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Sent: Friday, December 20, 2013 5:54 PM
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Subject: Comments in NRC-2012-0246

Attached please find comments of Don L. Keskey and Ronald C. Callen in Docket No. NRC-2012-0246 concerning the Waste Confidence Draft Generic Environmental Impact Statement (DGEIS) and proposed rule.

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December 20, 2013

Secretary
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Re: Docket ID No. NRC-2012-0246

**Comments of Don L. Keskey and Ronald C. Callen on the
Waste Confidence Draft Generic Environmental Impact
Statement (DGEIS) and proposed rule**

This filing comprises the comments of **Don L. Keskey**¹ and **Ronald C. Callen**² on the Commission's DGEIS and proposed rule referenced above. We appreciate the opportunity to comment on the issues presented.

We present several concerns for the Commission's consideration. One concern is that the Commission's DGEIS and proposed rule again signal a retreat by the Commission from its Waste Confidence Decisions issued decades ago. The DGEIS and proposed rule do not provide a credible path to ensure SNF disposal at any reasonable future time period.

A related concern is that the DGEIS and proposed rule accommodates a default position that would result in the stranding of Spent Nuclear Fuel (SNF) at nuclear plants or Independent Spent Fuel Storage Installations (ISFSI) at scores of locations in dozens of states on a permanent basis. Such an outcome would contradict national policy and commitments as set forth in the Nuclear Waste Policy Act of 1982, 42 USC 10101 *et seq.*, and the Standard Contracts entered

¹ Don L. Keskey, of Public Law Resource Center PLLC, represented 59 state agencies from 35 states in *Indiana Michigan Power Co, et al. v. Dept of Energy*, 88 F.3d 1272 (D.C. Cir. 1996), and *Northern States Power Co v. DOE*, 128 F.3d 754 (D.C. Cir. 1997). Mr. Keskey also has represented a party that challenged and opposed the U.S. Department of Energy's Motion to Withdraw its Yucca Mountain license application in NRC Docket No. 63-001. Mr. Keskey served as a Michigan Assistant Attorney General for 25 years and has been in private practice for 15 years, representing nonprofit organizations with respect to utility ratepayer interests.

² Ronald C. Callen has 15 years' experience as a physicist in the nuclear industry followed by 25 years on the staff of the Michigan Public Service Commission, two (2) years as the first director of NARUC's (National Association of Regulatory Utility Commissioners) nuclear waste office in Washington, D.C., and over twelve (12) years as a consultant and witness in cases involving nuclear power and spent nuclear fuel (SNF) matters.

into between the U.S. Department of Energy (DOE) and our nation's nuclear utilities,³ pursuant to which our nation's utility ratepayers have now paid more than \$37 billion to cover the costs of fees charged under the Standard Contract for a permanent repository for the safe and proper disposal of SNF.

The Commission's DGEIS and proposed rule demonstrate an unreasonable view of SNF disposal actions, virtually ignoring the delays in DOE's SNF disposal program, the breaches in the Standard Contract, the violations of the NWPA, and the suppression by Congress of appropriations to ensure good faith compliance with the NWPA and the Standard Contract. The federal courts declared in 1996 and 1997 that the obligation of utilities to pay the contract fees was a "reciprocal obligation" to the federal government's commencement of disposal of SNF by January 31, 1998,⁴ an obligation that has now been breached for nearly 16 years with no end in sight. The United States Court of Claims is now regularly issuing decisions in litigated cases awarding utilities substantial damages for the federal government's contract breach, which on a combined basis equates to billions of dollars. Meanwhile, ratepayers have continued to pay duplicative costs for the contract fees under the breached Standard Contract as well as otherwise avoidable increased costs for expansion of SNF storage, new ISFSI facilities, higher decommissioning obligations, among other costs. At the same time, states and their taxpayers and ratepayers where SNF is stored face contingent liabilities involving unknown billions of dollars of future costs in the event that both the nation's nuclear utilities and the federal government permanently default in their obligations to dispose SNF.

The DGEIS and proposed rule do not promote or enforce the provisions, objectives, and goals of the NWPA and the Standard Contract or a timely decision on the Yucca Mountain License Application. A proposed decision that would in effect accept the extremely long-term or permanent storage ("non-disposal") of SNF at or near the nation's nuclear plants simply is not consistent with the NWPA or the Standard Contract. The proposed DGEIS and rule appear to countenance the stranding or storage of SNF at or near plant sites for up to 150 years or more, and contain no effective provisions to ultimately ensure the safe and proper **disposal** of SNF. The Commission's rule also contains a questionable premise — that long-term SNF storage at current sites or perhaps some centralized sites (for 150 or more years) is safe and feasible merely on the basis of the limited experience involving SNF storage to date, particularly at ISFSI's, and at fewer locations with lower quantities of SNF, compared to what would exist over such a long time span.

The DGEIS and proposed rule appear aimed at promoting the further development of nuclear energy by detaching any concrete obligations for the safe **disposal** of the SNF generated from nuclear energy. The DGEIS and rule also increase the risk that the obligations for SNF disposal may ultimately be transferred to the states and to their ratepayers, despite the long legal and regulatory history involving federal government promises and commitments that SNF

³ 10 C.F.R. Part 961 - Standard Contract for Disposal of Spent Nuclear Fuel And/or High-Level Radioactive Waste.

⁴ *Indiana Michigan Power Co et al. v. DOE*, 88 F.3d 1272 (D.C. Cir. 1996); *Northern States Power Co v. DOE*, 178 F.3d 754 (D.C. Cir., 1997).

disposal was to be a national and federal obligation. The Commission appears to ignore the reality that available legal and corporate strategies exist that can provide for the transfer of nuclear plants and ISFSI's, and the SNF itself, to unfunded separate limited liability companies that can easily abandon SNF at existing sites once the economic value of the generating plants are exhausted.

The apparent escapist purpose or result facilitated by the DGEIS and proposed rule are reinforced by the federal government's inability or refusal to properly perform SNF disposal or to abide by federal court decisions clarifying and mandating said SNF disposal duties and obligations, as illustrated by *Indiana Michigan Power Co, et al v Dept of Energy*, 88 F3d 1272 (DC Cir 1996); *Northern States Power Co v DOE*, 128 F3d 754 (DC Cir 1997); *In re Aiken County*, U.S. Court of Appeals Docket No. 11-1271 (August 13, 2013); and *National Association of Regulatory Utility Commissioners v United States Department of Energy*, U.S. Court of Appeals Docket No. 11-1066 (November 19, 2013), and in numerous U.S. Court of Claims decisions awarding damages to utilities and appellate decisions arising therefrom.

If the Commission desires to promote nuclear energy, the responsible approach would be to strengthen, not weaken, the requirements for the prompt and safe disposal of SNF. Instead of accommodating the detachment of SNF disposal responsibilities from nuclear energy generation and development, the Commission should instead maintain the integral connection between the generation of SNF and the ensuring proper and timely SNF disposal. Unfortunately, the Commission's DGEIS and proposed rule may serve to facilitate, accommodate, and encourage continued delays toward SNF disposal.

We thus recommend that the Commission go back to the drawing boards on this DGEIS and proposed rule, and provide for a process that ensures a more balanced and effective approach to promoting nuclear energy by ensuring the safe disposal of SNF at a federal responsibility in accordance with the NWPA, the Standard Contracts, and the long history of federal commitments for SNF disposal that gave rise to the attendant authorization for civilian development of nuclear energy in the first instance.

Respectfully submitted,

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