

March 29, 2010

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARDS

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High-Level Waste Repository)

Docket No. 63-001-HLW

ASLBP Nos. 09-892-HLW-CAB04

**ANSWER OF CLARK COUNTY, NEVADA
TO PETITIONS TO INTERVENE OF THE STATE OF SOUTH CAROLINA,
AIKEN COUNTY, SOUTH CAROLINA AND
THE STATE OF WASHINGTON**

Pursuant to the CAB Order issued March 5, 2010 (“March 5 Order”), Clark County, Nevada (“Clark County”), hereby files this Answer to the Petitions to Intervene of the State of South Carolina (“South Carolina”), the State of Washington (“Washington”), and Aiken County, South Carolina (“Aiken County”) (together, the “Petitioners”) filed on February 26, 2010, March 3, 2010, and March 4, 2010, respectively. Clark County joins in the three Answers filed today by the State of Nevada (“Nevada”) in response to the Petitioners’ requests.¹ Nevada’s Answers address each of the Petitioners’ lack of standing, untimeliness, and matters of LSN compliance. Nevada’s Answers also address in detail each element of the proffered contentions. Clark County files this Answer to offer the following additional points regarding the Petitioners’ contrived claims of timeliness.

Neither South Carolina, Aiken County or Washington has proffered sufficient grounds for intervening at this stage of the proceeding, nearly two years since the DOE filed its License Application, and nearly a year and a half since the NRC called for all interested parties to come

¹ See March 5 Order at Ordering Paragraph 1 (“To the extent practicable, the parties are encouraged to file answers jointly with other parties asserting similar positions.”)

forward to be heard.² Each of the Petitioners claims that its interests in the proceeding ripened only after learning of the DOE's intent to withdraw the License Application.³ These arguments fail. Consideration of the Petitioners' own characterizations of their respective alleged interests and harms underscores the untimeliness of their petitions to intervene.

For example, Washington asserts that it has a "keen interest" in the DOE's motion to withdraw due to Washington's role of hosting and overseeing the cleanup of a majority of the nation's defense related high-level radioactive waste. Washington Petition at 1. Washington admits that "the disposition of this waste is intimately tied to the Yucca Mountain project." *Id.* Yet, these interests apparently were not sufficient enough to warrant that state's active involvement when the DOE filed the License Application in 2008. Indeed, Washington freely admits that it knew about and was fully aware of the initiation of this proceeding following the DOE's filing of the License Application in 2008. *See id.* at 9. Washington even admits that it contemplated the possibility that the DOE might later withdraw its application, but concluded that were the DOE to do so, it would be in violation of the Nuclear Waste Policy Act. *See id.* Washington claims that its analysis led it to the conclusion that, because it believed the DOE had no authority to withdraw once the License Application was filed, Washington "saw no reason to intervene during the prescribed 60-day period." *Id.* Washington's rationale presumes that the only outcome of this proceeding can be the ultimate approval of the License Application and that

² Notice of Hearing, 73 Fed. Reg. 63029 (October 22, 2008).

³ *See* Petition of the State of South Carolina to Intervene (February 26, 2010) ("South Carolina Petition") at 7 ("The Administration's recent announcement of its intent to abandon the application is a new and unexpected development that gives rise, for the first time, to a reason for South Carolina to have an interest in participating in this matter"); State of Washington's Petition to Intervene (March 3, 2010) ("Washington Petition") at 10 ("It was not until these events [DOE's announcement that it would file a motion to withdraw] that Washington's good cause to intervene ripened"); Petition of Aiken County, South Carolina, to Intervene (March 4, 2010) ("Aiken County Petition") at 3 ("this petition is based on the actual *motion* to withdraw the application").

all roads lead to Yucca Mountain. This presumption reveals an unreasonably narrow construction of the NRC's authority and ignores the possibility of denial of the License Application on the merits – an outcome not unlike that which will result if the DOE's motion to withdraw is granted. Yet, the possibility of a denial on the merits does not seem to concern Washington.

