

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

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 16th, 2010
	)	
	)	
	)	
	)	

**AIKEN COUNTY’S RESPONSE TO TWO PETITIONS  
FOR INTERLOCUTORY REVIEW**

Two parties, the Department of Energy (“DOE”) and Nye County, have asked this Commission to exercise its inherent authority to conduct an immediate interlocutory review of the Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) (“M&O”), issued by the Atomic Safety and Licensing Board (“Licensing Board”) on April 6, 2010, in the Yucca Mountain repository licensing proceeding. Aiken County has petitioned to intervene in the proceedings.

As a preliminary matter, Aiken County recognizes that it is inappropriate for a party to ask the Commission to exercise its inherent review authority, because allowing such requests from parties to a licensing proceeding undercuts the integrity of the Commission’s procedures.<sup>1</sup>

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<sup>1</sup> As a majority of the Commission agreed in *In re Entergy Nuclear Vt. Yankee*, 65 N.R.C. 1 (2007), the Commission's inherent authority to supervise licensing proceedings is not grounds for a party's own request Commission review. See *id.* at 7 (dissenting opinion of Commissioners Lyons and Jaczko: “The Commission's supervisory authority does not constitute grounds for a *party's own request* for appellate review.”); *id.* at 8 (concurring opinion of Commissioners Merrifield and McGaffigan: “We agree with the dissent that the Commission's inherent supervisory authority does not constitute grounds for a party's review.”).

As the dissent in *In re Entergy Nuclear Vt. Yankee* noted, “[w]ere it otherwise, there would be no limit to the kinds of arguments parties could legitimately present on appeal, and particularly on interlocutory appeal -- a result at odds with the Commission's oft-expressed intent to limit the availability of such appeals. Thus, the exercise

Without condoning attempts by other parties to fashion a new avenue of appeal to the Commission, Aiken County finds two of the assertions in the requests for review warrant a response in order to ensure that the Commission is not misinformed about the status of proceedings before the Court of Appeals or other issues.

First, both petitions confuse the issue of what is being challenged in federal court by Aiken County. Aiken County is specifically challenging DOE's final decision to withdraw its license application. The finality of DOE's decision does not depend on ratification by any other agency besides the DOE. The DOE's decision to withdraw its license application is a final decision of DOE. As the Licensing Board properly recognized, the NWPA vests original jurisdiction over civil actions related to the DOE's statutory duty to apply for licensure in the United States Courts of Appeals. M&O at 9-10.

Second, both petitions assume that the DOE's motion to withdraw involves little more than a blind application of a federal regulation, specifically 10 C.F.R. § 2.107. *See* DOE Petition for Interlocutory Review at 6; Nye County Petition for Interlocutory Review at 10. DOE supports this assumption by quoting a portion of a federal statutory provision: "The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications...." *Id.* n.1 (quoting 42 U.S.C. § 10134(d)).

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of this authority at the request of a party undercuts the integrity of the Commission's procedures." *id.* at 7 (N.R.C. 2007)(footnote omitted). *See also Carolina Power & Light Co.*, 51 NRC 297, 299 (2000) ("And the Commission itself may exercise its discretion to review a licensing board's interlocutory order if the *Commission* wants to address a novel or important issue. . . . However, the Commission's decision to do so in any particular proceeding stems from its inherent supervisory authority over adjudications and in no way implies that parties have a right to seek interlocutory review on that same ground.")(emphasis in original).

However, consideration of DOE's motion to withdraw its license application does not involve a routine application of federal regulations. This is apparent when the statutory provision cited by DOE is read further than what was quoted:

The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications, *except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of the submission of such application* [extendable up to 12 months with certain reporting requirements].

42 U.S.C. § 10134(d)(emphasis added). The NWPA clearly dictates that NRC procedures should be used except to the extent their application jeopardizes the fulfillment of NRC's duty to render a final approval or disapproval of the construction authorization within three years. This forbids interpretation of a regulation in such a way as to preclude final approval or disapproval, *i.e.* by granting withdrawal. To suggest that consideration of DOE's motion to withdraw requires nothing more than a mechanical employment of 10 C.F.R. § 2.107, which doesn't seem to contemplate denial of a motion to withdraw an license application,<sup>2</sup> is erroneous. The Licensing Board correctly noted that "no agency adjudicatory tribunal has addressed this issue in the context of the unique NWPA." M&O at 11.

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<sup>2</sup> In *In re Sequoyah Fuels Corp.*, 38 N.R.C. 304 (1993), the Atomic Safety & Licensing Board cast doubt on the "contention that the Commission, and thus the Presiding Officer, has discretion to deny an improper request for withdrawal of a license application." The Board noted that "If a withdrawal request comes after the issuance of a hearing notice, 10 C.F.R § 2.107 interposes no obstacle to an applicant's ability to withdraw a renewal application. The only discretion in play here involves the possible imposition of terms or conditions to accompany such a withdrawal." *Id.*

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

A handwritten signature in black ink that reads "Thomas R. Gottshall". The signature is written in a cursive style with a large, prominent 'T' and 'G'.

Signed (electronically) by  
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April 16th, 2010

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of **AIKEN COUNTY'S RESPONSE TO TWO PETITIONS FOR INTERLOCUTORY REVIEW** in the above-captioned proceeding have been served on the following persons this 16th day of April, 2010, by Electronic Information Exchange.

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