

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:
U.S. DEPARTMENT OF
ENERGY
(High Level Waste Repository)

Docket No. 63-001-HLW
ASLBP NO. 09-892-HLW-CAB04
March 15, 2010

**NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS**

PETITION TO INTERVENE

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(c),¹ and consistent with the June 20, 2008 Advisory Pre-License Application Presiding Officer Board's Memorandum and Order, LBP-08-10,² and its September 29, 2008 order,³ the National Association of Regulatory Utility Commissioners (NARUC) respectfully files this petition to intervene as a party in the proceeding on the application of the Department of Energy ("DOE") for a license to construct a high level nuclear waste repository at Yucca Mountain, Nevada.

¹ Although NARUC is filing this untimely "petition to intervene" pursuant to 10 C.F.R. § 2.309(c), and not as a "motion" pursuant to 10 C.F.R. § 2.323, the undersigned made a sincere effort to contact other parties and resolve any issues associated with our filing of an intervention petition. On March 2, 2010, NARUC sent a letter to the Secretary of Energy requesting that he not withdraw the application. On March 8, 2010, NARUC notified, by email, all of the parties to the proceeding of our intent to file this motion to intervene in opposition to DOE's motion to withdraw the license application for the high level nuclear waste repository at Yucca Mountain with prejudice. Today, NARUC discussed a possible resolution of certain procedural issues with counsel for the Department of Energy. As of March 15, 2010, the following parties have consented to or indicated that they do not oppose the petition to intervene: The "Four Nevada Counties" (Mineral, Lander, Churchill, and Esmeralda); White Pine County, Nevada; Nye County, Nevada. The NRC Staff asserted that it takes no position at this time.

² U.S. Dep't of Energy (High-Level Waste Repository) Pre-Licensing Application Presiding Officer's Memorandum and Order (Case Management Order Concerning Petitions to Intervene, Contentions, Responses, and Replies, Standing Arguments and Referencing Attached Supporting Materials) (LBP-01-10) 67 NRC __, (June 20, 2008), released in the proceeding U.S. Dep't of Energy (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO board), ASLBP No. 08-861-01-PAPO-BD01; LBP-08-10, 67 NRC 450 (2008), 73 Fed. Reg. 63,029 (October 22, 2008) available at, <http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi>. Adams number ML081720154.

³ Adams ML082730764. Advisory Pre-license Application Presiding Officer Board's Order (Regarding the Contention Formatting and Tables of Contents), released in the proceeding captioned U.S. Dep't of Energy (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO board), ASLBP No. 08-861-01-PAPO-BD01; LBP-08-10, (September 29, 2008) available at Adams ML082730764.

NARUC seeks leave to intervene as a party to contest the recently filed DOE motion to withdraw the license application for a permanent geologic repository at Yucca Mountain with prejudice.

NARUC, founded in 1889, is a national organization whose members include the commissioners that head the agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the rates and conditions of service associated with the intrastate operations of electric, natural gas, water, and telephone utilities. NARUC's member commissioners ensure that electric utility services are provided at rates and conditions that are just, reasonable, and nondiscriminatory. Both Congress and federal courts have consistently recognized NARUC as a proper entity to represent the collective interests of these State utility commissions.

As discussed, infra, NARUC's petition meets the Atomic Safety and Licensing Board's (Board) intervention requirements. NARUC's members maintain a significant interest in this proceeding. The Nuclear Waste Policy Act (NWPA), enacted in 1982, made the federal government responsible for safe disposal of high-level radioactive waste, including spent nuclear fuel. Under the Act, utilities pay for the eventual disposal of commercial nuclear waste through the Nuclear Waste Fund (NWF), which is, in turn, passed through, by our members, to

ratepayers. Since the NWPA was enacted in 1982, ratepayers served by our members, along with reactor owners, have paid more than \$17 billion dollars into the NWF, in part, to support the process of reviewing a permanent repository. DOE Office of Civilian Radioactive Waste Management, Office of Business Management Summary of Program Financial & Budget Information at 4 (Jan. 31, 2010), available at

<http://www.ocrwm.doe.gov/uploads/1/financialandbudgetsummary.pdf>.

(Attachment 2). Dismissal of the Yucca Mountain application will significantly undermine the government's ability to fulfill its outstanding obligation to take possession and dispose of the nation's spent nuclear fuel and high level nuclear waste. Dismissal at this late stage, in the absence of any rational explanation or record-based findings to justify it, is an incredible waste of the billions in ratepayer dollars spent on the licensing proceeding to date. Moreover, ratepayers across the country continue to pay for a national storage "solution," enhanced litigation costs, and the clearly documented increased costs of interim storage. If the motion is successful, and history is any indication, it will effectively delay DOE's ability to finally begin to accept waste for at least 25 years.

NARUC's State commission members have an obvious interest in this proceeding that no other party can adequately represent – protecting the health, safety, and economic interests of our ratepayers. There is no question that our

members' respective statutory duties to protect ratepayers is impacted by whatever action the NRC takes on this DOE motion.

A. Standing as a Matter of Right [10 C.F.R. § 2.309(d)]

1. Intervenor Information [10 C.F.R. §2.309(d)(1)(i)]

The name of the party and its address are as follows:

Name of Party: National Association of Regulatory Utility
Commissioners

Contact Information: James Bradford Ramsay, General Counsel
Telephone: 202-898-2207
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2. Nature of NARUC's right under the act to be made party to the proceeding [10 C.F.R. §2.309(d)(1)(ii)]

The Atomic Energy Act (AEA) asserts that the Commission shall admit to any proceeding any party that has an interest in the proceeding. 42 U.S.C.A §2239 (a)(1)(A).

