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

In the Matter of	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY	ASLBP No. 09-892-HLW-CAB04
(High Level Waste Repository)	April 6, 2010

MEMORANDUM AND ORDER
(Suspending Briefing and Consideration of Withdrawal Motion)

In June 2008, the Department of Energy (DOE) filed with the NRC an application (Application) for authorization to construct a national high-level nuclear waste repository at Yucca Mountain, Nevada. The seventeen volume, 8,600 page Application—underlain by millions of pages of supporting documentation and related materials—followed a decades-long process that was initiated under the Nuclear Waste Policy Act of 1982, as amended (NWPA). The Commission contemplated that the NRC's adjudicatory proceedings on DOE's Application alone (as distinct from the NRC Staff's extensive technical review) had "the potential to be one of the most expansive proceedings in agency history."[1]

Initially, twelve potential parties petitioned to intervene, collectively presenting for adjudication some 318 contentions that alleged various problems with the Application. DOE opposed every intervention petition and each of the 318 contentions. Eventually, NRC

[1] U.S. Dep't of Energy (High Level Waste Repository), CLI-08-14, 67 NRC 402, 405 (2008).

Construction Authorization Boards admitted all but one of the petitioners as parties, and accepted most of their contentions for further adjudicatory proceedings.[2]

Quite recently, some of the parties have changed their positions. DOE has now decided that "a geologic repository at Yucca Mountain is not a workable option" for long-term disposition of the nation's spent nuclear fuel and high-level nuclear waste.[3] DOE therefore moves, pursuant to 10 C.F.R. § 2.107, to withdraw its Application.

Five new petitioners seek to intervene to oppose DOE's motion to withdraw.[4] Rather than challenging the Application, as the original petitioners did, they challenge its withdrawal as being unlawful. Several other parties (former petitioners themselves) now oppose the intervention of all the new petitioners.[5]

The principal issues raised by the new petitioners, as well as by DOE's motion itself, are presently before the United States Court of Appeals for the District of Columbia Circuit in at least three pending actions.[6] That Court's rulings have the potential to resolve or moot most if

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[2] See generally U.S. Dep't of Energy (High Level Waste Repository), LBP-09-6, 69 NRC 367 (2009), aff'd in part, rev'd in part, CLI-09-14, 69 NRC 580 (2009).

[3] U.S. Department of Energy's Motion to Withdraw (Mar. 3, 2010) at 1.

[4] Petition of the State of South Carolina to Intervene (Feb. 26, 2010) [hereinafter South Carolina Petition]; State of Washington's Petition for Leave to Intervene and Request for Hearing (Mar. 3, 2010) [hereinafter Washington Petition]; Petition of Aiken County, South Carolina, to Intervene (Mar. 4, 2010) [hereinafter Aiken County Petition]; Petition to Intervene of the Prairie Island Indian Community (Mar. 15, 2010) [hereinafter PIIC Petition]; National Association of Regulatory Utility Commissioners Petition to Intervene (Mar. 15, 2010) [hereinafter NARUC Petition].

[5] Answer of the State of Nevada to the State of South Carolina's Petition to Intervene (Mar. 29, 2010) at 1; Answer of the State of Nevada to the State of Washington's Petition to Intervene (Mar. 29, 2010) at 1; Answer of the State of Nevada to Aiken County's Petition to Intervene (Mar. 29, 2010) at 1; Answer of Clark County, Nevada to Petitions to Intervene of the State of South Carolina, Aiken County, South Carolina and the State of Washington (Mar. 29, 2010) at 1; Joint Timbisha Shoshone Tribal Group Response to Petitions to Intervene by the States of South Carolina and Washington, and Aiken County, South Carolina (Mar. 29, 2010) at 1.

[6] In re Aiken County, No. 10-1050 (D.C. Cir. filed Feb. 19, 2010); Ferguson v. Obama, No. 10-1052 (D.C. Cir. filed Feb. 25, 2010); South Carolina v. U.S. Dep't of Energy, No. 10-1069 (D.C. Cir. transferred Mar. 25, 2010). The latter action was initiated in the Fourth Circuit on February 26, 2010, but was subsequently transferred to the District of Columbia Circuit.

not all issues raised by the new petitions and by DOE's motion before this Construction Authorization Board. In the interest of judicial efficiency, therefore, the Board will suspend further briefing of the new petitions to intervene and consideration of DOE's motion, pending guidance from the Court of Appeals on the relevant legal issues. The parties are encouraged to seek expedited resolution of their claims in that Court.