South Carolina and Aiken County's arguments likewise presume that the filing of the License Application was tantamount to the issuance of a license, which of course is not the case. The DOE's filing and prosecution of the License Application was always subject to potential rejection or dismissal by the NRC. Under the Petitioners' rationale of what constitutes timeliness, parties could be admitted timely even *after* a full hearing on the merits, and *after* a potential decision to deny the application. Such a result is clearly at odds with the Commission's desire that all interested parties come forward to protect their respective interests early in the proceeding. Only now, after Petitioners' presumptions that the filing of the DOE's License Application equates to construction approval have proven false, do Petitioners complain that each will be affected by an NRC decision that will constitute a concrete and particularized injury and a distinct and palpable harm that they will suffer if the DOE's motion to withdraw is granted.⁴

Washington's rationale is troubling in other respects. Its alleged foresight in 2008 (that the DOE might later withdraw) is an admission that the potential for the DOE's withdrawal was contemplated, but nonetheless disregarded. Prudence demanded that Washington seek timely intervention in 2008.

⁴ See Washington Petition at 7; see also South Carolina Petition at 3, 8 (arguing that dismissal has the effect of taking the site selection process back to the situation that existed prior to 1987); Aiken County Petition at 2 (arguing that the DOE's failure to go forward with Yucca Mountain could result in widespread contamination across the United States).

South Carolina and Aiken County fare no better. Like Washington, each elected to forego active participation when the NRC called upon all interested parties to come forward. And, each admits that it presumed that the mere filing of the License Application would result in approval and ultimate construction of the repository at Yucca Mountain.⁵

Clark County does not dispute that South Carolina, Aiken County and Washington have interests that may be affected by the outcome of this proceeding. However, it is precisely because these interests date back to well before the NRC published the Notice of Hearing that each of the Petitioners' new-found desire to intervene is untimely. The Petitioners presumed at their own peril that this proceeding was nothing more than a procedural formality with a pre-determined outcome that rendered their appearance unnecessary. In short, Petitioners have made no showing today that could not have been made over a year and a half ago (within the time specified in the Notice of Hearing).⁶ Good cause cannot be created on a whim, based on one's desire or one's evaluation of how or whether the litigation proceeds.

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⁵ See South Carolina Petition at 7 (The Administration's announcement of its intent to abandon the application "gives rise, for the first time to a reason for South Carolina to have an interest in participating in this matter"); Aiken County Petition at 3. Curiously, South Carolina claims that the alleged injury that it faces if the DOE's motion to withdraw is granted can be redressed by a decision to deny the motion to withdraw because the result will be that "the present proceedings will continue." South Carolina Petition at 4. Such a claim presumes that continuation of the proceeding equates to license approval and construction authorization.

⁶ See, e.g., *In the Matter of Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3) 62 N.R.C. 551, 564 (2005) ("To demonstrate good cause, a petitioner must show not only why it could not have filed within the time specified in the notice of opportunity for hearing, but also that it filed as soon as possible thereafter.")

For the reasons stated in Nevada's Answer, as supplemented herein, Clark County respectfully requests that the Board issue an Order denying the Petitions to Intervene of South Carolina, Aiken County, and Washington.

Respectfully submitted,

/s/ filed electronically _____
Alan I. Robbins
Debra D. Roby
Bryce C. Loveland
Jennings, Strouss & Salmon, PLC
1350 I Street, NW, Ste. 810
Washington D.C. 20005
telephone: (202) 464-0539
email: arobbins@jsslaw.com
email: droby@jsslaw.com
email: bloveland@jsslaw.com
Attorneys for Clark County, Nevada

Dated: March 29, 2010

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**UNITED STATES OF AMERICA
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer of Clark County, Nevada to Petitions to Intervene of the State of South Carolina, Aiken County, South Carolina and the State of Washington have been served on the following persons this 29th day of March, 2010, by Electronic Information Exchange.