NARUC has a direct interest in this proceeding based on its representation of its members' interests arising under the AEA and the Nuclear Waste Policy Act of 1982, 42 U.S.C §§ 10101 et seq. ("NWPA"). See, e.g., NARUC v. DOE, 851

F.2d 1424 (D.C. Cir. 1988), where, although standing was not specifically addressed, NARUC was the lead petitioner in a successful appeal involving DOE and the nuclear waste disposal program. Congress also frequently recognizes both NARUC's members' expertise and their obvious substantial interests by inviting NARUC to testify on nuclear waste disposal issues.⁴

⁴ See, e.g., Testimony on behalf of NARUC by [1] the Honorable Laura Chappelle, Chair, Michigan Public Service Commission before the U.S. House of Representatives Energy and Commerce Committee Subcommittee on Energy and Air Quality to address **approval of the site at Yucca Mountain**, available at <http://www.naruc.org/Testimony/chappelle.pdf> (Jan. 1, 2002); [2] the Honorable Sam J. Ervin, IV, Commissioner, North Carolina Utilities Commission before the U.S. House of Representatives Energy and Commerce Committee Subcommittee on Energy and Air Quality to address **"A Review of the Department of Energy's Yucca Mountain Project, and Proposed Legislation to Alter the Nuclear Waste Trust Fund"**, available at http://www.naruc.org/Testimony/ervintestimony_032504.pdf (Mar. 24, 2004); [3] the Honorable Marylyn Showalter, NARUC President, Commissioner with the Washington Utilities and Transportation Commission before the U.S. House of Representatives Energy and Commerce Committee Subcommittee on Energy and Air Quality, on **"The Energy Policy Act of 2005"** (which covered nuclear waste disposal issues), available at http://www.naruc.org/Testimony/showwaltertestimony_021005.pdf (Feb. 10, 2005); [4] the Honorable Robert Garvin, Commissioner, Wisconsin Public Service Commission, before the U.S. House of Representatives Energy and Commerce Committee Subcommittee on Energy and Air Quality, on **"Nuclear Waste Fund Reform,"** available at http://www.naruc.org/Testimony/garvintestimony_031005.pdf (Mar. 10, 2005); [5] the Honorable Stan Wise Chairman, Georgia Public Service Commission before the U.S. House of Representatives Energy and Commerce Committee Subcommittee on Energy and Air Quality, on **"Nuclear Fuel Management and Disposal,"** available at http://www.naruc.org/Testimony/Test_Nuc_Waste_9-13-06_Final.pdf (Sept. 13, 2006); [6] the Honorable James Y. Kerr, II, NARUC President, Commissioner, North Carolina Utilities Commission before the United States Senate Committee on Environment and Public Works on **"Examination of the Licensing Process for the Yucca Mountain Repository"**, available at <http://www.naruc.org/Testimony/07%201029%20Kerr%20Testimony.pdf> (Oct. 31, 2007); and [7] the Honorable Anne C. George, Connecticut Department of Utility Control before the U.S. House of Representatives Energy and Commerce Committee Subcommittee on Energy and Air Quality on **"Next Steps Toward Permanent Nuclear Waste Disposal"**, available at <http://www.naruc.org/Testimony/08%200715%20George%20Testimony.pdf> (Jul. 15, 2008).

NARUC is sui generis and has represented the interests of State public utility commissioners for over 100 years.⁵ The association also has been recognized both by Congress in several statutes⁶ and consistently by Article III courts⁷ as the proper entity to represent the collective interests of the State utility commissions. NARUC also routinely files on behalf of its members before DOE, the Federal Energy Regulatory Commission, the National Institute of Standards and Technology, the National Telecommunications Information Administration, the Federal Communications Commission, the Federal Trade Commission, the

⁵ All of NARUC's members are government regulators. For years (until the mid-nineties) the federal government provided office space for NARUC in the offices of the Interstate Commerce Commission (ICC). When the ICC was dissolved, the Federal Energy Regulatory Commission offered to provide rent-free office facilities, but the State Commission leadership of NARUC declined.

⁶ See 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Board to consider issues of concern to both the Federal Communications Commission and State regulators with respect to universal service, separations, and related concerns; Cf. 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). Cf. NARUC, et al. v. ICC, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains "...Carriers, to get the cards, applied to...(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system.).

⁷ See, e.g., United States v. Southern Motor Carrier Rate Conference, Inc., 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985) (where the United States Supreme Court noted: "The District Court permitted . . . (NARUC), an organization composed of state agencies, to intervene as a defendant. Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions of those States in which the defendant rate bureaus operate." 471 U.S. 52, n. 10. See also, Indianapolis Power and Light Co. v. ICC, 587 F.2d 1098 (7th Cir. 1982); Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir. 1976); Compare, NARUC v. Federal Energy Regulatory Commission, 475 F.3d 1277 (D.C. Cir. 2007); NARUC v. Federal Communications Commission, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985).

Rural Utilities Service, the Securities and Exchange Commission, and other federal agencies.

In any case, under longstanding NRC precedent, an organization may properly base standing on its members' interests ("representational standing"). The organization must show at least one individual member has standing to participate, in accordance with the three-part judicial test. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 390-93 (1979).⁸ The organization must: (1) identify at least one of its members by name and address; (2) demonstrate how that member may be affected by the licensing action; and (3) show (preferably by affidavit) that the organization is authorized to request a hearing on behalf of that member. Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-98-12, 47 NRC 343, 354; aff'd in part, rev'd in part, CLI-98-21, 48 NRC 185 (1998); citing Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).⁹

⁸ Based on the "case or controversy" limitations of Article III of the Constitution, judicial concepts require that the petitioner show: (1) a distinct harm that constitutes injury-in-fact; (2) that the injury can be fairly traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision. Bennett v. Spear, 520 U.S. 154, 167 (1997) (citing Lujan v. Defenders of the Wildlife, 504 U.S. 555, 560-61 (1992)).

⁹ See also, Private Fuel Storage, (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999), suggesting an organization must also show that: (1) its members would otherwise have standing to sue; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires an individual member to participate in the organization's lawsuit.

The attached affidavit of Commissioner Wright, the current Chairman of NARUC's *Nuclear Issues-Waste Management Disposal Subcommittee*, discusses the particularized injuries suffered by NARUC members as a result of the continuing lack of a licensed high level waste repository, and provides evidence that demonstrate that NARUC is authorized by members to petition to intervene and represent their interests in this matter. In brief:

[a] Name and address of a NARUC Member State Commissioner:

The Honorable David Wright is a Commissioner with the South Carolina Public Service Commission and a NARUC member who receives his official mail at South Carolina Public Service Commission, 101 Executive Center Drive, Columbia, SC 29210. He is just one of over 250 NARUC member State commissioners from across the United States, but his experiences and obligations are representative of his colleagues.

[b] NARUC's authorization to participate for its members:

Specifically, the affidavit, appended as Attachment 1, cites a February 2010 resolution passed by NARUC at its recent winter meetings in Washington, D.C., instructing NARUC to oppose withdrawal of the application and to appear before the NRC.

