

May 21, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF ANSWER TO SUPPLEMENT/AMENDMENT
TO PETITION OF THE NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS TO INTERVENE

INTRODUCTION

The National Association of Regulatory Utility Commissioners (NARUC) filed a petition to intervene in the above-captioned proceeding on March 15, 2010, National Association of Regulatory Utility Commissioners Petition to Intervene, dated March 15, 2010 (Petition) and a supplement or amendment to its Petition on May 11, 2010. Supplement or Amendment to Petition of the National Association of Regulatory Utility Commissioners to Intervene, dated May 11, 2010 (NARUC Amendment). The NRC staff (Staff) answer to the Amendment is set forth below.

BACKGROUND

On June 3, 2008, the Department of Energy (DOE) submitted the "Yucca Mountain Repository License Application," (LA) seeking authorization to begin construction of a permanent high-level waste repository at Yucca Mountain. See Yucca Mountain, Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008); corrected 73 Fed. Reg. 40,883 (July 16, 2008). On October 17, 2008, the Commission issued a "Notice of Hearing and Opportunity to Petition for Leave to Intervene," which provided that intervention petitions must be filed within 60 days. *U.S. Dep't of Energy* (High-Level Waste Repository),

CLI-08-25, 68 NRC 497 (2008); see also *U.S. Dep't of Energy* (High-Level Waste Repository); Notice of Hearing and Opportunity To Petition for Leave to Intervene on an Application for Authority To Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, 73 Fed. Reg. 63,029 (October 22, 2008).

Three Construction Authorization Boards (CABs or Boards) designated to rule on intervention petitions granted 10 petitions to intervene, granted interested governmental requests under § 2.315(c), and admitted over 300 contentions. *U.S. Dept. of Energy* (High-Level Waste Repository), LBP-09-6, 69 NRC 367, 377-378 nn.5-19, 499-500, *aff'd in part, rev'd in part*, *U.S. Dept. of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580 (2009). Formal discovery on Phase I issues in the proceeding began with the submission of initial witness disclosures by the parties on or before October 10, 2009. CAB Case Management Order #2, dated September 30, 2009 (unpublished).

In response to a DOE "Motion to Stay the Proceeding," dated on February 1, 2010 (Stay Motion), CAB-04 granted a stay of the proceeding on February 16, 2010.¹ On March 3, 2010, DOE filed a motion to withdraw the license application. U.S. Department of Energy's Motion to Withdraw, dated March 3, 2010 ("Motion to Withdraw"). On March 15, 2010, NARUC filed its Petition seeking to intervene as a party in this proceeding, and proffering four contentions. Petition at 2.

¹ The Stay Motion reported that the President had directed DOE to "discontinue its application to the U.S. Nuclear Regulatory Commission for a license to construct a high-level waste geologic repository at Yucca Mountain in 2010," and referenced statements in the proposed budget prepared by the Office of Management and Budget for Fiscal Year 2011. Stay Motion at 1 (citing Budget of the U.S. Government, Fiscal Year 2011, Appendix at 437 (available at <http://www.whitehouse.gov/omb/budget/fy2011/assets/doe.pdf>)).

On April 6, 2010, the Board suspended briefing on the NARUC Petition and the DOE Motion to Withdraw, until further notice.² On April 23, 2010, the Commission vacated the April 6, 2010 Board order and remanded the matter back to the Board for resolution of the DOE Motion to Withdraw by June 1, 2010.³ On April 27, 2010, the Board, among other things, ordered that answers to the NARUC Petition be filed by May 4, 2010 and that NARUC 's reply be filed by May 11, 2010.⁴

On May 4, 2010, the Staff filed an answer opposing NARUC's Petition, but noting that it did not object to NARUC to participating as *amicus curiae*. NRC Staff Answer to National Association of Regulatory Utility Commissioners' Petition to Intervene, dated May 4, 2010 (Staff Answer), at 1 n.1 and 29. The State of Nevada filed an answer opposing NARUC's Petition. State of Nevada's Answer to National Association of Regulatory Utility Commissioners' Petition to Intervene, dated May 4, 2010 (Nevada Answer). On May 11, 2010, NARUC filed its Amendment that added an affidavit from a second NARUC member, a Commissioner with the Minnesota Public Utilities Commission and revised the test of its original petition to reflect the addition. See, e.g., Amendment at 1. On that same date, NARUC filed a reply to answers filed in response to its Petition, citing its Amendment and the new affidavit of Commissioner Reha as added support for its standing.⁵

² Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion), dated April 6, 2010 (unpublished) at 13.

³ *U.S. Dept. of Energy*, CLI-10-13, 71 NRC __ (April 23, 2010) slip op. at 5.

⁴ Order (Setting Briefing Schedule), dated April 27, 2010 (unpublished) at 2. That order indicated the Board would rule on the DOE withdrawal motion by June 30, 2010.

