UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In Re: State of Texas	)	Docket No. 17-60191
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MOTION OF THE NUCLEAR ENERGY INSTITUTE AND NUCLEAR UTILITIES FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENTS

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Wolf Creek Nuclear Operating Corporation;
Union Electric Company d/b/a Ameren Missouri; and
Tennessee Valley Authority

April 5, 2017

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Fifth Circuit Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Other Interested Persons	Counsel
All other U.S. utilities or corporations or other entities that own/operate or previously owned/operated nuclear electric generating stations.	Unknown

Respectfully Submitted,

s/Jay E. Silberg

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I. Introduction

The Nuclear Energy Institute, Inc. ("NEI"), on behalf of itself and its members, and the Nuclear Utilities listed below who own or operate nuclear power plants[1] respectfully move this Court for leave to intervene in the above-captioned proceeding in accordance with Fed. R. App. P. 15(d) and 27, and Fifth Circuit Rules 15.5 and 27.[2] NEI's and the Nuclear Utilities' intervention would be limited to the Texas prayers for relief seeking restitution from and disgorgement of the Nuclear Waste Fund.[3]

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[1] The entities are Energy Northwest; Kansas Gas and Electric Company d/b/a Westar Energy; Kansas City Power & Light Company; Kansas Electric Power Cooperative, Inc.; Wolf Creek Nuclear Operating Corporation; Union Electric Company d/b/a Ameren Missouri; and Tennessee Valley Authority (collectively, the "Nuclear Utilities").

[2] In accordance with Fifth Circuit Rule 27.4, NEI has contacted all other parties in an attempt to determine whether an opposition to this motion will be filed. The Respondents do not oppose the motion. The State of Texas has said that it will file an opposition to this motion.

[3] Petition at 27. To the extent that Texas' opposition to this Motion claims that intervention on these issues is not ripe at this time, Movants' significant interests in this lawsuit will endure so long as the prayers for restitution and disgorgement persist in the Petition.

NEI, a trade association organized under Section 501(c)(6) of the Internal Revenue Code, is responsible for establishing unified industry policy affecting the nuclear energy industry, including matters governed by the Nuclear Waste Policy Act ("NWPA" or the "Act"). NEI's members include all entities licensed to generate electricity from civilian nuclear power reactors in the United States. As a result, NEI's members have paid fees into the Nuclear Waste Fund in accordance with NWPA Section 302(a)[4] and the "Standard Contract for the Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste," commonly referred to as the "Standard Contract."[5]

Each of the Nuclear Utilities has paid fees into the Nuclear Waste Fund and is a member of NEI:

- Energy Northwest owns and operates the Columbia Generating Station, a single reactor unit located near Richland, Washington.

- Kansas Gas and Electric Company (d/b/a Westar Energy), Kansas City Power & Light Company, and Kansas Electric Power Cooperative, Inc. are each partial owners of the Wolf Creek Generating Station, a single reactor unit located in Coffey County,

[4] 42 U.S.C. § 10222(a).

[5] The Standard Contract was adopted by rulemaking and is codified in U.S. Department of Energy ("Department" or "DOE") regulations. *See* 10 C.F.R. Part 961.

Kansas. Wolf Creek Nuclear Operating Company is owned by the three Kansas entities, operates the Station, and, as agent for its owners, has paid fees into the Nuclear Waste Fund.

- Union Electric Company (d/b/a/ Ameren Missouri) owns and operates the Callaway Energy Center, a single reactor unit located near Fulton, Missouri.

- Tennessee Valley Authority owns and operates (1) the Browns Ferry Nuclear Plant, a three reactor plant located near Athens, Alabama; (2) the Sequoyah Nuclear Plant, a two reactor plant located near Soddy-Daisy, Tennessee; and (3) the Watts Bar Nuclear Plant, a two reactor plant located near Spring City, Tennessee.

The "Original Petition" of the State of Texas seeks to raise issues concerning Respondents' compliance with certain aspects of the Act. NEI and the Nuclear Utilities share Texas' desire for restart of the federal used fuel management program. Two relief requests raised in the Petition, however, would harm, not help, efforts to reestablish a durable used fuel management program. In particular, Texas' Petition includes prayers calling for restitution from and disgorgement of

the Nuclear Waste Fund.[6] NEI and the Nuclear Utilities seek to intervene with respect to these two prayers.