*[c] Standing:*¹⁰

The affidavit also outlines the general scope of the South Carolina Commission's interest in this proceedings, citing its obvious concerns about a successful review of Yucca Mountain, and how DOE's withdrawal of the application undermines Commissioner Wright's, and many of his NARUC colleagues', ability to fulfill their respective parens patriae statutory duties to protect, the health, safety, and economic welfare of electric ratepayers. DOE, in its Final Environmental Impact Statement for the Yucca Mountain Geological Repository, concludes that not building the repository, assuming that no effective institutional controls in place after 100 years, would lead to a situation where, "the spent nuclear fuel and high-level radioactive storage facilities in at 72 commercial and 5 DOE sites would begin to deteriorate and that radioactive material would be released into the environment, contaminating the local atmosphere, soil, surface water, and groundwater." FEIS Section 7.2.2, at p. 7-33.¹¹ Those sites are all

¹⁰ This requirement raises an interesting issue, as all of NARUC's voting members are officials heading "governmental bod[ies]," and because all nuclear facilities are located within the boundaries of States that have a NARUC member commission, arguably, NARUC should be deemed to have standing for purposes of this hearing and "need not address the standing requirements." See 10 C.F.R. § 2.309(d)(2). However, pending a final ruling on this petition, we address the standing issue, infra.

¹¹ See, generally, Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105-6 (1976) (Zone of interests created by the AEA is avoidance of a threat to health and safety of the public). Cf. footnote 10, and the accompanying text at pages 4-5 of the attached Affidavit of the Honorable David Wright, NARUC Member Commissioner, in Support of the Standing of the National Association of Regulatory Utility Commissioners.

within the geographic boundaries of NARUC's State commission members. Mr. Wright's affidavit references those in South Carolina as well as, via a webpage citation, the locations of others. See also map of locations at FEIS Figures 7-7, at 7-36.

As is discussed in the affidavit, NARUC's member State commission interests will be adversely affected by the continuing unavailability of a repository.

State utility commissions oversee nuclear utility rates including the pass-through cost of the Nuclear Waste Fund that pays for the establishment of a long-term repository, including the Nuclear Regulatory Commission's (NRC's) licensing proceedings. 42 U.S.C. § 10222. Ratepayers have funded, via pass-throughs, over \$17 billion dollars in fees into the Nuclear Waste Fund to cover costs associated with the yet-to-be provided federal waste disposal repository. (See Attachment 2). In addition, because of the ongoing lack of a repository, used fuel remains in interim storage at the sites of both operating and at least eight shut-down facilities. NARUC Commissioners must deal with the issues of costs to the utilities of interim storage and the security of this waste while waiting for the federal government to take title and dispose of the waste as required by the NWPA. DOE does not contest this mandate. In its motion to withdraw the application, "DOE reaffirms its obligation to take possession and dispose of the nations spent nuclear fuel and high level nuclear waste." U.S. Dep't of Energy (High-Level

Waste Repository) DOE Motion to Withdraw, ASLBP No. 09-892-HLW-CAP04, at 1 (March 3, 2010) (DOE Motion).

The listed distinct harms are directly traceable to the withdrawal of the license application for the repository and, assuming a “favorable outcome,” *i.e.*, that this Commission rejects the DOE motion will be substantially diminished.¹² If, on the other hand, the DOE is allowed to withdraw the licensing application, the billions expended for the licensing proceeding would be wasted, and the long-term nuclear waste storage process would be back at square one. This would significantly delay the DOE’s ability to take title to the waste, exacerbating the security issues and extending the cost of interim storage, while DOE continues to collect money under the NWF. This would cause significant harm to NARUC’s members, constituting an injury in fact that is clearly within the zone of interest that the NWPA and AEA seek to protect.

[d] “Private Fuel Storage” Factors:

In terms of the Private Fuel Storage factors referenced in footnote 9, *supra*, there is no doubt NARUC’s members have sufficient injury to justify suit. It is also clear from both the examples of serial testimony referenced in footnote 4 NARUC has presented to Congress in the last eight years, as well as the passage of

¹² See, footnote 8, *supra*.

multiple resolutions on this topic over the last 25 years,¹³ our participation as amici in two recent appeals,¹⁴ and as the lead petitioner in the earlier cited NARUC v.

¹³ See, e.g., the last 10 years of NARUC resolutions on Nuclear issues, available online at NARUC's website at <http://www.naruc.org/resolutions.cfm>: Resolution (a) on *National Policy for Management and Disposal of Spent Fuel from Commercial Nuclear Power Plants* (Feb. 17, 2010), (b) *In Support of Ensuring the Federal Government Fulfills its Obligation to Remove Spent Nuclear Fuel from Present Reactor Storage Sites* (Feb. 18, 2009), (c) *Regarding Guiding Principles for Disposal of High-Level Nuclear Waste* (Feb. 20, 2008) (d) *Supporting Maintaining Continued Focus on Development of a Permanent Repository for Nuclear Waste Disposal* (Feb. 21, 2007), (e) *Supporting Limited Interim Storage of Spent Nuclear Fuel And Preserving the Nuclear Waste Fund for a Permanent Repository* (Aug. 2, 2006), (f) *Opposing Having the Federal Government Take Title to Spent Nuclear Fuel in Dry Cask Storage and Keep it at Reactor Sites* (Feb. 15, 2006), (g) *Supporting Reform of the Nuclear Waste Fund* (Feb. 15, 2006), (h) *Supporting Reform of the Nuclear Waste Fund* (Feb. 16, 2005), (i) *Supporting Reform of the Nuclear Waste Fund* (Mar. 10, 2004), (j) *Supporting Needed Reform of the Nuclear Waste Fund* (Feb. 26, 2003), (k) *Regarding Transportation and Other Community Impacts Associated with a Geologic Repository at Yucca Mountain, Nevada* (Nov. 13, 2002), (l) *Urging a Prompt Administration Decision on Yucca Mountain* (July 18, 2001), (m) *Supporting Nuclear Power Plant License Renewal* (July 26, 2000), (n) *In Support of the Department of Energy's Civilian Radioactive Waste Program Budget for Fiscal Year 2001* (Mar. 8, 2000), (o) *On the U.S. Department of Energy's Draft Environmental Impact Statement for a Geologic Repository at Yucca Mountain, Nevada* (Nov. 10, 1999), (p) *Supporting an Adequate Appropriation for the Department of Energy's Nuclear Waste Management and Disposal Program* (July 23, 1999), (q) *Regarding the Nuclear Regulatory Commission's Efforts to Improve its Regulatory Processes* (Feb. 24, 1999), (r) *On Funding Nuclear Research and Development* (Feb. 24, 1999), and (s) *Regarding the DOE's Viability Assessment of a High-Level Nuclear Waste Repository at Yucca Mountain* (Feb. 24, 1999).