CAB 01

William J. Froehlich, Chair
Thomas S. Moore
Richard E. Wardwell
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Email: wjfl@nrc.gov
tsm2@nrc.gov
rew@nrc.gov

CAB 02

Michael M. Gibson, Chair
Alan S. Rosenthal
Nicholas G. Trikouros
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Email: mmg3@nrc.gov
axr@nrc.gov
ngt@nrc.gov

CAB 03

Paul S. Ryerson, Chair
Michael C. Farrar
Mark O. Barnett
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Email: psr1@nrc.gov
mcf@nrc.gov
mobl@nrc.gov
mark.barnett@nrc.gov

CAB 04

Thomas S. Moore, Chair
Paul S. Ryerson
Richard E. Wardwell
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Email: tsm2@nrc.gov
psr1@nrc.gov
rew@nrc.gov

U.S. Nuclear Regulatory Commission

Atomic Safety and Licensing Board Panel
Mail Stop-T-3 F23
Washington, D.C. 20555-0001
Administrative Judges
E. Roy Hawkens, Chief Admin. Judge
Email: erh@nrc.gov
Lawrence McDade
Email: lgm1@nrc.gov
Matthew Rotman
Email: matthew.rotman@nrc.gov

U.S. Nuclear Regulatory Commission

Office of the Secretary of the Commission
Mail Stop 0-16C1
Washington, D.C. 20555-0001
Hearing Docket
Email: hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission

Washington, D.C. 20555-0001

Anthony Barrata

Email: ajb5@nrc.gov

G. Paul Bollwerk, III

Email: gpb@nrc.gov

Lauren Bregman

Email: 1rb1@nrc.gov

Margaret J. Bupp, Esq.

Email: mjb5@nrc.gov

Christopher C. Chandler

Email: Christopher.Chandler@nrc.gov

Sara Culler

Email: sara.culler@nrc.gov Joseph Deucher

Email: jhd@nrc.gov

Anthony C. Eitreich, Esq.

Email: ace1@nrc.gov

Karin Francis, Paralegal

Email: kfx4@nrc.gov

Adam S. Gendelman, Esq.

Email: Adam.Gendelman@nrc.gov

Joseph S. Gilman, Paralegal

Email: jsg1@nrc.gov

Daniel J. Graser

Email: dig2@nrc.gov

Patricia Harich

Email: patricia.harich@nrc.gov

Emile L. Julian, Esq.

Email: elj@nrc.gov; Emile.Julian@nrc.gov

Zachary Kahn

Email: zxk1@nrc.gov

U.S. Nuclear Regulatory Commission

Washington, D.C. 20555-0001

Emily Krause

Email: eik1@nrc.gov

Erica LaPlante

Email: eal1@nrc.gov

Daniel W. Lenehan, Esq.

Email: dwl2@nrc.gov

Linda Lewis

Email: linda.lewis@nrc.gov

David McIntyre

Email: David.McIntyre@nrc.gov

Matthew Rotman

Email: matthew.rotman@nrc.gov

Tom Ryan

Email: Tom.Ryan@nrc.gov

Andrea L. Silvia, Esq.

Email: alc1@nrc.gov

Andrew Welkie

Email: axw5@nrc.gov

Jack Whetstone

Email: jgw@nrc.gov

Mitzi A. Young, Esq.

