

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:

U.S. DEPARTMENT OF ENERGY

(High-Level Waste Repository)

Docket No. 63-001-HLW

ASLBP NO. 09-892-HLW-CAB04

April 21, 2010

**STATE OF WASHINGTON'S RESPONSE TO
PETITIONS FOR INTERLOCUTORY REVIEW**

The Department of Energy (DOE) and Nye County, Nevada, have petitioned the Nuclear Regulatory Commission (NRC or Commission) for interlocutory review of the Atomic Safety and Licensing Board's (Licensing Board) April 6, 2010, decision. Proposed Intervenor State of Washington (Washington) provides the following response to those petitions. Because pending consolidated actions in the District of Columbia Circuit Court of Appeals go to the merits of whether DOE may even move to withdraw its license application, a ruling in those actions may moot the withdrawal motion and intervention petitions now before the Licensing Board. The Commission should thus decline to accept interlocutory review.

The Licensing Board's April 6, 2010, Memorandum and Order (M&O) accurately describes the procedural background for its decision. *See* M&O at 1-9. DOE has moved to withdraw its license application with prejudice and multiple parties, including Washington, have concurrently sought leave to intervene in the matter to oppose such withdrawal. Those

proposed parties¹ have raised multiple contentions with a common central point: whether DOE has legal authority to file such a motion in this proceeding and whether the Licensing Board or the NRC has authority to entertain and grant such a motion. *See* M&O at 6; Washington’s Petition at 15-17. At the same time, four original actions have now been filed in the District of Columbia Circuit Court of Appeals.² These actions are broader in scope than the withdrawal motion now before the Licensing Board. They bypass the question of whether DOE’s motion should be granted (and if so, under what terms) and instead go to the more fundamental question of whether DOE may even *seek* to terminate the Yucca Mountain project, including its license application. As such, the actions do not depend on exhausting an administrative process before the NRC. Indeed, if the Court agrees with Washington and the other petitioners, DOE’s motion should not even be before the NRC.

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¹ The Licensing Board, per its M&O, has not ruled on the petitions. The petitions of Washington, South Carolina, Aiken County, South Carolina are fully briefed.

² *In re: Aiken County*, No. 10-1050; *Ferguson v. Obama*, No. 10-1052; *South Carolina v. U.S. Department of Energy*, No. 10-1069; and *Washington v. U.S. Department of Energy*, No. 10-1082. In addition, NARUC—a proposed intervenor in this action—has sought to intervene in all four cases filed in the District of Columbia Court of Appeals. In its lawsuit, Washington also seeks preliminary injunctive relief. Pursuant to a motion brought by the United States for additional time to respond, the D.C. Circuit had ordered briefing on Washington’s motion for preliminary injunction to conclude on April 28, 2010. Washington conferred with the U.S. on its motion and did not oppose that motion based on the U.S.’ representation that DOE would cease taking further action to shutdown the Yucca Mountain project. *See* DOE Supplement to its Notice of Deferral, filed April 20, 2010.

The Licensing Board correctly decided that it should withhold ruling on both DOE's withdrawal motion and the pending petitions to intervene. The Commission should decline to take interlocutory review as requested by DOE and Nye County.

DATED this _____ day of April, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the State of Washington's Response to Petitions for Interlocutory Review dated April 21, 2010, have been served upon the following persons by Electronic Information Exchange.

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