

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Atomic Safety and Licensing Board

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

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In the Matter of)	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 09-892-HLW-CAB04
(License Application for Geologic Repository at Yucca Mountain))	April 5, 2010
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REPLY OF AIKEN COUNTY TO ANSWERS TO PETITION TO INTERVENE

On February 19th, 2010, Aiken County submitted a petition to the District of Columbia Circuit Court of Appeals seeking, *inter alia*, mandamus and injunctive relief enjoining the Secretary of Energy (“Secretary”) and the United States Department of Energy (“DOE”) from withdrawing the DOE’s license application for construction of the Yucca Mountain geologic repository.¹ On February 24th, 2010, the Court of Appeals issued its order seeking DOE’s response to Aiken County’s petition.

On March 3rd, 2010, DOE filed a motion to withdraw its license application before the Atomic Safety and Licensing Board / Construction Authorization Board (“Board”) of the Nuclear Regulatory Commission (“NRC”). On the next day, March 4th,

¹ The Nuclear Waste Policy Act (“NWPA”) expresses the intent of Congress that the federal Courts of Appeal have original jurisdiction over civil actions concerning the Secretary’s duty to submit a license application for the construction of the Yucca Mountain Geologic Repository. *See* 42 U.S.C. § 10139(a).

2010, Aiken County petitioned to intervene before the Board pursuant to 10 C.F.R. § 2.309 or, in the alternative, to appear as an interested governmental entity pursuant to 10 C.F.R. § 2.315(c). On March 5th, 2010, the Board issued its initial order regarding scheduling of answers to the petition of Aiken County and other parties. This reply by Aiken County addresses the various answers to Aiken County's petition to intervene.²

As a preliminary matter, Aiken County notes that DOE supports its petition to intervene, as does Nye County, Nevada. Eureka County and the County of Inyo and take no position on Aiken County's petition to intervene. Nor do the four Nevada Counties of Churchill, Esmerelda, Lander, and Mineral, as long as Aiken County has met the requirements for intervention set forth in 10 C.F.R. § 2.309 or, alternatively, 10 C.F.R. § 2.315. While the Board suggested joint submissions where possible, a series of arguments are made with respect to Aiken County's petition by different parties. However, the very proponent of the action at issue does indeed support Aiken County's intervention here.

The State of Nevada, Clark County, and NRC Staff oppose Aiken County's petition to intervene, for various reasons addressed below. The Joint Timbisha Shoshone Tribal Group joins with and supports most of the State of Nevada's answer in opposition of Aiken County's intervention, except for portions relating to Aiken County's compliance with Licensing Support Network ("LSN") related regulations. Opposition to Aiken County's intervention relates mainly to challenges to Aiken County's standing, timeliness issues, and alleged noncompliance with the LSN. These issues are addressed

² Although Aiken County has sought to intervene here in the hopes that the Board will deny the withdrawal request, it also seeks relief from the United States Court of Appeals for the District of Columbia because only a court can authoritatively construe the federal statute and compel DOE to go forward with its obligations under the NWPA.

in turn below, followed by Aiken County's reply to other miscellaneous arguments advanced in opposition to Aiken County's intervention, followed by Aiken County's petition for waiver of regulations whose purpose is not advanced by their mechanical application to this unique proceeding.

I. Aiken County Has Standing To Intervene.

Aiken County has standing to intervene in this action under 10 C.F.R. § 2.309 or to appear in this proceeding under 10 C.F.R. § 2.315(c). No party persuasively rebuts the fact that Aiken County is the location of the Savannah River Site ("SRS"), which consumes over ten percent of Aiken County's land area; or that Aiken County itself also owns land in close proximity to SRS; or that the DOE's decision to withdraw its license application could, by its own analysis, result in widespread contamination at 5 DOE sites around the country, one of which is SRS; or that the negative perception of becoming a permanent nuclear waste dump will adversely affect the future economic development and job creation efforts in Aiken County.

Congress has specified that only Yucca Mountain shall be considered as the nation's high-level waste repository. *See Nevada v. DOE*, 400 F.3d 9, 11 (D.C. Cir. 2005) ("through an amendment to the NWPA, Congress directed the Secretary to consider building a repository only at Yucca Mountain"). Because DOE seeks to eliminate Yucca Mountain as the nation's high-level waste repository, DOE's action would ultimately cut off the very means to effectuate the Federal Government's "responsibility to provide for the permanent disposal of high-level radioactive waste," 42 USCS § 10131(a)(4). In other words, this proceeding could affect Aiken County's concrete interests by converting

SRS into a *de facto* permanent high-level waste repository.³ Aiken County's concrete interest is neither "abstract" nor "purely procedural," as alleged by Nevada. Aiken County need not show that Yucca Mountain repository would ultimately ever be opened in order to have standing in this proceeding. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.7.