I. Procedural Status

On February 16, 2010, this Board granted (with certain exceptions) DOE's motion to stay discovery and other aspects of this adjudicatory proceeding until the Board resolves DOE's motion to withdraw the Application.[7] The Board is not generally empowered to direct the NRC Staff in the performance of the Staff's independent responsibilities.[8] Hence, the Staff's independent technical review of the Application is not affected by the Board's stay order. The Staff has informed the Board that it expects to complete two of the five volumes of the Safety Evaluation Report (SER) on the Application by November 2010.[9] Even if the Board had not stayed discovery, hearings on contested factual issues would ordinarily not take place until after the NRC Staff issues relevant portions of the SER.

II. New Petitions to Intervene

The five new petitioners allege their respective interests in this proceeding to be as follows:

A. Washington

Washington hosts DOE's Hanford Nuclear Reservation (Hanford), which stores radioactive, mixed radioactive and hazardous wastes.[10] The wastes are stored in underground

[7] CAB Order (Granting Stay of Proceeding) (Feb. 16, 2010) (unpublished).

[8] See, e.g., Shaw Areva Mox Servs., LLC (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 63 (2009).

[9] See CAB Case Management Order #3 (Feb. 1, 2010) at 1 (unpublished).

[10] Washington Petition at 2.

tanks, of which more than one third are leaking and have discharged approximately one million gallons of waste into the soil at the Hanford site. The released wastes have migrated into the Hanford groundwater, which flows into the Columbia River, negatively impacting Washington's environment and economy.[11]

DOE has proposed to process the released wastes in a waste treatment plant (WTP), thereby eliminating the need to store waste in leaking tanks.[12] Pursuant to the NWPA, the design is predicated on the assumption that the WTP's high-level waste output will be disposed of at the national repository. Accordingly, the WTP was designed and partially constructed to satisfy Yucca Mountain facility performance standards. To date more than half of the design and construction has been completed for the four components of this complex plant. Termination of the Yucca Mountain project at this time might require the WTP facility to be demolished and re-constructed in accordance with another repository's waste acceptance criteria.[13] This delay would require the waste to remain in leaking storage tanks indefinitely. Additionally, Hanford is storing four other types of waste, and in the absence of a national repository, Washington fears that it will be forced to store high-level wastes indefinitely, with no designated final disposal path.[14]

B. South Carolina

The Savannah River Site (SRS) and seven commercial reactors with onsite storage of spent nuclear fuel are located in South Carolina.[15] Thus, South Carolina is uniquely situated as a potential candidate state for a waste disposal or storage facility, should the Yucca Mountain

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[11] Id. at 3.

[12] Id. at 4.

[13] Id. at 5-6.

[14] Id. at 6.

[15] South Carolina Petition at 3-4.

facility be abandoned. Further, abandonment of the Yucca Mountain project would prolong the inherent risks associated with onsite storage of high-level waste at the SRS and statewide commercial reactors. This action would require South Carolina to develop emergency preparedness and transportation plans.[16]

C. Aiken County, South Carolina

The SRS is located in Aiken County, South Carolina.[17] Aiken County also owns real property close to the SRS. Failure to go forward with the Yucca Mountain project could result in widespread contamination of spent nuclear fuel at the SRS, negatively impacting human health.[18]

D. National Association of Regulatory Utility Commissioners

The National Association of Regulatory Utility Commissioners (NARUC) is a national organization comprised of state public utility commissioners responsible for regulating the rates and conditions of interstate electricity.[19] NARUC's members have a statutory duty to protect the health, safety and economic interest of ratepayers. Pursuant to the NWPA, ratepayers have paid more than $17 billion dollars into the Nuclear Waste Fund to support the development of a geologic repository for high-level waste. Abandoning Yucca Mountain would undercut the federal government's ability to dispose of high-level waste and spent nuclear fuel and waste the billions of dollars that ratepayers have already spent on Yucca Mountain.[20]

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[16] Id.

[17] Aiken County Petition at 2.

[18] Id.

[19] NARUC Petition at 3.

[20] Id. at 4.