Email: may@nrc.gov

Marian L. Zobler

Email: mlz@nrc.gov

U.S. Nuclear Regulatory Commission

Office of Commission Appellate Adjudication

Mail Stop 0-16C1

Washington, DC 20555-0001

OCAA Mail Center

Email: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission

Office of the General Counsel

Mail Stop O-15D21

Washington, DC 20555-0001

OGC Mail Center

Email: OGCMailCenter@nrc.gov

Counsel for the U.S. Department of Energy

Morgan, Lewis, Bockius LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004
Donald J. Silverman, Esq.
Email: dsilverman@morganlewis.com
Alex S. Polonsky, Esq.
Email: apolonsky@morganlewis.com
Jay M. Gutierrez, Esq.
Email: jgutierrez@morganlewis.com
Thomas D. Poindexter, Esq.
Email: tpoindexter@morganlewis.com
Annette M. White, Associate
Email: Annette.white@morganlewis.com
Paul J. Zaffuts, Esq.
Email: pzaffuts@morganlewis.com
Lewis M. Csedrik, Associate
Email: lcsedrik@morganlewis.com
Charles B. Moldenhauer, Associate
Email: cmoldenhauer@morganlewis.com
Brian P. Oldham, Associate
Email: boldham@morganlewis.com
Clifford W. Cooper, Paralegal
Email: ccooper@morganlewis.com
Shannon Staton, Legal Secretary
Email: ssaton@morganlewis.com

Counsel for the U.S. Department of Energy

Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
Kelly L. Faglioni, Esq.
Email: kfaglioni@hunton.com
Donald P. Irwin, Esq.
Email: dirwin@hunton.com
Michael R. Shebelskie, Esq.
Email: mshebelskie@hunton.com
Patricia Slayton, Senior Paralegal
Email: pslayton@hunton.com
Stephane Meharg
Email: smeharg@hunton.com
Belinda Wright
Email: bwright@hunton.com

U.S. Department of Energy

Office of General Counsel
1000 Independence Avenue S.W.
Washington, DC 20585
Martha S. Crosland, Esq.
Email: martha.crosland@hq.doe.gov
Nicholas P. DiNunzio, Esq.
Email: nick.dinunzio@rw.doe.gov
James Bennett McRae
Email: ben.mcrae@hq.doe.gov
Cyrus Nezhad, Esq.
Email: cyrus.nezhad@hq.doe.gov
Christina C. Pak, Esq.
Email: christina.pak@hq.doe.gov

For the U.S. Department of Energy

Talisman International, LLC
1000 Potomac St., NW, Suite 300
Washington, DC 20007
Patricia Larimore, Senior Paralegal
Email: plarimore@talisman-intl.com

U.S. Department of Energy

Office of General Counsel
1551 Hillshire Drive
Las Vegas, NV 89134-6321
George W. Hellstrom, Esq.
Email: george.hellstrom@ymp.gov
Jocelyn M. Gutierrez, Esq.
Email: jocelyn.gutierrez@ymp.gov
Josephine L. Sommer, Paralegal
Email: josephine.sommer@ymp.gov

U.S. Department of Energy

Bechtel-SAIC
Yucca Mountain Project Licensing Group
1251 Center Crossing Road, M/S 423
Las Vegas, NV 89144
Jeffrey Kriner, Regulatory Programs
Email: Jeffrey.kriner@ymp.gov
Stephen J. Cereghino, Licensing/Nucl Safety
Email: stephen_cereghino@ymp.gov

U.S. Department of Energy

Bechtel-SAIC
Yucca Mountain Project Licensing Group
6000 Executive Boulevard, Suite 608
North Bethesda, MD 20852
Edward Borella, Sr Staff, Licensing/
Nuclear Safety
Email: edward_borella@ymp.gov
Danny R. Howard, Sr. Licensing Engineer
Email: danny_howard@vmp.gov

U.S. Department of Energy

Office of Counsel, Naval Sea Systems
Command
Nuclear Propulsion Program
1333 Isaac Hull Avenue, SE
Washington Navy Yard, Building 197
Washington, DC 20376
Frank A. Putzu, Esq.
Email: frank.putzu@navy.mil

Counsel for the State of Nevada

Egan, Fitzpatrick, Malsch & Lawrence, PLLC
2001 K Street, NW, Suite 400
Washington, DC 20006
Martin G. Malsch, Esq.
Email: mmalsch@nuclearlawyer.com
Susan Montesi:
Email: smontesi@nuclearlawyer.com