⁵ National Association of Regulatory Utility Commissioners' Reply to the Answers Filed to its March 15, 2010 Petition to Intervene by Clark County, County of Inyo, Eureka County, Four Nevada Counties of Churchill, Esmeralda, Lander and Mineral, Joint Timbisha Shoshone Tribal Group, Nye County, the Nuclear Regulatory Commission Staff, the State of Nevada, and the U.S. Department of Energy, dated May 11, 2010 (Reply), at 18.

DISCUSSION

The Commission's rules do not provide for the filing of the Amendment, and NARUC did not seek Board permission before filing the Amendment or citing the Amendment in its Reply.⁶ Once an intervention petition is filed, the only pleadings that the Commission's rules allow for are an opportunity for the applicant, the Staff and any other party to file an answer to the petition, and the opportunity for the petitioner to file a reply to those answers. 10 C.F.R. § 2.309(h)(1); 10 C.F.R. § 2.309(h)(3) ("No other written answers or replies will be entertained."). The Commission has emphasized that its timeliness requirements require petitioners to provide support for their claims at the outset. See *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223 (2004). Thus, the Amendment is an unauthorized filing.

The Amendment could also be viewed as a late filing without good cause.⁷ In the Petition, NARUC claimed representational standing, based on the interests of one of its members, David Wright, a Commissioner with the South Carolina Public Service Commission. Petition at 8-9. NARUC's Amendment appears to be an attempt to overcome deficiencies identified regarding its Petition. Specifically, Nevada's arguments that NARUC should be denied standing because Commissioner Wright cannot represent the interests of South Carolina since that state's Attorney General filed a separate intervention petition and 10 C.F.R. § 2.309(d)(2)(ii) only allows for admission of a "single designated representative of the State."

⁶ The Staff notes that NARUC concluded their Amendment itself with a request that it be allowed.

⁷ Under the Commission's regulations, "[n]ontimely requests and/or petitions and contentions" will not be entertained unless they meet the requirements of 10 C.F.R. § 2.309(c). *Crow Butte Resources, Inc.* (License Amendment for the North Trend Expansion Project), LBP-08-06, 67 NRC 241, 257 n.40 (2008).

See Nevada Answer at 2.⁸ The new affidavit is from Hon. Phyllis Reha, a Commissioner with the Minnesota Public Utilities Commission (and NARUC member). See Amendment at 1.

Although the Amendment is an unauthorized filing and is untimely, the Staff does not object to NARUC as it does not alter the Staff's position regarding NARUC's standing. The Staff's opposition to granting NARUC standing was not based on NARUC's failure to identify an acceptable individual with standing in his or her own right. The Staff's opposition was based on NARUC's failure to demonstrate standing and proffer an admissible contention. Staff Answer at 1. NARUC bases its standing argument on the interest on its members' ability to fulfill their *parens patriae* duties to protect the electric rate payers, who are not NARUC members. Petition at 4, 5, 10 and 12. The Staff opposed granting NARUC standing because ratepayer interests are not sufficient to confer standing.⁹ Staff Answer at 7 (citing *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317, 336 n. 23 (2002)). In addition, the Staff's opposed granting NARUC discretionary intervention because of NARUC's failure to establish that a balancing of the factors under 10 C.F.R. § 2.309(e) weighed in NARUC's favor. Staff Answer at 8-11.¹⁰

Thus, the Amendment does not change the Staff's basis for opposing NARUC's intervention. Consequently, the Staff does not object to the Amendment.

⁸ In its reply, NARUC asserts that Nevada's argument must fail if NARUC bases its intervention on claims asserted by a Commissioner from another state. Reply at 18.

⁹ In contrast, Nuclear Energy Institute (NEI) was granted standing based on its representation of its members, who are nuclear utilities and intended beneficiaries of the NWPA. *Roedler v. U.S. Dep't of Energy*, 255 F.3d 1347, 1352 (Fed. Cir. 2001).

¹⁰ Commission precedent recognizes that petitioners should be given the benefit of the doubt in order to avoid denying intervention petitions solely because of defective pleadings. In *Virginia Electric & Power Co.* (North Anna Power Station, Units 1 & 2), ALAB-146 6 AEC 631, 633-34 (1973), the Atomic Safety Licensing Appeal Board refused to deny standing where the petition had "readily curable" defects and granted petitioner leave to amend her petition to comply with the Commission's procedural requirements. *Id.* at 633, 634.

CONCLUSION

Although the Amendment was filed without Board permission, and has not been shown to be timely, the Staff does not object to the Amendment.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER T SUPPLEMENT/AMENDMENT TO PETITION OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS TO INTERVENE" in the above-captioned proceeding have been served on the following persons this 21st day of May, 2010, by Electronic Information Exchange.

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