On behalf of its members, NEI has participated directly as a party in Nuclear Waste Fund litigation.[7] NEI's members have similarly been parties in litigation involving the Nuclear Waste Fund.[8] NEI has also participated directly as a party on behalf of its members in litigation involving other aspects of the nuclear waste program.[9]

NEI and the Nuclear Utilities meet the standard for intervention as of right and the standard for permissive intervention based on their interests in the subject matter of the Petition, and the impact that Prayers for Relief No. 21 ("an order providing Petitioner with restitution from the Nuclear Waste Fund") and No. 22 ("an order disgorging the Nuclear Waste Fund") would have on NEI, NEI's

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[6] Petition at 27.

[7] *See, e.g., National Association of Regulatory Utility Commissioners v U.S. Department of Energy*, 736 F.3d 517 (D.C. Cir. 2013); *National Association of Regulatory Utility Commissioners v U.S. Department of Energy*, 680 F.3d 819 (D.C. Cir. 2012); *National Association of Regulatory Utility Commissioners v. U.S. Department of Energy,* 405 Fed. Appx. 507 (D.C. Cir. 2010). Kansas Gas and Electric, Kansas City Power & Light, Kansas Electric Power Cooperative, and Wolf Creek Nuclear Operating Corporation also participated in the Nuclear Waste Fund fee suspension litigation.

[8] *See, e.g.*, *Alabama Power Co. v U.S. Department of Energy*, 307 F.3d 1300 (11th Cir. 2002); *National Association of Regulatory Utility Commission v. U.S. Department of Energy*, 851 F.2d 1424 (D.C. Cir. 1988).

[9] *Nuclear Energy Institute v. EPA*, 373 F.3d 1251, 1279 (D.C. Cir. 2004) (challenge to ground water standard for nuclear waste repository) ("*NEI v. EPA*"); *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-09-6, 69 NRC 367, 483 (2009) (granting NEI intervenor status as a party to the NRC adjudication of the Yucca Mountain license application).

members, and the Nuclear Utilities. NEI seeks to intervene on behalf of its members, and the Nuclear Utilities seek to intervene on their own, because granting the restitution and disgorgement remedies sought by Petitioner would deplete the Nuclear Waste Fund, contrary to the plain language and purposes of the Act, causing direct harm to NEI, NEI's members, and the Nuclear Utilities.

NEI's and the Nuclear Utilities' proposed intervention opposing two of the remedies sought by Petitioner should in no sense be considered an endorsement of the Federal Government's handling of the used fuel program, aspects of which NEI and the Nuclear Utilities have criticized and challenged for many years.

II. NEI Has Standing to Represent the Interests of Its Members

Federal courts consistently find that associations like NEI have standing to represent the interests of their members in appropriate circumstances. "Even in the absence of injury to itself, an association may have standing solely as the representative of its members."[10] To establish an organization's right to intervene on behalf of its members, the organization must demonstrate both associational standing and prudential standing. For associational standing, NEI must show that: "(1) its members would otherwise have standing to sue on their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3)

[10] *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[11] For prudential standing, NEI must show that its "grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit."[12]

NEI meets the standards for associational and prudential standing. If granted, Texas' prayers for restitution from the Nuclear Waste Fund and disgorgement of the Fund would necessarily reduce the funds available for the development and construction of a repository – which the Act directs shall be at Yucca Mountain, Nevada[13] – and would even further delay the opening of a repository.[14] Indeed, the Blue Ribbon Commission on America's Nuclear Future found that funding for the repository program has been constrained, and that such constraints have caused significant delay.[15] As the D.C. Circuit ruled in *NEI v. EPA*, "[a]s to injury-in-fact, we have no doubt that delaying the opening of the