Egan, Fitzpatrick, Malsch & Lawrence, PLLC
12500 San Pedro Avenue, Suite 555
San Antonio, TX 78216
Charles J. Fitzpatrick, Esq.
Email: cfitzpatrick@nuclearlawyer.com
John W. Lawrence, Esq.
Email: jlawrence@nuclearlawyer.com
Laurie Borski, Paralegal
Email: lborski@nuclearlawyer.com

Bureau of Government Affairs

Nevada Attorney General
100 N. Carson Street
Carson City, NV 89701
Marta Adams, Chief Deputy
Attorney General
Email: madams@ag.nv.gov

Nevada Agency for Nuclear Projects

Nuclear Waste Project Office
1761 East College Parkway, Suite 118
Carson City, NV 89706
Steve Frishman, Tech. Policy Coordinator
Email: steve.frishman@gmail.com
Susan Lynch, Administrator of
Technical Programs
Email: slynch1761@gmail.com

Counsel for Nye County, Nevada

Ackerman Senterfitt
801 Pennsylvania Avenue, NW, #600
Washington, DC 20004
Robert Andersen, Esq.
Email: robert.andersen@akerman.com

Counsel for Nye County, Nevada

530 Farrington Court
Las Vegas, NV 89123
Jeffrey VanNiel, Esq.
Email: nbrjdv@gmail.com

Nye County Regulatory/Licensing Advisor

18160 Cottonwood Rd. #265
Sunriver, OR 97707
Malachy Murphy, Esq.
Email: mrmurphv@chamberscable.com

Nye County Nuclear Waste

Repository Project Office (NWRPO)

1210 E. Basin Road, #6
Pahrump, NV 89060
Sherry Dudley, Admin. Technical Coordinator
Email: sdudley@co.nye.nv.us
Zoie Choate, Secretary
Email: zchoate@co.nye.nv.us

Counsel for Clark County, Nevada

Jennings, Strouss & Salmon
1350 I Street , NW, Suite 810
Washington, DC 20005-3305
Alan I. Robbins, Esq.
Email: arobbins@jsslw.com
Debra D. Roby, Esq.
Email: droby@jsslw.com

Jennings, Strouss & Salmon
8330 W. Sahara Avenue, #290
Las Vegas, NV 89117
Bryce C. Loveland, Esq.
Email: bloveland@jsslw.com

Clark County, Nevada

Office of the District Attorney
500 S. Grand Central Parkway
Las Vegas, NV 98155
Elizabeth A. Vibert, Deputy District Attorney
Email: elizabeth.vibert@ccdavnv.com
Phil Klevorick, Sr. Mgmt Analyst
Email: klevorick@co.clark.nv.us

Counsel for Lincoln County, Nevada

1100 S. Tenth Street
Las Vegas, NV 89017
Bret Whipple, Esq.
Email: baileys@lcturbonet.com or
Email: bretwhipple@nomademail.com

For Lincoln County, Nevada

Intertech Services Corporation
PO Box 2008
Carson City, NV 89702
Mike Baughman, Consultant
Email: bigboff@aol.com

Lincoln County Nuclear Oversight Program

P.O. Box 1068
Caliente, NV 89008
Connie Simkins, Coordinator
Email: jcciac@co.lincoln.nv.us

Lincoln County District Attorney

P.O. Box 60
Pioche, NV 89403
Gregory Barlow, Esq.
Email: lcdca@lcturbonet.com

Counsel for Eureka County, Nevada

Harmon, Curran, Speilberg & Eisenberg, LLP
1726 M. Street N.W., Suite 600
Washington, DC 20036
Diane Curran, Esq.
Email: dcurran@harmoncurran.com
Matthew Fraser, Law Clerk
Email: mfraser@harmoncurran.com

Eureka County, Nevada

Office of the District Attorney
701 S. Main Street, Box 190
Eureka, NV 89316-0190
Theodore Beutel, District Attorney
Email: tbeutel.ecda@eurekanv.org