E. Prairie Island Indian Community

The Prairie Island Indian Community (PIIC) is a Federally-recognized Indian Tribe, located adjacent to an Independent Spent Fuel Storage Installation and the Prairie Island Nuclear Generating Plant, both of which store spent nuclear fuel.[21] Pursuant to the NWPA, this spent nuclear fuel must be permanently disposed of at the national repository, where it will no longer subject PIIC members to health and safety risks. PIIC also represents the interests of ratepayers in the Community, who are among the nation's ratepayers that have paid billions of dollars under the Standard Contract for the disposal of spent nuclear fuel.[22]

III. New Contentions

Collectively, the five new petitions proffer sixteen contentions that are based upon the NWPA and the Standard Contract;[23] the National Environmental Policy Act (NEPA); the Administrative Procedure Act (APA); the United States Constitution; and the NRC's own precedents. All sixteen contentions are legal issue contentions, which do not involve disputed facts. Moreover, all sixteen address the same basic question: whether DOE acts beyond its authority or otherwise unlawfully in seeking to withdraw the Application.

Answers to two of the new petitions—PIIC's and NARUC's—are not due until April 9, 2010. The answers to Aiken County's, South Carolina's and Washington's petitions, however, reveal three basic positions.

Ironically—because it is, after all, DOE's motion that the new petitions challenge—DOE adopts the most generous stance. DOE would allow all the new petitioners to intervene in

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[21] PIIC Petition at 2-3.

[22] Id. at 2.

[23] The Court of Appeals previously addressed the NWPA and the Standard Contract in Ind. Mich. Power Co. v. Dep't of Energy, 88 F.3d 1272 (D.C. Cir. 1996) and Northern States Power Co. v. U.S. Dep't of Energy, 128 F.3d 754 (D.C. Cir. 1997).

opposition to its motion to withdraw.[24] "DOE believes that States and State subdivisions, affected tribes, and NARUC should be able to present their differing view of the law on this issue in this unique proceeding."[25] DOE is nonetheless "confident that its Motion to Withdraw is consistent with all governing law."[26]

The NRC Staff is more cautious. Because it concludes that neither Washington, South Carolina nor Aiken County has proffered an admissible contention, the Staff asserts that none can be admitted as a party.[27] The Staff would, however, allow Aiken County to participate as an interested governmental body under 10 C.F.R. § 2.315(c).[28] The Staff would also allow such participation by Washington and South Carolina, if requested.[29]

Among other things, the Staff asserts that the issues that may be contested in this adjudicatory proceeding are limited by the Commission's initial hearing notice—that is, to whether the Application "satisfies applicable safety, security, and technical standards and whether the applicable requirements of NEPA and NRC's NEPA regulations have been met."[30] Because all new contentions pertain to DOE's motion to withdraw, and not to the issues identified in the Commission's hearing notice, the Staff asserts that none: (1) is properly within

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[24] U.S. Department of Energy's Response to Petitions to Intervene of the State of Washington, the State of South Carolina, Aiken County, the National Association of Regulatory Utility Commissioners, and the Prairie Island Indian Community (Mar. 29, 2010) at 3.

[25] Id. at 2.

[26] Id.

[27] See 10 C.F.R. § 2.309(a).

[28] See Aiken County Petition at 3 (seeking alternative relief as an interested government body).

[29] In their replies, Washington and South Carolina have requested such participation in the alternative. State of Washington's Reply to Answers of the State of Nevada, NRC Staff, U.S. Department of Energy, and Clark County, Nevada (Apr. 5, 2010) at 13 n.16; Reply Brief of the State of South Carolina on Its Petition to Intervene (Apr. 5, 2010) at 18.

[30] NRC Staff Answer to State of Washington's Petition for Leave to Intervene and Request for Hearing (Mar. 29, 2010) at 12.

the scope of the proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii);[31] (2) is "material to the findings the NRC must make to support the action that is involved in the proceeding," as required by 10 C.F.R. § 2.309(f)(1)(iv);[32] or (3) controverts a specific portion of the Application, as required by 10 C.F.R. § 2.309(f)(1)(vi).[33]

The State of Nevada is least generous. Nevada—joined by Clark County, Nevada, the Joint Timbisha Shoshone Tribal Group, and the Native Community Action Council—says that Aiken County, South Carolina and Washington should not be allowed to participate at all. Specifically, Nevada asserts that none has demonstrated standing, that their petitions are untimely, and that all have failed to demonstrate substantial and timely compliance with licensing support network (LSN) requirements.[34] Nevada also argues that Aiken County has failed to demonstrate entitlement to participate as an interested governmental entity.[35]

As set forth above, the new petitioners demonstrate substantial interests in this proceeding. Although not deciding their status or the admissibility of their contentions at this time, it appears to the Board that, at a minimum, Aiken County, South Carolina and Washington would all likely qualify for participation as interested governments under 10 C.F.R. § 2.315(c), if they satisfy LSN requirements. On the same conditions, PIIC would appear, at a minimum, to qualify under 10 C.F.R. § 2.315(c) as an affected, Federally-recognized Indian Tribe if it desires such status.