[11] *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).
[12] *Bennett v. Spear*, 520 U.S. 154, 162 (1997).
[13] NWPA § 160 (42 U.S.C. § 10172) designates Yucca Mountain, Nevada as the sole site to be characterized for a repository. This designation was confirmed in 2002 when, in accordance with the procedures set forth in NWPA §§ 115 and 116 (42 U.S.C. §§ 10135-36), Congress enacted the Yucca Mountain Development Act (P. L. No. 107-200, 116 Stat. 735), which was a joint "resolution of repository siting approval," and which overrode the State of Nevada's disapproval of the site.
[14] NWPA § 302(a)(5)(B) (42 U.S.C. § 10222(a)(5)(B)) required the Department to begin disposal of the spent nuclear fuel generated by NEI's members by January 31, 1998.
[15] *See* Report to the Secretary of Energy prepared by the Blue Ribbon Commission on America's Nuclear Future (included in the Texas Appendix at Exhibit 9) at pp. xi, 23 (Bates Nos. 000033, 000067).

Yucca Mountain repository would inflict concrete harm on NEI members [who] expend substantial sums to operate their own storage facilities."[16] With respect to the second factor, "pursuing litigation to speed the licensing of a permanent repository is 'germane to [NEI's] purpose . . . .'"[17] The interests NEI seeks to protect include ensuring the integrity of the Nuclear Waste Fund – which consists of billions of dollars in fees paid by the nuclear industry and accrued interest – so that sufficient funds are available to pay for the disposal of the nation's spent nuclear fuel. For the third factor, neither the claims asserted nor the relief requested by Texas requires that NEI's members participate in this lawsuit because the relief sought is injunctive.[18]

NEI also meets the requirements for prudential standing because its interests fall within the zone of interests protected by the NWPA. The NWPA obligates the Federal Government to provide for the permanent disposal of spent nuclear fuel, and obligates those who benefit from spent nuclear fuel generation (*i.e.*, NEI's members) to pay for its disposal.[19] This Court has previously found that nuclear

[16] *NEI v. EPA*, 373 F.3d at 1279.
[17] *Id*.
[18] *City of Waukesha v. EPA*, 320 F.3d 228, 236 (D.C. Cir. 2003) (finding that NEI had standing to represent its members' interests), citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 344 (1997) (requests for declaratory and injunctive relieve do not require "individualized proof and both are thus properly resolved in a group context").
[19] NWPA § 111(a)(4) ("while the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of in order to protect the public health and safety and the environment, the costs of

electric utilities' "defined role" in the NWPA statutory scheme is "providing funding for the Nuclear Waste Policy Act."[20] NEI's interests are thus squarely implicated by Texas' prayers for restitution and disgorgement.

The Nuclear Utilities have standing as of right for the same reason as NEI: restitution from or disgorgement of the Nuclear Waste Fund would necessarily reduce the funds available for the development and construction of a repository, resulting in even further delay in the program, which "would inflict concrete harm on [those who] expend substantial sums to operate their own storage facilities."[21]

III. NEI and the Nuclear Utilities Satisfy the Requirements for Intervention as of Right

To intervene as of right under Fed. R. Civ. P. 24(a)(2),[22] one must: (1) file a timely motion; (2) claim an interest relating to the subject of the action and show that the outcome of the proceeding may, as a practical matter, impede the ability to protect those interests; and (3) demonstrate that its interests may not be adequately

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such disposal should be the responsibility of the generators and owners of such waste and spent fuel") (42 U.S.C. § 10131(a)(4)).

[20] *Texas v. U.S. Dep't of Energy*, 754 F.2d 550, 551 (5th Cir. 1985). This case implicates not only the nuclear industry's "defined role" in funding the NWPA program, as described in *Texas*, but also NEI's interests in the NRC's Yucca Mountain proceeding to which NEI is already a party, *see* note 9, *supra*.

[21] *NEI v. EPA*, 373 F.3d at 1279.

[22] Because Fed. R. App. P. 15(d) provides no standards for resolving intervention questions, this Court has looked to "the policies underlying intervention in the trial courts pursuant to Fed. R. Civ. P. 24." *Texas*, 754 F.2d at 551.

represented by the existing parties.[23] NEI and the Nuclear Utilities satisfy each of these requirements.