Nuclear Waste Advisory for Eureka County, Nevada

1983 Maison Way
Carson City, NV 89703
Abigail Johnson, Consultant
Email: eurekanrc@gmail.com

Eureka County Public Works

P.O. Box 714
Eureka, NV 89316
Ronald Damele, Director
Email: rdamele@eurekanv.org

For Eureka County, Nevada

NWOP Consulting, Inc.
1705 Wildcat Lane
Ogden, UT 84403
Loreen Pritchford, Consultant
Email: lpitchford@comcast.net

Counsel for Churchill, Esmeralda, Lander, and Mineral Counties, Nevada

Armstrong Teasdale, LLP
1975 Village Center Circle, Suite 140
Las Vegas, NV 89134-6237
Robert F. List, Esq.
Email: rlist@armstrongteasdale.com
Jennifer A. Gores, Esq.
Email: jgores@armstrongteasdale.com

White Pine County, Nevada

Office of the District Attorney
801 Clark Street. #3
Ely, NV 89301
Richard Sears, District Attorney
Email: rwsears@wpcde.org

For White Pine County, Nevada

Intertech Services Corporation
PO Box 2008
Carson City, NV 89702
Mike Baughman, Consultant
Email: bigboff@aol.com

White Pine County Nuclear Waste

Project Office
959 Campton Street
Ely, NV 89301
Mike Simon, Director
Email: wpnucwst1@mwpower.net

Counsel for Inyo County, California

Greg James, Attorney at Law
710 Autumn Leaves Circle
Bishop, CA 93514
Greg James, Esq.
Email: gljames@earthlink.net

Attorney for the County of Inyo

233 East Carrillo Street Suite B
Santa Barbara, California 93101
Michael C. Berger, Esq.
Email: mberger@bsglaw.net
Robert S. Hanna, Esq.
Email: rshanna@bsglaw.net

Inyo County Yucca Mountain Repository

Assessment Office

P.O. Box 367
Independence, CA 93526-0367
Alisa M. Lembke, Project Analyst
Email: alembke@inyocounty.us

Esmeralda County Repository Oversight Program

Yucca Mountain Project
PO Box 490
Goldfield, NV 89013
Edwin Mueller, Director
Email: muellered@msn.com

California Department of Justice

Office of the Attorney General
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Susan Durbin, Deputy Attorney General
Email: susan.durbin@doj.ca.gov
Michele Mercado, Analyst
Email: michele.mercado@doj.ca.gov

Office of the Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Timothy E. Sullivan, Deputy Attorney General
Email: timothy.Sullivan@doj.ca.gov

California Department of Justice

300 S. Spring Street, Suite 1702
Los Angeles, CA 90013
Brian Hembacher, Deputy Attorney General
Email: brian.hembacher@doj.ca.gov

California Energy Commission

1516 Ninth Street
Sacramento, CA 95814
Kevin W. Bell, Senior Staff Counsel
Email: kwbell@energy.state.ca.us

Nuclear Energy Institute

Office of the General Counsel
1776 I Street, NW Suite 400
Washington, DC 20006-3708
Ellen C. Ginsberg, General Counsel
Email: ecg@nei.org
Michael A. Bauser, Deputy General Counsel
Email: mab@nei.org
Anne W. Cottingham, Esq.
Email: awc@nei.org

Counsel for the Nuclear Energy Institute

Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, N.W.
Washington, DC 20037-1122
Jay E. Silberg, Esq.
Email: jay.silberg@pillsburylaw.com
Timothy J.V. Walsh, Esq.
Email: timothy.walsh@pillsburylaw.com
Maria D. Webb, Senior Energy Legal Analyst
Email: maria.webb@pillsburylaw.com

