, and 2) proffer at least one admissible contention that meets the requirements of 10 C.F.R. § 2.309(f)(1). *See Calvert Cliffs 3 Nuclear Project LLC, & Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 189 (2009).

I. Standing and Contentions

To establish standing to intervene as a party, Aiken County must meet the Commission's requirements set forth in 10 C.F.R. § 2.309(d). Under § 2.309(d), a request for hearing or petition for leave to intervene must state:

> (i) The name, address and telephone number of the requestor or petitioner;
> (ii) The nature of the requestor's/petitioner's right under the [Atomic Energy Act] to be made a party to the proceeding;
> (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and
> (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/ petitioner's interest.

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[3] In this Answer, the Staff follows the Boards' previous instructions regarding the content of answers to intervention petitions. *See* "CAB Case Management Order #1," dated January 29, 2009 (unpublished) (slip op. at 2) (adopting provisions in previous Advisory Pre-License Application Presiding Officer (APAPO) orders relating to pleading requirements); *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-08-10, 67 NRC 450, 456 (2008) (limiting answers to addressing specific deficiencies in petitions and contentions).

10 C.F.R. § 2.309(d)(1). The Commission adheres to contemporary judicial standards for standing: (1) Actual or imminent injury in fact (2) Causal connection between the injury and the conduct in question; and (3) Injury redressible by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Quivira Mining Corp.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11,
48 NRC 1, 6 (1998).

Aiken County states "DOE's own analysis is that failure to go forward with Yucca Mountain could result in 'widespread contamination at the 72 commercial and 5 DOE sites across the United States, with resulting human health impacts.' *See* FEIS/DOE-250. The Savannah River Site in Aiken County is one of the five referenced DOE sites." Aiken County Petition at 2-3. This statement, together with Aiken County's statements of responsibility for the "health, safety and welfare" of its citizens, land ownership "in close proximity to the SRS," and that the Savannah River Site is located in Aiken County, arguably addresses injury and traceability. *See id*. However, Aiken County's petition does not explain how its injury can be redressed by a favorable decision in this proceeding. Consequently, Aiken County has not demonstrated that it has standing to intervene.

Aiken County states that it seeks to intervene "in the same manner" as stated by South Carolina in its Petition to Intervene, and that Aiken County incorporates South Carolina's Petition by reference. Aiken County Petition at 3. Beyond referencing South Carolina's Petition, Aiken County does not proffer any contentions. A petitioner may not participate as a party unless it can establish that it has standing and independently proffers a least one admissible contention. *Calvert Cliffs 3*, 69 NRC at 189. The Commission's strict pleading requirements disfavor incorporation by reference in an intervention petition. *See Consolidated Edison Co. of*

New York et al. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 132-133 (2001). For example, the Commission does not allow

> wholesale incorporation by reference by a petitioner who, in a written submission, merely establishes standing and attempts, without more, to incorporate the issues of other petitioners . . . [or] . . . incorporation by reference of another petitioner's issues in an instance where the petitioner has not independently established compliance with [Commission] requirements for admission as a party in its own pleadings by submitting at least one admissible issue of its own.

Id. at 133.

In *Indian Point*, two petitioners incorporated each other's contentions by reference. *Id.* at 132-133. The Commission provisionally allowed them to incorporate each others' issues because each of the two petitioners had demonstrated their standing to intervene, and each of the petitioners had presented at least one admissible contention. *Id*. at 132.

Aiken County, however, has not proffered an admissible contention, and therefore has not satisfied the requirements of 10 C.F.R. § 2.309. Thus, Aiken County's request to intervene should be denied.[4]

II. Timeliness

Aiken County's petition is untimely because it was filed after the December 22, 2008 deadline in the Notice of Hearing. *See* 73 Fed. Reg. at 63,029. A nontimely intervention petition may not be considered unless the Board determines that the eight-factor balancing test[5]

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[4] If Aiken County is admitted as an interested government under 10 C.F.R. 2.315(c), it could participate on all issues in the proceeding. Participation under that provision does not require the proffer of an admissible contention or that the request be submitted by the deadline indication in the *Federal Register* notice. *Gulf States Utilities Co*. (River Bend Station, Units 1&2), ALAB-444, 6 NRC 760, 768 (1977).

[5] The factors to be considered are:

(i) Good cause, if any, for the failure to file on time;
(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
(continued. . .)

weighs in favor of the petitioner. *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC __, slip op. at 3-4 (March 26, 2010). The Commission has held that the first factor—whether there is good cause for failure to file on time—is the most important consideration. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 564 (2005). A determination of whether there is "good cause" for nontimely filing requires an analysis of: (1) "why [the petitioner] could not have filed within the time specified in the notice of hearing" and (2) whether the petitioner "filed as soon as possible thereafter." *Id*. at 564-65. If a petitioner cannot demonstrate good cause for its late-filing, the tardiness of the petitioner will only be excused if the petitioner makes a compelling showing on the other factors. Thus, a failure to show good cause is not dispositive. A petitioner's compelling showing under the remaining factors may counsel in favor of permitting a nontimely filing. *See Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-8, 67 NRC 193, 197-98 (2008).