A. The Motion to Intervene is Timely

The Federal Rules of Appellate Procedure and Fifth Circuit rules do not establish a deadline for a motion to intervene in a mandamus proceeding. In a somewhat analogous situation, in the case of a petition for review of an order from an agency proceeding, Fifth Circuit Rule 15.5 provides that a motion to intervene should be filed "not later than 14 days prior to the due date of the brief of the party supported by the intervenor." The Court directed that Federal Respondents file their responses to the Texas Petition by April 19, 2017.[24] This intervention motion is being filed no later than 14 days prior to the due date of the responses and therefore is timely.

B. NEI and the Nuclear Utilities Have Protectable Interests in Opposing Restitution and Disgorgement of the Nuclear Waste Fund

Intervention by NEI and the Nuclear Utilities is necessary to protect their interests and the interests of NEI's other members. With respect to two Prayers for Relief sought, Petitioner's interest in restitution and disgorgement of the Nuclear

[23] *Sierra Club v. Espy*, 18 F.3d 202, 1204-05 (5th Cir. 1994).
[24] Letter from Lyle W. Cayce, Clerk, U.S. Court of Appeals for the Fifth Circuit, to Counsel for Respondents, Case No. 17-60191 (Mar. 20, 2017).

Waste Fund is at odds with the interests of the Nuclear Utilities and other NEI members' in preserving the Nuclear Waste Fund so that it can be used for its statutorily-designated purpose: disposing of nuclear utilities' spent nuclear fuel and high-level radioactive waste. The Nuclear Utilities and NEI's other nuclear electric utility members include the nuclear power generators that have paid more than $20 billion into the Nuclear Waste Fund. That Fund has accrued over $20 billion in interest[25] since the United States began collecting the nuclear waste fee in 1983 in accordance with NWPA § 302(a)[26] and the Standard Contracts which all utilities with nuclear power plants were compelled to sign.

Texas' prayers for restitution and disgorgement implicate at least three additional interests of the Nuclear Utilities and NEI:

First, Texas' prayers could undermine the Government's statutory and contractual obligation to dispose of the utilities' spent nuclear fuel and high-level radioactive waste. If the Court ordered restitution or disgorgement, that could be interpreted as a total breach of the Standard Contract. This in turn, could be interpreted to alter the ongoing obligations of the parties – more specifically, it

[25] *See* U.S. Department of Energy Office of Inspector General Audit Report OI-FS-17-04, Department of Energy Nuclear Waste Fund's Fiscal Year 2016 Financial Statement Audit (Dec. 2016) at p. 27, *available at* https://www.energy.gov/sites/prod/files/2016/12/f34/OAI-FS-17-04.pdf . As of September 30, 2016, the U.S. Treasury securities held by the Department related to the Nuclear Waste Fund had a fair value of $46.0 billion. *Id.* at 5.

[26] 42 U.S.C. § 10222(a).

could undermine the utilities' contractual position. The NWPA required that the Department begin to dispose of the utilities' used fuel "beginning not later than January 31, 1998."[27] Similarly, the Standard Contract provided that the services to be provided by DOE under the contract shall begin "not later than January 31, 1998."[28] DOE missed these statutory and contractual milestones.[29] As the Federal Circuit has stated, "[t]he breach involved all the utilities that had signed the contract—the entire nuclear electric industry."[30] More than seventy breach of contract lawsuits have been settled or litigated in the U.S. Court of Federal Claims to recover "as damages the additional expenses [they] incurred in continuing to store the nuclear waste past the date on which the Department was obligated to remove it."[31]

Each lawsuit was for a *partial* breach of contract, rather than total breach, for multiple reasons. First, the Department has never asserted that it had been relieved of its obligation to perform in accordance with the Standard Contract,