II. Aiken County's Petition to Intervene and Contentions Should Not Be Rejected as Untimely.

Opponents of Aiken County's intervention have correctly pointed out that Aiken County's petition to intervene did not occur on or before December 22, 2008. *See, e.g.,* Nevada Answer at 2 ("[Aiken County] stood by for almost one and one-half years and did nothing."); Clark County Answer at 4 ("Petitioners have made no showing today that could not have been made over a year and a half ago...."). Because Aiken County's petition to intervene admittedly did not occur in 2008, Aiken County incorporated the "nontimely filing factors" of 10 C.F.R. § 2.309(c) as delineated by the State of South Carolina, in its petition to intervene -- with the sole exception that the Aiken County petition to intervene was based on the actual *filing* of the motion to withdraw, rather than

³ SRS provides "temporary, environmentally-safe storage onsite" for canisters of immobilized high-level waste "until their permanent transfer to a repository." Department of Energy Press Release SR-06-03, *Startup of Second Nuclear Waste Storage Facility at the Savannah River Site*, July 10, 2006, available online at http://www.srs.gov/sro/nr_2006/sr0603.htm. SRS also provides temporary underwater storage of spent nuclear fuel in underwater pools. *See* Department of Energy website, Environmental Management, Savannah River Site 3, at <http://www.em.doe.gov/bemr/bemrsites/sars3.aspx> ("Until the spent nuclear fuel is disposed, the Savannah River Site will provide safe, monitored storage facilities from which the fuel can be readily retrieved, when necessary. Spent nuclear fuel will be stored onsite until FY 2026 and then moved to a federal geologic repository.")

the *decision* to withdraw the application.

The State of Nevada suggests that Aiken County expressly disavowed South Carolina's timeliness arguments. Nevada affirms to this Board that "Aiken County expressly 'does not incorporate by reference timeliness arguments made by the State of South Carolina Attorney General in its petition to intervene'" Nevada Answer at 9 (quoting Aiken County Petition at 3 n.1). In fact, Aiken County declined to incorporate only those "timeliness arguments made by the South Carolina Attorney General in its Petition to Intervene *which are not required for this Petition.*" Aiken County Petition at 3 n.1 (emphasis added).

That somehow Aiken County would be on notice over a year ago that there would be a non-scientific withdrawal which would preclude the Board from reaching a substantive decision on the license application is simply preposterous. As set out in the accompanying affidavit, DOE's actions are exceptional circumstances not contemplated by NRC's regulations of foreseeable by any potential party.

Aiken County addressed the timeliness factors required for untimely petitions and contentions by incorporation of South Carolina's petition to intervene. As incorporated, these factors included (1) good cause to grant Aiken County's petition because Aiken County had no reason to be part of the proceedings prior to DOE's decision to withdraw, South Carolina Petition at 7; (2) the nature of Aiken County's right to be made a party, the location of SRS, which has received consideration as a disposal site for high-level waste and /or spent nuclear fuel, *id.* at 7-10; (3) the nature of Aiken County's interest in the proceeding, including the prospect of widespread contamination at SRS, *id.* at 10-11; (4) the uncertain effect of non-participation on ongoing actions by Aiken County in a

federal Court of Appeals; *id.* at 11-12 (5) the availability of other means whereby the Aiken County's interest will be protected, *id.* at 13; (6) the nonexistence of existing parties to protect Aiken County's interests in the proceeding, *id.* at 13-14; (7) the minimal delay caused by Aiken County's intervention, *id.* at 14-15; and (8) the extent to which Aiken's participation would assist in developing a sound record, *id.* at 15. Aiken County concurs with NRC Staff that "a balancing of the ... factors in 10 C.F.R. § 2.309(c), and Aiken County's good cause, favors the Board's allowing the late filing." NRC Staff Answer at 8.

III. Aiken County Has Complied with the LSN Requirements.

Aiken County's intervention is also opposed on grounds related to the LSN. As a preliminary matter, "[n]othing in the regulations requires a petitioner to demonstrate its compliance in the initial petition." *In re United States DOE*, 2009 NRC LEXIS 68 (N.R.C. May 11, 2009). Furthermore, "when its compliance is challenged, a petitioner need only state in its reply that it has complied with the LSN requirements." *Id.* Aiken County has so complied.