¹⁴ See, August 5, 2009, **Brief Of Amicus Curiae the National Association of Regulatory Utility Commissioners Supporting Nebraska Public Power District's Appeal To Reverse the United States Court of Federal Claims' October 31, 2006 Order**, filed in Nebraska Public Power District v. United States, Case Number 2007-5083 before the United States Court of Appeals for the Federal Circuit (NARUC's brief addressed a DOE defense under the "standard contract" to avoid paying damages for breaching its duty to accept nuclear waste.) See also, **January 21, 2009, Motion For Leave To File Amicus Curiae Brief And Brief of the National Association of Regulatory Utility Commissioners As Amicus Curiae In Support Of Petitioners**, filed in the United States Supreme Court, Case No. 08-790, On a petition for a Writ of Certiorari to the United Court of Appeals for the Federal Circuit in the proceeding captioned Delmarva Power and Light Company and Atlantic City Electric Company v. United States & PSEG Nuclear, LLC and Public Service Electric and Gas Company, (NARUC's brief argues about the impact unanticipated long-term onsite storage caused by DOE's failure to take waste), available at <http://www.naruc.org/Filings/09%200121%20Delmarva%20Amicus%20fin%20pdf.pdf>.

DOE case,¹⁵ that the interests that the organization seeks to protect in this case are central and germane to its purpose. It is also apparent that the relief NARUC is requesting – rejecting the DOE’s motion to withdraw – does not require an individual NARUC member to participate in this lawsuit to protect any separate interest.

3. Nature and extent of NARUC’s property/ financial or other interest in the proceeding [10 C.F.R. §2.309(d)(1)(iii)]

NARUC’s members expend increased staff and financial resources on safety/financial oversight (and on licensing new facilities) because of DOE’s failure to comply with its statutory obligation to take possession of waste. Utilities pay for the so-far non-existent repository for commercial nuclear waste through the NWF, which is, in turn, passed through, by NARUC members, to ratepayers. Since the NWPA was enacted in 1982, State ratepayers served by our members, along with reactor owners, have paid more than \$17 billion dollars into the Nuclear Waste Fund, in part, to support the process of reviewing a permanent repository. (Attachment 2).¹⁶ See also, the standing discussion, supra at Section A, starting on page 5.

¹⁵ 851 F.2d 1424 (D.C. Cir. 1988).

¹⁶ DOE Office of Civilian Radioactive Waste Management, Office of Business Management Summary of Program Financial & Budget Information at 4 (Jan. 31, 2010), available at <http://www.ocrwm.doe.gov/uploads/1/financialandbudgetsummary.pdf>.

4. Possible effects of any decision or order that may be issued on NARUC's interest [10 C.F.R. §2.309(d)(1)(iv)]

The withdrawal with prejudice of the Yucca Mountain application is an attempt by DOE to permanently eliminate Yucca Mountain as geological repository option. Such a withdrawal would significantly harm ratepayers who have paid billions of dollars, through utility charges approved by State commissions, into the Nuclear Waste Fund (established by 42 U.S.C. § 10222(c)). The NWF pays for the research, licensing, and other costs associated with the repository design. See 42 U.S.C. § 11072, (enumerating NWF uses). Over 20 years ago, Congress designated Yucca Mountain as the site for the repository. See Nuclear Waste Policy Amendments Act of 1987 (enacted Dec. 22, 1987), codified at 42 U.S.C. 10172. DOE's motion to withdraw the application with prejudice, if granted, would waste decades of ratepayer-funded research on the basis of a wholly unsubstantiated assertion that "Yucca Mountain is not a workable option for long-term disposition of these materials." DOE Motion at 1. It also necessarily exacerbates NARUC's member commission's ability to carry out their fiduciary responsibilities to protect the health, safety, and economic welfare of its State electric ratepayers.

B. Discretionary Intervention in the alternative [10 C.F.R. § 2.309(e)]

If NARUC is determined to lack standing as a matter of right under 10 C.F.R. § 2.309(d), NARUC petitions in the alternative for intervention at the discretion of the Board in accordance with 10 C.F.R. § 2.309(e).

1. NARUC's participation may reasonably be expected to assist in developing a sound record [10 C.F.R. § 2.309(e)(1)(i)]

See the Section I. C. 8 discussion, infra, at page 22.

2. Nature and extent of NARUC's property, financial, or other interest in the proceeding [10 C.F.R. § 2.309(e)(1)(ii)]

See the discussion in Section I. A. 3, supra, at page 14.

3. Possible effect of any decision or order on NARUC's interest [10 C.F.R. § 2.309(e)(1)(iii)]

See the discussion in Section I. A. 4, supra, at page 15.

4. Other means by which the NARUC's interest may be protected [10 C.F.R. § 2.309(e)(2)(i)]

See the discussion in Section I. C. 5, infra, at page 20.

5. Extent that NARUC's perspective will be represented by existing parties [10 C.F.R. § 2.309(e)(2)(ii)]

See the discussion in Section I. C. 6, infra, at page 20.

6. Extent to which NARUC's participation will inappropriately broaden the issues or delay the proceeding [10 C.F.R. § 2.309(e)(2)(iii)]

See the discussion in Section I. C. 7, infra, at pages 21-22.

C. Non-Timely Intervention [10 C.F.R. § 2.309(c)]

NRC rules of procedure allow for late-intervention and establish eight factors to evaluate a motion to intervene. See 10 C.F.R. § 2.309(c). We discuss each factor, infra. The Board has broad discretion in granting petitions to intervene based on these factors. See Virginia Electric & Power Co. (North Anna Power Station, Units 1 &2) ALAB-342, 4 NRC 98 (1976) superseded by statute on other grounds, Pub. L. No, 97-145, as recognized in Envirocare of Utah, Inc. LBP-928, 35 NRC 167 (1992).