With respect to good cause for failure to file on time, 10 C.F.R. § 2.309(c)(1)(i), Aiken County says that its petition is based on the filing of DOE's Motion to Withdraw. *See* Petition

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(. . .continued)

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

at 3. The Staff does not dispute that Aiken County filed its petition promptly after the new information became available inasmuch as it filed the day after DOE's filing. Although not clearly articulated by Aiken County, the Staff is of the opinion that a balancing of the remaining factors in 10 C.F.R. § 2.309(c), and Aiken County's good cause, favors the Board's allowing the late filing.

III. Compliance with 10 C.F.R. § 2.1003

10 C.F.R. § 2.1003 requires each potential party, interested government participant, and party to certify that it has made its documentary material available on the Licensing Support Network (LSN). In addition, a petitioner will not be found to be in substantial and timely compliance unless the petitioner complies with all of the orders of the Pre-License Application Presiding Officer (PAPO) regarding electronic availability of documents. *High-Level Waste Repository*, CLI-08-25, 68 NRC at 500.

Aiken County did not address LSN compliance in its petition. *See* Aiken County Petition at 1-3. However, on March 15, 2010, Aiken County certified that it had made available "electronic files of documentary material specified in 10 C.F.R. § 2.1013 and established procedures to "implement requirements of § 2.1013." Aiken County Certification of Electronically Available Documentary Material, March 15, 2010.[6] Consequently, the Staff does not challenge whether Aiken County has complied with the LSN certification requirements.

IV. Interested Governmental Participant

If denied intervention as a party, Aiken County alternatively requests that it be permitted to participate as an interested government under 10 C.F.R. § 2.315(c). Aiken County Petition

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[6] Aiken County published one document, its counsel's Notice of Appearance. Notice of Appearance of Thomas R. Gottshall, March 4, 2010 (LSN# AKN000000001)

at 3. The Staff does not oppose the admission of Aiken County as an interested governmental participant under 10 C.F.R. § 2.315(c), because Aiken County appears to have a cognizable interest in the outcome of this proceeding. *See generally Exxon Nuclear Co. Inc*. (Nuclear Fuel Recovery and Recycling Center), ALAB-447, 6 NRC 873, 876-79 (1977). However, if allowed to participate as an interested governmental participant, Aiken County must take the proceeding as it finds it and the proceeding shall not be delayed in order to accommodate Aiken County, *see High-Level Waste Repository*, CLI-08-25, 68 NRC at 500 n.1; *see also* Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste*, 54* Fed. Reg. at 14,937 (April 14, 1989), and the Board may require Aiken County to indicate the subject matter on which it wishes to participate. *Consolidated Edison Co. of New York* (Indian Point, Units 2 & 3), LBP-82-25, 15 NRC 715, 723 (1982).

V. Stay Request

Aiken County seeks denial of DOE's Motion to Withdraw, dissolution of the stay in this proceeding and resumption of consideration of the Yucca Mountain license application. Aiken County Petition at 3. Alternatively, Aiken County requests a stay of consideration of DOE's Motion to Withdraw pending resolution of Aiken County's petition that challenges the lawfulness of DOE's Motion to Withdraw in the U.S Court of Appeals for the D.C. Circuit. *Id*. (attaching Petition for Declaratory and Injunctive Relief and Writ of Mandamus, *Aiken County v. Chu,* No. 10-1050, D.C Cir., Feb. 19, 2010). Aiken County also raises the issue of whether the Board has the legal authority to stay or terminate the license application. *Id*.

Aiken County has not offered any argument in support of this request, and consequently, it has not given the Board any basis upon which to grant its request.[7] The mere possibility that proceedings will be mooted by another agency's decision is not sufficient reason to postpone ruling on the motion. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 383 (2001), *see also Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18 (1998) (reaffirming Commission's commitment to efficient and expeditious processing of adjudications.)

Also, Aiken County's court filing has been challenged on procedural grounds.[8] Thus, the Board should not stay consideration of DOE's Motion to Withdraw pending resolution of Aiken County's D.C. Circuit Petition.

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[7] For example, Aiken County has not addressed traditional stay factors. *See, e.g.*10 C.F.R. § 2.343(e).

[8] The government recently replied to Aiken County's Petition in the D.C. Circuit, seeking a summary denial of Aiken County's on the ground that it is premature, because the NRC has not acted on DOE's withdrawal Motion. March 24, 2010, Department of Justice, Respondent's Response to in Opposition to the Petition.

CONCLUSION

For the foregoing reasons, the Board should deny Aiken County's petition to intervene as a party under 10 C.F.R. § 2.309 and deny the County's request for a stay. The Staff does not object to Aiken County's request to participate as an interested governmental participant under 10 C.F.R. § 2.315(c).

Respectfully submitted,

/Signed (electronically) by/

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