Subpart J requires potential parties to make electronically available documentary material, as defined in 10 C.F.R. § 2.1001. Assuming the LSN requirements apply in the case of potential intervenors seeking to raise narrow legal issues, Aiken has satisfied the requirements, because "an electronic file need not be provided for acquired documentary material that has already been made available by the potential party, interested governmental participant or party that originally created the documentary material." 10

C.F.R. § 2.1001(a)(1). From the outset of its petition to intervene, Aiken County has made available every piece of documentary material on which it intends to rely in this intervention by way of electronic process.

Out of an abundance of caution and in response to prompting by NRC staff members, Aiken County also achieved LSN compatibility and added two documents (which were created by Aiken County and previously made available to other parties) to its local document repository for inclusion in the LSN. These documents were Aiken County's Notice of Appearance and its Petition to Intervene. Two parties indicate in their Answers that only one of these documents is visible in the LSN, which may be a reflection of the periodicity at which the LSN system "crawls" the local document repositories identifying new documents. Aiken County has no documentary material to make available on the LSN not previously made available to all parties.

IV. Miscellaneous Arguments

Single Representative. Nevada asserts that Aiken County cannot designate its attorney as its single representative under 10 C.F.R. § 2.315(c). Nevada Answer at 7. Considering the role of the single representative under § 2.315(c) to "introduce evidence, interrogate witnesses where cross-examination by the parties is permitted, advise the Commission ... file proposed findings in those proceedings where findings are permitted, and petition for review by the Commission under § 2.341 with respect to the admitted contentions," Nevada's argument is simply wrong. A designation of an attorney as an entity's representative, which designation is separate and apart from the attorney's Notice

of Appearance, is clearly permissible.

Representative for Adopted Contentions. Nevada asserts that “10 C.F.R. § 2.309(f)(2) requires that Aiken County designate in its petition an authorized representative to act for both it and South Carolina on matters covered by the adopted contentions.” Nevada Answer at 13. Aiken County assumes that Nevada intended to reference § 2.309(f)(3), which is more germane to Nevada’s assertion. However, even that provision does not support Nevada’s assertion that any such designation must be contained in Aiken County’s petition.

Need for Unique Contention. NRC Staff argues that Aiken County cannot incorporate South Carolina’s contentions without establishing one admissible contention of its own. NRC Staff Answer at 5-6. NRC Staff cites dictum in a previous NRC opinion, but points to no regulation which mandates this result. Given the extremely limited nature of the legal issues involved in Aiken County’s petition to intervene, it would be absurd to require Aiken to craft novel contentions in order to intervene. “[C]ontention-pleading rules are designed, in part, ‘to ensure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.’ *Consolidated Edison Co. of New York et. al*, 54 N.R.C. 109 (N.R.C. 2001) (footnote omitted). Aiken County has demonstrated that it can offer substantial legal support for its adopted contentions, and should be permitted to adopt South Carolina’s contentions without contriving a novel contention of its own, absent a regulation which expressly prohibits adoption in this manner.

V. Waivers are Justified in the Circumstances.

Aiken county also petitions the Board and Commission for a waiver or waivers, pursuant to 10 C.F.R. § 2.335, of any timeliness, LSN, and contention regulations, including those addressed above, whose purposes are not served by their mechanical application. See attached Affidavit in Support of Waiver. Although 10 C.F.R. § 2.335 by its terms applies only to “parties,” the regulation also applies to petitioners. See *N.J. Dep't of Env'tl. Prot. v. United States NRC*, 561 F.3d 132, 143 (3d Cir. 2009) (§2.335 is “proper way” for state agency seeking intervention to seek waiver); *In re Dominion*, 60 N.R.C. 253, 270 (N.R.C. 2004) (“Absent a showing of “special circumstances” under 10 C.F.R. § 2.335(b), which the petitioners have not made, this matter must be addressed through Commission rulemaking.”). Furthermore, 10 C.F.R. § 2.335 petitions are appropriate for consideration in the high-level waste repository proceeding. See *In re United States DOE*, 2009 NRC LEXIS 54 (N.R.C. Dec. 9, 2009).

VI. Conclusion.

Aiken County’s petition at this point is for a narrow proposition, not a scientific one. Aiken County simply seeks to have the application process move forward without withdrawal so that the Board may consider, then grant or deny, the application in accordance with applicable law. For the reasons set forth above, Aiken County’s petition to intervene should be GRANTED.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

Signed (electronically) by _____
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April 5, 2010

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Atomic Safety and Licensing Board

Before Administrative Judges:
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AFFIDAVIT IN SUPPORT OF WAIVER UNDER 10 C.F.R. § 2.335(B)

Thomas R. Gottshall, first being duly sworn, deposes and says that:

1. I am counsel for Aiken County, South Carolina, in matters related to this proceeding.

2. Pursuant to 10 C.F.R. § 2.335(b), I submit the following affidavit on behalf of Aiken County.

10 C.F.R. § 2.335(b) provides:

A party to an adjudicatory proceeding subject to this part may petition that the application of a specified Commission rule or regulation or any provision thereof, of the type described in paragraph (a) of this section, be waived or an exception made for the particular proceeding. The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a

provision of it) would not serve the purposes for which the rule or regulation was adopted. The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested. Any other party may file a response by counter affidavit or otherwise.