1. Good Cause for failure to file on time [10 C.F.R. § 2.309(c)(i)]

NRC weights this first factor the most heavily when deciding whether to grant NARUC's petition. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3) CLI-05-24, 62 NRC 551 (2005). DOE's March 3, 2010 motion to withdraw its licensing application triggered NARUC's motion to intervene. NARUC clearly had good reason for not filing by the original deadline for interventions. This DOE motion to withdraw the license application was not just unpredictable, but also highly improbable, when the deadline for timely interventions lapsed on December 21, 2008, sixty days from the Federal Register publication of the Licensing Proceeding for the High Level Waste Repository. 73 Fed. Reg. 63029 (Oct. 22, 2008).

When DOE filed the application, it was poised for an NRC evaluation of its technical merits. NARUC supported DOE in the 2002 Congressional debate that resulted in Congress once again sanctioning the selection of Yucca Mountain as the site for the geological repository. See Approval of Yucca Mountain Site, Pub. L. No. 107-200 Stat. 735 (2002). DOE took *six years*, from 2002 to 2008 to prepare the license application. The preparation, while lengthy and costly, resulted in a high quality license application that, on its face, provides the Board reasonable assurance that the facility can be built and operated in accordance with the legal and regulatory requirements. As a result, there was no reason for NARUC to intervene.

The NRC has held that new developments and the availability of new information support out-of-time motions to intervene. See Duke Power Co. (Amendment to Materials License SNM-1773- Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528 9 NRC 146, 148-49 (1979); Consumer Power Co. (Midland Plant, Units 1 & 2), LBP-82-62, 16 NRC 571, 577 (1982); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station Units, 1 & 2), CLI-92, 36 NRC 62, 69-73 (1992). In evaluating such motions, the Board looks at when the information came to light

and when the petitioner should reasonably have become aware of it. Texas Utilities Electric Co. at 69-71. If DOE’s motion is granted, the NRC will no longer have an opportunity to evaluate the license application on its merits. This presents NARUC with an obvious reason for intervening late, the key information – DOE’s legally suspect, and surprising decision to withdraw the application when *the same agency spent six years assuring everyone that the application was supported in all of the particulars* – “is only now available for the first time,” Id. at 70. Immediately upon learning that DOE filed a motion to withdraw the application, a motion that is woefully inadequate on its face, NARUC consulted with our members and prepared this petition to intervene.

2. The nature of NARUC’s right under the Act to be made party to a proceeding [10 C.F.R. § 2.309(c)(ii)]

See the discussion in, Section I. A. 2, supra, at pages 5-14.

3. The nature and extent of NARUC’s property, financial or other interests in the proceeding [10 C.F.R. § 2.309(c)(iii)]

See the discussion in Section I. A. 3, supra, at page 14.

4. The possible effect of any order that may be entered in the proceeding on NARUC’s interests [10 C.F.R. § 2.309(c)(iv)]

See the discussion in Section I. A. 4, supra, at page 15.

5. The availability of other means whereby NARUC’s interests will be protected [10 C.F.R. § 2.309(c)(v)]

While NARUC is considering other avenues to protect its interests including legal action,¹⁷ communication with DOE, and engagement with the Blue Ribbon Commission on America’s Nuclear Future, this Board will determine whether or not DOE can withdraw its application. The withdrawal “with prejudice” is intended to “provide finality in ending the Yucca Mountain project” DOE Motion at 3. While NARUC reserves its right to pursue recourse in other forums, this proceeding will have a significant and direct impact on NARUC’s interests and defense of those interests in another forum may be significantly less effective than defending the interests in this proceeding.

6. The extent to which NARUC’s interest will be represented by existing parties [10 C.F.R. § 2.309(c)(vi)]

No existing party to this proceeding, or potential intervener, represents a NARUC member commission or directly covers all of NARUC’s member’s interests. See discussion, supra, at pages 10-16.

¹⁷ Several law suits have been filed against DOE in anticipation of this application to withdraw the license with prejudice: In Re Aiken County (DC Circuit Docket No. 10-1050); Ferguson, Lampson, and Petersen v. Obama (DC Circuit Docket No. 10-1052); and South Carolina v. DOE (4th Cir.).

7. The extent to which NARUC's participation will broaden the issues or delay the proceeding [10 C.F.R. § 2.309(c)(vii)]

DOE's motion to withdraw the licensing application raises the question of whether DOE even has authority to request withdrawal without any justification (record-based or otherwise) or, in any case, withdrawal "with prejudice." It also presents squarely whether the Board has the authority to grant such a motion. NARUC will oppose DOE's motion (See Contentions in Section II, *infra*). Our participation will not broaden the issues or delay the proceeding. This docket is still in the discovery phase and a date has not been set for a hearing on the merits. DOE's motion to withdraw already shifted the procedural schedule,¹⁸ effectively providing time for interventions that will not engender further delay. Moreover, the Board issued a scheduling order indicating it will decide South Carolina, Washington, and Aiken County petitions to intervene before it will set the deadline for answers regarding DOE's motion to withdraw the application. U.S. Dep't of Energy (High-Level Waste Repository) Order Concerning Scheduling, ASLBPN09-892-HLW-CAB04 (March 5, 2010). The NRC has granted late intervention in similar circumstances. See e.g. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation) BP-99-3, 49 NRC 40 (1999) (allowing for intervention when a case was still in the informal discovery stage)

¹⁸ The Board granted DOE a 30-day stay of proceedings while DOE prepared its motion to withdraw the application. Order Granting Stay of Proceeding (February 16, 2010).

c.f. Dominion Nuclear Connecticut, Inc. 62 NRC at 564 (denying intervention when the proceeding had closed). It also should grant NARUC's petition.

8. The extent to which NARUC's participation may reasonably be expected to assist in developing a sound record [10 C.F.R. § 2.309(c)(viii)]

NARUC's participation will promote a full briefing on the issues raised by DOE's motion to withdraw the application with prejudice. As the contentions asserted in the following section demonstrate, NARUC will contribute to a robust briefing and hearing on the merits of DOE's motion to withdraw the application.

II. CONTENTIONS TO BE RAISED [10 C.F.R. 2.309(f)]

In accordance with the rules of procedure and the June 20, 2008 Memorandum and Order,¹⁹ NARUC sets forth the following contentions:

¹⁹ U.S. Dep't of Energy (High-Level Waste Repository) Pre-Licensing Application Presiding Officer's Memorandum and Order (LBP-01-10) 67 NRC __, (June 20, 2008).