[27] NWPA § 302(a)(5)(B) (42 U.S.C. § 10222(a)(5)(B)).
[28] 10 C.F.R. § 961.11, Standard Contract, Art. II.
[29] *See Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336 (Fed. Cir. 2000); *Northern States Power Co. v. United States*, 224 F.3d 1361 (Fed. Cir. 2000).
[30] *Maine Yankee*, 225 F.3d at 1342.
[31] *See, e.g.*, *id.* According to the DOE Inspector General Audit Report OI-FS-17-04, *supra* n. 25 at p. 21, settlements and judgments from these lawsuits have resulted in payments to nuclear utilities exceeding $6.1 billion.

instead acknowledging that its performance was delayed.[32] Second, the federal courts have emphasized that a partial breach of contract is the appropriate cause of action "[i]f the injured party elects to or is required to await the balance of the other party's performance under the contract."[33] Indeed, the Federal Circuit has ruled that the Standard Contract, incorporating the NWPA's requirements, required that plaintiffs bring partial breach actions.[34] In addition, the federal courts have consistently held that partial breach of contract was the appropriate claim since the NWPA requires that DOE be exclusively responsible for the disposal of used fuel, thereby prohibiting utilities from pursuing alternative disposal remedies.[35]

Texas' prayers for restitution from and disgorgement of the Nuclear Waste Fund, if successful, could be interpreted to create a total breach of the Standard Contract.[36] Such relief would be at odds with the requirements of the NWPA and

[32] *See Indiana Michigan Power Co. v. U.S.*, 422 F.3d 1369, 1374 (Fed. Cir. 2005) ("while the government did indicate that it would not meet the 1998 deadline, its actions did not portend an absolute refusal to perform the contract").
[33] *Id.* (citing Restatement (Second) of Contracts, § 236 cmt. b.).
[34] *Id.* ("The NWPA itself, and the Standard Contract's terms drafted pursuant to it, compelled Indiana Michigan to bring an action for partial, not total, breach.").
[35] *Id.*, citing NWPA secs. 302(a)(4) and (b)(2) (42 U.S.C. § 10222(a)(4) and (b)(2)); *Roedler v. DOE*, 255 F.3d 1347, 1350 (Fed. Cir. 2001).
[36] *See Hansen Bancorp, Inc. v. United States*, 367 F.3d 1297, 1309 (Fed. Cir. 2004) ("relief in restitution is 'available only if the breach gives rise to a claim for damages for total breach and not merely to a claim for damages for partial breach'") (quoting Restatement (Second) of Contracts, § 373 cmt. a).

the settlements and damages lawsuits that have resulted in over $6 billion in damages payments to nuclear electric utilities from the Judgment Fund.[37]

Second, Texas' prayers for restitution and disgorgement arguably could undermine utilities' Nuclear Regulatory Commission ("NRC") operating licenses for their nuclear power reactors. If the prayers are granted and total breach of the Standard Contract is deemed to occur, NWPA sec. 302(b)(1) would be implicated. That section of the Act prohibits the NRC from issuing or renewing a license to operate a nuclear power reactor absent a disposal contract with the Federal government.[38]

Third, restitution and disgorgement have the potential to increase the future fees that might have to be collected from the Nuclear Utilities and NEI's other utility members, if fee collection were resumed.[39] In *Alabama Power*, the Eleventh Circuit rejected an agreement between a nuclear power plant owner and DOE as violating the NWPA. The agreement would have granted the owner an offset against future Nuclear Waste Fund payments in exchange for the owner's release

[37] *See* DOE Inspector General Audit Report OI-FS-17-04 at p. 21, n. 25, *supra*.
[38] 42 U.S.C. § 10222(b)(1).
[39] In 2013, as a result of litigation instituted by NEI, the National Association of Regulatory Utility Commissions, and a group of nuclear electric utilities, the D.C. Circuit directed the Department of Energy to submit a proposal to Congress to set the Nuclear Waste Fund fee to zero "until such a time as either the Secretary chooses to comply with the Act as it is currently written, or until Congress enacts an alternative waste management plan." *National Association of Regulatory Utility Commissioners*, 736 F.3d at 521. Since 2014, the fee has been set at zero.

of its breach of contract claim against DOE for failure to meet its disposal obligations. The Court rejected the agreement in part because such agreement would have increased the fees paid by other utilities' to cover the costs of disposal.[40] In other words, an offset against future payments would mean less money in the Nuclear Waste Fund, as would occur here if Texas were successful in its prayers for restitution or disgorgement. In the future, this would require other utilities to pay greater fees to cover the costs of disposal.