3. The motion of the Department of Energy (DOE) to withdraw its license application for the Yucca Mountain high-level waste geologic repository is an exceptional circumstance not contemplated by the Nuclear Regulatory Commission's regulations. DOE's attempt to withdraw its application presents legal issues which were unforeseeable by Aiken County within the original Notice of Hearing for the Yucca Mountain license application published in 2008. Because of the unique nature and procedural posture of the proceeding, several regulations would not serve their intended purpose if mechanically applied, and should be waived as necessary to allow full participation by Aiken County to argue each of its contentions.

a. Contentions. The purpose of the contention rules is to focus litigation on concrete issues to result in a clearer and more focused record for decision. *In re Fla. Power & Light Co. St. Lucie Nuclear Plant*, 68 N.R.C. 279, 287-288 (N.R.C. Aug. 15, 2008). “[C]ontention-pleading rules are designed, in part, ‘to ensure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.’” *Consolidated Edison Co. of New York et. al*, 54 N.R.C. 109 (N.R.C. 2001) (footnote omitted). Regarding the specific subject matter of whether DOE and NRC have the authority to respectively seek and grant withdrawal of the license application, Aiken County's participation will provide focus to this concrete issue, because of Aiken County's unique status, *i.e.* home county to SRS which could become a *de facto* permanent high-level waste repository if

DOE's abandonment of the only Congressionally-approved permanent high-level waste facility is allowed. As discussed in its reply, Aiken County has demonstrated that it can offer substantial legal support for its adopted contentions, and should be permitted to adopt and advance arguments pertaining to South Carolina's contentions without contriving a novel contention of its own, absent a regulation which prohibits adoption in this manner.

b. LSN Issues. The purpose of the LSN is "to provide for the entry of, and access to, potentially relevant licensing information as early as practicable before DOE submits the license application [and to reduce] the initial time-consuming discovery process, including the physical production and on-site review of documents by parties to the HLW licensing proceeding." *In re United States DOE*, 60 N.R.C. 300, 306 (N.R.C. Aug. 31, 2004). The LSN requirements should not be blindly applied in these unique circumstances, where the purpose of the LSN itself is not advanced. Aiken County possesses no "relevant licensing information" and Aiken County's participation does not involve any "time-consuming discovery." Rather, Aiken County seeks intervention at this time to advance legal arguments pertaining to the limited subject matter of the propriety of withdrawal of the license application.

c. Timeliness. The fundamental purpose of a Notice of Hearing is to provide facility opponents a fair opportunity to be heard. *In re Shaw Areva Mox Servs.*, 66 N.R.C. 169, 199 (N.R.C. Oct. 31, 2007). Implicitly, timing requirements related to intervention and contentions have been set to provide this fair opportunity to opponents of the Yucca Mountain geologic repository. However, to the extent that timing requirements tied to the Notice of Hearing of October 22nd are sought to be enforced against Aiken County in this proceeding, they actually

contravene the stated purpose of fairness. In the procedural context of this licensing hearing, where the proponent of the license application under the Nuclear Waste Policy Act has unforeseeably sought to withdraw the license application after expiration of the notice period, enforcement of the timeliness requirements to prevent Aiken County's full participation would work a fundamental unfairness on Aiken County.

4. Aiken County respectfully petitions the Board and Commission to waive any regulations concerning timeliness, LSN requirements, and contentions which are not resolved by Aiken County's reply, to the extent that such regulations or orders impede Aiken County's ability to fully participate in this proceeding and advance arguments.

5. I declare under penalty of perjury that the foregoing is true and correct. Executed on April 5th, 2010.

Signed (electronically) by _____
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SWORN TO AND SUBSCRIBED before me

this 5th day of April, 2010.

Executed in accordance with
10 C.F.R. 2.304(d) by

Louisa H. Gantt
Notary Public for South Carolina

My Commission Expires: 4/23/2019

**UNITED STATES OF AMERICA
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CERTIFICATE OF SERVICE

I hereby certify that copies of the **REPLY OF AIKEN COUNTY TO ANSWERS TO PETITION TO INTERVENE and AFFIDAVIT IN SUPPORT OF WAIVER UNDER 10 C.F.R. § 2.335(B)** in the above-captioned proceeding have been served on the following persons this 5th day of April, 2010, by Electronic Information Exchange.

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