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[31] See id. at 12-13.

[32] Id. at 14-15.

[33] Id. at 15.

[34] See 10 C.F.R. § 2.1012(b)(1).

[35] Nevada is silent on the potential status of South Carolina and Washington as interested governments—presumably because, unlike that of Aiken County, their original petitions did not expressly request such status in the alternative.

IV. Pending Actions in the Court of Appeals

Two of the five petitioners—Aiken County and South Carolina—have filed in the United States Courts of Appeals actions under Section 119 of the NWPA that challenge withdrawal of the Application on many of the same grounds asserted in the petitions before this Board. Both actions are now pending in the District of Columbia Circuit, where briefing is underway in the Aiken County action (which was filed there) and briefing has been scheduled in the South Carolina action (which was transferred there).[36]

Section 119 of the NWPA authorizes original actions in the federal courts of appeals that are unusual and perhaps unique. It provides that "the United States courts of appeals shall have original and exclusive jurisdiction over any civil action" alleging specified violations of the NWPA and certain related violations of the Constitution or NEPA. Unlike more typical jurisdictional statutes, Section 119 is not just limited to review of "final" agency actions.

V. Reasons for the Board to Defer to the Court of Appeal's Rulings on Legal Issues

For several reasons, the Board concludes that the pending actions in the Court of Appeals will likely yield quicker and more authoritative resolution of most if not all relevant legal issues than if the Board were to address them without waiting for the Court's guidance.

First, while the Board expresses no view on the merits of the claims before the Court of Appeals, such claims appear to be properly before the Court. Although Section 119(a)(1)(A) of the NWPA authorizes the federal courts of appeals to review pertinent "final" agency actions, in addition Section 119(a)(1)(B) vests in such courts "original and exclusive jurisdiction" over any

[36] The South Carolina action, originally filed in the Fourth Circuit, was transferred to the District of Columbia Circuit on March 25, 2010. Also pending in the District of Columbia Circuit is a third action on behalf of certain individuals from the State of Washington. Although styled as a petition for review of the "final action of the President and Secretary of Energy to abandon and not to proceed with plans to apply for and pursue a license for, and to construct a repository for high level radioactive waste at Yucca Mountain"—and not as an original action under Section 119—that matter also raises many of the same issues. Ferguson v. Obama, No. 10-1052 (D.C. Cir. filed Feb. 26, 2010).

civil action "alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part."

Assuming arguendo that the Secretary of Energy was obligated to file the Application in the first place, it would elevate form over substance not to construe allegations of unlawful withdrawal of the Application as tantamount to alleging the Secretary's "failure" regarding that obligation. Likewise, given the interactive nature of both the adjudicatory process before the Board and the NRC Staff's ongoing technical review of the Application, withdrawal would also appear tantamount to a "failure" to prosecute. In the circumstances of this Application, a motion to withdraw and failure to prosecute are two sides of the same coin.

Second, unlike in most administrative proceedings, the Court of Appeals would not likely benefit from the development of an administrative record in this case. The relevant issues are all legal issues, which require no factual development. With respect to certain issues, such as those arising under the APA and the Constitution, the NRC can claim no specialized expertise to which the Court of Appeals might wish to defer. With respect to other issues, such as those arising under the NWPA and NEPA, the NRC and DOE might each claim expertise—effectively neutralizing this factor in areas of disagreement.

Third, the pending actions in the Court of Appeals do not seem to the Board to be premature. The key issue is clear and well-defined: that is, whether DOE has lawful authority to withdraw the Application. From the standpoint of efficient judicial administration, there appears little practical advantage for the Court of Appeals to defer consideration of the matter. Given the lengthy, contested nature of the Yucca Mountain proceeding (which has spawned at least two earlier decisions of the D.C. Circuit),[37] it is unrealistic to expect that no party would appeal a final NRC decision, regardless of what it might be. If not addressed now, the same issues will almost certainly return to the Court of Appeals in the future.

[37] See Nevada v. Dep't of Energy, 457 F.3d 78 (D.C. Cir. 2006); Nuclear Energy Inst., Inc. v. Envtl. Prot. Agency, 373 F.3d 1251 (D.C. Cir. 2004).