A. NAR²⁰-MISC-01

NEITHER DOE NOR THE NRC HAVE DISCRETION TO TERMINATE THIS PROCEEDING WITH PREJUDICE.

1. Specific statement of issue of law raised or controverted.

Whether DOE has the authority to withdraw its application with prejudice, and whether NRC has discretion to grant such a withdrawal under 42 U.S.C. §10134(b) and 42 U.S.C. §10134(d).

2. Brief explanation of basis of contention.

Congress has determined that the deep geological repository at Yucca Mountain is the appropriate method for disposing of nuclear waste, and established a procedure to analyze that choice. The procedure is designed to ensure that any repository will provide maximum protection to the public and the environment. See 42 U.S.C. § 10131(b) and the Joint Resolution of Congress Approving the site at Yucca Mountain, Nevada or the Development of a Deep Geological Repository, Pub. L, No, 107-200 Stat. 735 (2002).

²⁰ “NAR” is an abbreviation for NARUC as used in this document as required by the U.S. Dep’t of Energy (High-Level Waste Repository) Pre-Licensing Application Presiding Officer’s Memorandum and Order (LBP-01-10) 67 NRC __, (June 20, 2008), at 5.

Through the Joint Resolution signed by the President, Congress selected Yucca Mountain, and bound the parties to move forward with the application process.²¹ After the selection of Yucca Mountain, the NWPA directs DOE to submit an application to the NRC for licensing:

“The Secretary shall submit to the Commission an application for a construction authorization for a repository at [Yucca Mountain] not later than 90 days after the date which the recommendation of the site designation is effective....”
42 U.S.C. §10134(b) (emphasis added).

The NWPA then specifies that the NRC “shall consider the application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications” 42 U.S.C. §10134(d) (emphasis added).

This language makes clear that DOE is obligated to submit the application and the NRC is obligated to review it. Neither has discretion. This Board itself has previously conceded that DOE is “required to submit an application for a construction authorization to the NRC” U.S. Dep’t of Energy (High Level Waste Repository), LBP-09-6, 69 NRC __ (May 11, 2009) (slip op) at 27 (emphasis in

²¹ See e.g. *Nuclear Energy Inst. v. EPA*, 373 F. 3d 1251, 1302 (D.C. Cir. 2004). (“Congress's enactment of the Resolution –which independently approved the Yucca site for development – was a final legislative action once it was signed into law by the President....the Resolution is law and cannot be set aside absent a constitutional defect. Having found no such defect, we conclude that ... Congress has settled the matter, and we, no less than the parties, are bound by its decision.”)

original). NWPA Section 114 obligates DOE and NRC to follow through with the application proceeding until NRC makes a decision on the merits of the application.

DOE's motion not only attempts to circumvent the statute's clear instructions, it also – with no factual basis – seeks dismissal with prejudice to “provide finality in ending the Yucca Mountain project.” DOE Motion at 3. DOE asserts that withdrawal with prejudice will preclude DOE from ever filing another application for a repository at Yucca Mountain.

Significantly, DOE does not assert any record-based finding or rationale for ignoring the statutorily-mandated licensing procedure. It only asserts that the President has determined that Yucca Mountain “has not proven effective.” DOE Motion at 4. This Presidential “determination” cannot provide any basis for either DOE or the NRC to ignore the law. NARUC does not challenge DOE's discretion to establish a Blue Ribbon Commission (BRC) to study America's Nuclear Future, including alternatives to Yucca Mountain (in fact NARUC intends to participate in the BRC's process). Nor do we assert that the requirement to submit the application would necessarily result in its approval – though certainly the six years of preparation strongly suggest that approval is likely. The statute simply requires

DOE and NRC to take the next step to study the safety of Yucca Mountain and determine if a repository could be licensed there.²² Simply put, DOE lacks authority to file a motion to have the application dismissed with prejudice without any analysis or record that would support that decision. Nor does the NRC have the authority to permanently preclude the option of a license for a Yucca Mountain repository by granting DOE's motion to withdrawal with prejudice.

3. Demonstrate issue is within scope of proceeding.

By filing its application on March 3, 2010 to withdraw with prejudice the license application, DOE made this issue central to the proceeding.

4. Issue is material to findings NRC must make to support action involved in the proceeding.

The legality of DOE's motion to withdraw with prejudice the license application and whether NRC has the authority to grant such a motion are material to the proceeding.

²² The Joint Resolution directed DOE to "take the next step in the process laid out by the Nuclear Waste Policy Act and apply to the NRC for authorization to construct the repository at Yucca Mountain" S. Rep. No. 107-159, at 13 (2002).

5. Concise statement of alleged facts or expert opinions and references to specific issues relied upon.

The issues raised in this pleading are exclusively legal in nature. Given that DOE has provided no technical or record-based citations/rationale to support and/or justify its motion, no factual issues have been raised.

6. Genuine dispute of law or fact.

DOE clearly believes it has the authority to withdraw the application with prejudice. NARUC contests this assertion as described supra. NARUC does not anticipate any disputed facts, because DOE has not offered any to justify its motion.

B. NAR-MISC-02

ALTERNATIVELY, IF THE NWPA DOES NOT PRECLUDE DOE FROM MOVING TO DISMISS WITH PREJUDICE, DOE HAS FAILED TO MEET THE BOARD’S REQUIREMENTS FOR DISMISSAL WITH PREJUDICE.

1. Specific statement of issue of law raised or controverted.

Whether DOE’s motion to withdraw the license application with prejudice meets the requirements for such a withdrawal that the Board has asserted in prior cases.

2. Explain basis of contention.

If the Board determines that the NWPA does not preclude DOE from moving to withdraw its application with prejudice, DOE’s application still fails to meet the Board’s requirements for withdrawal with prejudice.