Counsel for the Nuclear Energy Institute

Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006-3817
David A. Repka, Esq.
Email: drepka@winston.com
William A. Horin, Esq.
Email: whorin@winston.com
Rachel Miras-Wilson
Email: rwilson@winston.com
Carlos L. Sisco, Senior Paralegal
Email: csisco@winston.com

Native Community Action Council

P.O. Box 140
Baker, NV 89311
Ian Zabarte, Member of Board of Directors
Email: mrizabarte@gmail.com

Counsel for the Native Community Action Council

Alexander, Berkey, Williams & Weathers LLP
2030 Addison Street, Suite 410
Berkeley, CA 94704
Curtis G. Berkey, Esq.
Email: cberkey@abwwlaw.com
Rovianne A. Leigh, Esq.
Email: rleigh@abwwlaw.com
Scott W. Williams, Esq.
Email: swilliams@abwwlaw.com

Counsel for Timbisha Shoshone Tribe

Fredericks, Peebles, & Morgan LLP
1001 Second St.
Sacramento, CA 95814
Darcie L. Houck, Esq.
Email: dhouch@ndlaw.com
John M. Peebles, Esq.
Email: jpeebles@ndlaw.com

Timbisha Shoshone Yucca Mountain Oversight

Program Non-Profit Corporation
3560 Savoy Boulevard
Pahrump, NV 89601
Joe Kennedy, Member of Board of Directors and
Executive Director
Email: joekennedy08@live.com
Tameka Vazquez, Bookkeeper
Email: purpose_driven12@yahoo.com

Counsel for Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation

Godfrey & Kahn, S.C.
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
Douglas M. Poland, Esq.
Email: dpoland@gklaw.com
Steven A. Heinzen, Esq.
Email: sheinzen@gklaw.com
Hannah L. Renfro, Esq.
Email: hrenfro@gklaw.com
Jacqueline Schwartz, Paralegal
Email: jschwartz@gklaw.com
Julie Dobie, Legal Secretary
Email: jdobie@gklaw.com

Counsel for Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation

Godfrey & Kahn, S.C.
780 N Water Street
Milwaukee, WI 53202
Arthur G. Harrington, Esq.
Email: aharring@gklaw.com

Counsel for State of South Carolina

Davidson & Lindemann, P.A.
1611 Devonshire Drive, 2nd Floor
P.O. Box 8568
Columbia, SC 29202
William H. Davidson, II
E-mail: wdavidson@dml-law.com
Kenneth P. Woodington
E-mail: kwoodington@dml-law.com

Counsel for State of Washington

State of Washington
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
Michael L. Dunning
Assistant Attorney General
Email: MichaelD@atg.wa.gov
H. Lee Overton
Assistant Attorney General
Email: LeeO1@atg.wa.gov
Andrew A. Fitz
Senior Counsel
Email: AnyF@atg.wa.gov

Counsel for Aiken County, South Carolina

Haynesworth Sinkler Boyd, PA
1201 Main Street, Suite 2200
P.O. Box 11889
Columbia, SC 29211-1889
Thomas R. Gottshall, Esq.
Email: tgottshall@hsblawfirm.com

**Counsel for National Association of
Regulatory Utility Commissioners**

1101 Vermont Avenue NW, Suite 200
Washington, DC 20005
James Bradford Ramsey, General Counsel
Email: jramsay@naruc.org
Robin J. Lunt, Associate General Counsel
Email: rlunt@naruc.org

Counsel for Prairie Island Indian Community

5636 Sturgeon Lake Road
Welch, MI 55089
Philip R. Mahowald, General Counsel
Email: pmahowald@piic.org

/s/ filed electronically

Alan I. Robbins
Debra D. Roby
Bryce C. Loveland
Jennings, Strouss & Salmon, PLC
1350 I Street, NW
Suite 810
Washington, D.C. 20005-3305
Tel: (202) 464-0539
email: arobbins@jsslw.com
email: droby@jsslw.com
email: bloveland@jsslw.com
Attorneys for Clark County, Nevada

Dated: March 29, 2010