Fourth, this Construction Authorization Board's own authority to adjudicate the relevant issues has been challenged. As noted, the NRC Staff contends that all the new petitioners' claims are beyond the scope of the proceeding that the Commission has asked the Board to conduct concerning the safety, security and environmental impact of the proposed Yucca Mountain facility.[38] Petitioner Washington has itself questioned the Board's jurisdiction to adjudicate certain of its claims under NEPA and the APA.[39]

Unlike the Court of Appeals, the Board has no power to issue injunctions or hold parties in contempt. Pursuant to 10 C.F.R. § 2.107, other Boards and the Commission have addressed the terms and conditions upon which an application might be withdrawn,[40] but to our knowledge no Board has ever ruled that an application cannot lawfully be withdrawn at all. Obviously, however, no agency adjudicatory tribunal has addressed this issue in the context of the unique NWPA.

The Board's authority over DOE may be especially problematic. As the Commission has instructed, absent "strong and concrete evidence otherwise," the Board must extend some degree of comity to DOE and presume "that government agencies and their employees will do their jobs honestly and properly."[41] This does not mean, of course, that it is not the Board's responsibility to "scrutinize DOE's construction authorization application with care, or that the NRC would hesitate to reject that application if it is fatally flawed."[42] But just as that

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[38] See 10 C.F.R. § 63.31.

[39] Washington Petition at 21, 24.

[40] See, e.g., Sequoyah Fuels Corp. (Source Material License No. SUB-1010), CLI-95-2, 41 NRC 179, 192-93 (1995); P.R. Elec. Power Auth. (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125 (1981); Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 50-55 (1999); Pac. Gas & Elec. Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 53 (1983); Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), LBP-82-81, 16 NRC 1128, 1140-41 (1982).

[41] Dep't of Energy, CLI-09-14, 69 NRC at 606.

[42] Id.

responsibility does not authorize the Board to "go beyond the application itself and inquire broadly into DOE's institutional honesty and capability,"[43] arguably it might not permit the Board to overrule DOE's own judgment on whether DOE has discretion to withdraw the Application.

Finally, a fundamental objective of the NWPA—that a decision be made promptly on whether construction of the Yucca Mountain facility shall proceed—would be advanced by receiving guidance from the Court of Appeals now, rather than at the end of the process. The NWPA directs the NRC to make a prompt decision on the Application within a specified time period.[44] The implementing NRC regulations, which apply both to the NRC Staff's technical review and this Construction Authorization Board's resolution of adjudicatory challenges, do likewise.[45]

The Congressional mandate for a reasonably prompt, final decision on whether the Yucca Mountain facility will go forward is best served by adjudication of DOE's right to withdraw the Application through the Section 119 actions now pending in the Court of Appeals, where briefing has already begun. If the Board were to address the new petitions, and then turn to DOE's motion to withdraw, our rulings might first be appealed to the Commission and only thereafter to the Court of Appeals. It makes little sense to initiate such a parallel route to the Court—which in the best of circumstances could take many months—when the relevant issues are already before the Court.

VI. Conclusion

Accordingly, the Board will withhold decision on the five new petitions and DOE's motion to withdraw, pending further developments in the related actions in the United States Court of

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[43] Id. at 607.

[44] See 42 U.S.C. § 10134(d).

[45] See 10 C.F.R. Part 2, App. D.

Appeals for the District of Columbia Circuit. The parties are encouraged to seek expedited resolution of their claims in that Court.

Answers and replies regarding PIIC's and NARUC's petitions need not be filed until the Board so orders. The stay of this proceeding entered on February 16, 2010 remains in effect.[46]

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

/RA/

Paul S. Ryerson
ADMINISTRATIVE JUDGE

/RA/

Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 6, 2010

[46] If they have not already done so, however, all new petitioners are encouraged to complete all steps to meet the agency's LSN regulations, including certifying that their LSN document collections are available. See 10 C.F.R. § 2.1009(b); Dep't of Energy, LBP-09-6, 69 NRC at 383. Additionally, once each petitioner certifies its LSN document collection, it must continue to meet the supplementation requirements. See PAPO Board Revised Second Case Management Order (Pre-License Application Phase Document Discovery and Dispute Resolution) (July 6, 2007) at 21 (unpublished); CAB Case Management Order #1 (Jan. 29, 2009) at 2 (unpublished).

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NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (SUSPENDING BRIEFING AND CONSIDERATION OF WITHDRAWAL MOTION), dated April 6, 2010, have been served upon the following persons by Electronic Information Exchange.

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[Original Signed by Christine M. Pierpoint]
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