NRC conforms to the standard view that dismissal with prejudice should be granted only after the merits of the case have been evaluated and adjudicated.²³

²³ See Philadelphia Electric Co. (Fulton Generating Units 1 and 2), ALAB-657, 14 NRC at 973, 978-79 (1981) (citing Jamison v. Miracle Mile Rambler, Inc., 536 F.2d 560, 564 (3d Cir. 1976) ““A dismissal with prejudice “constitutes an adjudication of the merits as fully and completely as if the order had been entered after trial.””); Puerto Rico Power Authority (North Coast Nuclear Plant, Unit 1) 14 N.R.C. 1125, 1133 (1981)

“[I]t is highly unusual to dispose of a proceeding on the merits, *i.e.*, *with prejudice*, when in fact the health, safety and environmental merits of the application have not been reached;” Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-662, 14 NRC 1128, 1135 (1982) (holding that dismissal with prejudice amounts to adjudication on the merits); Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 51 (1999) (holding that dismissal with prejudice amounts to adjudication on the merits).

Dismissal with prejudice is a severe sanction that the NRC has determined should be applied sparingly. The standard from Philadelphia Electric Co. and Puerto Rico Power Authority recognizes that:

(1) it is highly unusual to dispose of a proceeding on the merits, *i.e.*, *with prejudice*, when in fact the health, safety and environmental merits of the application have not been reached; (2) the effect spent in pursuing a nuclear power plant application at the same site for a second time is presumptively preceded by a judgment, entitled to some credence, that there exists a public interest need for the plant's power; and (3) the number of potentially acceptable sites for a nuclear power plant are perforce limited: they should not be eliminated from further consideration absent good and sufficient reason.
Puerto Rico Power Authority at 1133.

Applied to the instant case, these factors argue against granting withdrawal with prejudice: (1) the health, safety, and environmental merits have not been evaluated; (2) the NWPA's selection of Yucca Mountain for the geological

repository lends at least some credence to the idea that the geological repository would be in the public interests; and (3) the number of potentially acceptable sites for a geological repository are even more limited than those of a nuclear plant. The NRC's own test for withdrawal with prejudice of the application weighs heavily against granting DOE's motion.

Generally withdrawal with prejudice requires some demonstration that harm resulted to a party or the public interest in general. See Philadelphia Electric Co. 14 NRC at 979, Puerto Rico Power Authority at 1133. In the instant case, DOE's motion does not even attempt to assert that the application caused harm to any party or the public in a manner that would justify the motion to withdraw the application with prejudice. Instead their motion seeks *finality*. But granting the motion with prejudice will cause harm to others who support the application and to the public interest as codified in the NWPA, which requires DOE to file an application for licensing of a repository at Yucca Mountain. The Board should deny the motion to withdraw the application with prejudice because "the public interest would best be served by leaving the ... option open to the applicant should changed conditions warrant its pursuit." Puerto Rico Power Authority at 1132.

3. Demonstrate issue is within scope of proceeding.

By filing its application on March 3, 2010 to withdraw with prejudice the license application, DOE made this issue central to the proceeding.

4. Issue is material to findings NRC must make to support action involved in the proceeding.

The NRC must determine whether or not DOE meets the requirements for withdrawal with prejudice in order to move forward with the proceeding.

5. Concise statement of alleged facts or expert opinions and references to specific issues relied upon.

The issues raised in this pleading are exclusively legal in nature. DOE has not raised any technical inadequacy or record-based findings undermining the original submission of the license application.

6. Genuine dispute of law or fact.

DOE clearly believes it has the authority to withdraw the application with prejudice. NARUC contests this assertion as described above. NARUC does not anticipate any disputed facts.

C. NAR-MISC-03

***DOE’S DECISION TO IRREVOCABLY TERMINATE
THE YUCCA MOUNTAIN PROJECT IS ARBITRARY
AND CAPRICIOUS IN VIOLATION OF
ADMINISTRATIVE PROCEDURES ACT***

**1. Specific statement of issue of law or fact to be raised or
controverted.**

Whether DOE’s motion to withdraw the license application with prejudice without any explanation besides the assertion that “Yucca Mountain is not a workable option for long term disposition. . .” (DOE Motion at 1) is arbitrary and capricious in violation of the Administrative Procedures Act (APA), 5 U.S.C. §706(2) (A).

2. Explain basis of contention

DOE acted arbitrarily and capriciously in moving to withdraw its licensing application with prejudice without any administrative record or colorable explanation for the action. This contention relates to NARUC’s first contention that DOE does not have the discretion to withdraw the application with prejudice under the NWPA. The NRC may not have the jurisdiction to evaluate DOE’s violation of the APA, but in the case that the Board asserts jurisdiction over this

issue, NARUC contends that DOE's motion to withdraw the application with prejudice violates the APA.

DOE's motion to withdraw the application is certainly a "final agency action," challengeable under APA § 704. The DOE is attempting through its motion to withdraw the application with prejudice to create finality. "DOE seeks [withdrawal with prejudice] because it does not intend ever to re-file an application to construct a permanent geological repository for spent nuclear fuel and high level radioactive waste at Yucca Mountain." DOE Motion at 3 n. 3. In the motion, "DOE reaffirms its obligation to take possession and dispose of the nation's spent nuclear fuel and high level nuclear waste." DOE Motion at 1. But, on the bare assertion that "the Secretary of Energy has decided that a geological repository at Yucca Mountain is not a workable option for long term disposition of these materials" DOE wants to permanently preclude the option of establishing a long term repository at Yucca Mountain. Id. The motion to withdraw does not provide any reasoning or explanation besides the decision of the President and the Secretary of Energy to abandon the project. The motion recognizes that the Yucca Mountain project was initiated by Congress over 20 years ago, and that scientific and engineering knowledge have advanced dramatically in that period. DOE Motion at 3. DOE does not apply any of these scientific or engineering advances

to analyze the project. Rather the Department seeks to arbitrarily and capriciously cease the licensing proceeding and preclude any future analysis or consideration of the Yucca Mountain as a geological repository. This motion to withdraw the application with prejudice is an effort to reverse, without any explanation or record supporting the withdrawal, long standing nuclear waste policy. The withdrawal with prejudice would result in the abandonment of billions of dollars worth of investment and decades of work and preclude the possibility that Yucca Mountain would ever be considered as a long term solution to the nuclear waste problem in this country.

3. Demonstrate issue is within scope of proceeding.

By filing its application on March 3, 2010 to withdraw with prejudice the license application, DOE made this issue central to the proceeding.

4. Issue is material to findings NRC must make to support action involved in the proceeding.

NARUC's contention goes to the core of whether or not DOE's motion should be granted, and as such is material to the proceeding.

5. Concise statement of alleged facts or expert opinions and references to specific issues relied upon

The issues raised in this pleading are exclusively legal in nature.