C. No Existing Party Adequately Represents NEI's and the Nuclear Utilities' Interests

The Federal Respondents cannot protect NEI's and the Nuclear Utilities' interests. The interests of the Respondents frequently diverge from the interests of NEI and its member utilities on the Nuclear Waste Fund and other NWPA issues.[41] The Government is, after all, the contractual counterparty to each of the utilities who has signed the Standard Contract. NEI and utilities have been forced to sue the Government regarding the Fund and NWPA obligations.

Moreover, NEI and the Nuclear Utilities cannot predict what Respondents' position will be on the issues on which they request to intervene. Indeed, seven years ago, DOE sought to withdraw the Yucca Mountain license application

[40] *Alabama Power,* 307 F.3d at 1314.
[41] *See, e.g., Alabama Power Co., supra* n. 8*; Indiana Michigan Power Co., supra* n. 32, *National Association of Regulatory Utility Commissioners,* 736 F.3d 517, *supra* n. 7.

pending before the NRC;[42] while last month, the Government proposed $120 million to resume the Yucca Mountain licensing proceeding (among other things).[43] Nor can NEI and the Nuclear Utilities predict at this time how Respondents will defend their position and whether that defense will be inconsistent with NEI's and the Nuclear Utilities' position on these and other issues. For these reasons, NEI and the Nuclear Utilities respectfully submit that their intervention is necessary in order to adequately protect their interests and the interests of NEI's members.

IV. NEI and the Nuclear Utilities Also Satisfy the Standard for Permissive Intervention

NEI and the Nuclear Utilities are not only entitled to intervene as of right, but also qualify for permissive intervention. Federal Rule of Civil Procedure 24(b)(1) provides that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact."[44]

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[42] *See* U.S. Department of Energy (High-Level Waste Repository), LBP-10-11, 71 N.R.C. 609, 617 (2010) (rejecting the Department's March 3, 2010 motion to withdraw the license application with prejudice).

[43] Office of Management and Budget, *America First: A Budget Blueprint to Make America Great Again* (March 2017) at p. 19, *available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf

[44] *See also Newby v. Enron Corp.*, 443 F.3d 416, 421 (5th Cir. 2006).

As demonstrated previously, the intervention motion is timely. Further, as discussed above, NEI's members possess legally protectable interests that will be harmed if the Court were to grant Texas' prayers for restitution and disgorgement of the Nuclear Waste Fund. To protect those interests, NEI and the Nuclear Utilities will argue (among other things) that Texas' requests for restitution from and disgorgement of the Nuclear Waste Fund are contrary to the NWPA and are otherwise unnecessary because the contractual remedies are being applied through settlements and continued litigation before the U.S. Court of Federal Claims.[45] Thus, a common question of law exists in this case and permissive intervention is appropriate.

[45] According to the DOE Inspector General Audit Report OI-FS-17-04, *supra* n. 25, the Department estimates its potential remaining liability to be approximately $24.7 billion, also to be paid out of the Judgment Fund. Audit Report at p. 22. For those cases that have been settled, the utilities submit annual claims to the DOE for those that costs they would not have incurred had the Department met its obligation to begin to dispose of spent nuclear fuel by January 31, 1998.

V. Conclusion

For the forgoing reasons, NEI and the Nuclear Utilities respectfully request that the Court grant this motion for leave to intervene in this proceeding.

Respectfully Submitted,

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April 5, 2017

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April, 2017 an electronic copy of the foregoing motion was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

s/Jay E. Silberg
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Counsel for Movants

CERTIFICATE OF COMPLIANCE

1. This Motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) and Fifth Circuit Rule 27.4 because it contains 4,042 words, except for the items excluded from the word count pursuant to F. R. App. P. 32(f), as determined by the word-count function of Microsoft Word 2010.

2. This Motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Fifth Circuit Rule 32.1 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Times New Roman 14-point font text for the main body and 12-point font text for footnotes.

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