6. Genuine dispute of law or fact

DOE clearly believes it has the authority to withdraw the application with prejudice. NARUC contests this assertion as described above. NARUC does not anticipate any disputed facts.

D. NAR-MISC-04

***DOE DID NOT COMPLY WITH NEPA BEFORE
DECIDING TO IRREVOCABLY TERMINATE THE
YUCCA MOUNTAIN WASTE REPOSITORY PROJECT***

1. Specific statement of issue of law or fact to be raised or Controverted.

Whether DOE's motion to withdraw the license application with prejudice violates the National Environmental Policy Act (NEPA) 42 U.S.C. § 4321 et seq.

2. Explain basis of contention

DOE's NEPA compliance is a broader issue germane to whether or not DOE can withdraw its application with prejudice. Evaluation of NEPA applicability and compliance may be outside of the NRC's jurisdiction, but in the case that NRC asserts jurisdiction over this claim, NARUC asserts the following contention.

NEPA requires that any federal agency study any action that may significantly effect the environment. 42 U.S.C. § 4332. The motion to withdraw the application for a high-level nuclear waste repository at Yucca Mountain with prejudice falls within NEPA's purview. 40 C.F.R. § 1508.8 (effects that must be studied); 40 C.F.R. § 1508.11 (defining major federal action); 40 C.F.R. § 1508.27 (defining significantly). DOE is therefore required, under NEPA and DOE's own governing regulations, to evaluate its decision to withdraw the application with

prejudice under NEPA before acting to implement its decision. 42 U.S.C. §4332; 40 C.F.R. § § 1501.2, 1501.3, 1501.3, 1502.3, 1506.1, 1507.1; 10 C.F.R. §§ 1021.210(b), 1021.211.

DOE does not assert that it made any attempt to study the environmental impacts of its motion to withdraw with prejudice the application. Nor does it assert that this decision falls within the “No Action Alternative” assessed in the Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High Level Nuclear Waste at Yucca Mountain, Nye County, Nevada (February 2002) (FEIS). In fact, DOE’s motion to withdraw the application fails to even address its NEPA obligations.

DOE’s decision to abandon the Yucca Mountain repository without any analysis of the environmental impacts of the decision (including the effects of leaving waste in interim, on-site storage) violates DOE’s obligations under NEPA.

3. Demonstrate issue is within scope of proceeding.

By filing its application on March 3, 2010 to withdraw with prejudice the license application, DOE made this issue central to the proceeding.

4. Issue is material to findings NRC must make to support action involved in the proceeding

NARUC's contention regarding the DOE's failure to conform to NEPA addresses the legality of DOE's motion and as such is material to the proceeding.

5. Concise statement of alleged facts or expert opinions and references to specific issues relied upon

The issues raised in this pleading are exclusively legal in nature.

6. Genuine dispute of law or fact

DOE clearly believes it has the authority to withdraw the application with prejudice. NARUC contests this assertion as described above. NARUC does not anticipate any disputed facts.

III. CONCLUSION

For the foregoing reasons, NARUC respectfully requests that its Petition for Leave to Intervene be granted.

DATED this 15 day of March, 2010

Signed (electronically) by JAMES BRADFORD RAMSAY

James Bradford Ramsay

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National Association of Regulatory
Utility Commissioners

Attachment 1

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:
U.S. DEPARTMENT OF
ENERGY
(High Level Waste Repository)

Docket No. 63-001-HLW
ASLBP NO. 09-892-HLW-CAB04
March 15, 2010

**AFFIDAVIT OF THE HONORABLE DAVID WRIGHT,
NARUC MEMBER COMMISSIONER,
IN SUPPORT OF THE STANDING OF
THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

David Wright, being duly sworn, states as follows:

1. My name is David Wright. I have been a Commissioner on the South Carolina Public Service Commission and a voting member of the National Association of Regulatory Utility Commissioners (NARUC) since March 3, 2004. I am also currently the Chairman of the NARUC's *Nuclear Issues-Waste Management Disposal Subcommittee*, as well as, NARUC's *Washington Action* and *Electricity Committees*. In 2005, I became a National Co-Chairman of the *Yucca Mountain Task Force*, a national group of commissioners, businesses, and independent organizations focused on promoting the expeditious opening of the Yucca Mountain repository in Nevada. In December 2006, I became National Chairman of the *Nuclear Waste Strategy Coalition (NWSC)*. I have served as a representative and board member of NWSC since becoming a commissioner. I have also served as the President of the *Southeastern Association of Regulatory Utility Commissioners*. I receive official mail at: South Carolina Public Service Commission, 101 Executive Center Drive, Columbia, SC 29210.

2. NARUC, founded in 1889, includes as members commissioners at regulatory agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands. These State employees are charged with regulating the rates and conditions of service associated with the intrastate operations of electric, natural gas, water, and phone utilities.

3. In February 2010, at its recent winter meetings held in Washington, D.C., NARUC passed a “***Resolution on National Policy for Management and Disposal of Spent Fuel from Commercial Nuclear Power Plants.***” A copy of the resolution is attached. That resolution [1] instructs NARUC to “call upon the Secretary of Energy not to withdraw the Yucca Mountain license application from the review process underway at the NRC,” [2] points out that “NARUC and State utility commissions as stakeholders in the disposal policy on behalf of ratepayers—who continue to bear the ultimate cost of the fee payments to the Fund—should play an active role in representing their views to the Blue Ribbon Commission, drawing upon the multiple NARUC nuclear waste policy resolutions adopted over the past 25 years, and [3] specifically instructs NARUC to “convey to the (Nuclear Regulatory) Commission that any alternative that leaves the spent nuclear fuel at present storage sites indefinitely, whether managed by the owners or by the government, is inconsistent with the NWPA findings of 1982 and would break faith with the communities which host those reactors with the understanding that the spent fuel would be removed by the government.”

4. Like almost all of my fellow NARUC State Commissioners, I am charged by State statute with overseeing the operations of electric utilities operating in my State. For example, this past February, my Commission unanimously approved a request by our State’s largest utility, South

Carolina Electric & Gas (SCE&G), to join with a State-owned utility to build two new nuclear reactors. We approved rate increases to finance SCE&G's \$5.4 billion dollar investment in the new nuclear plant, which will be located just 30 miles north of our State's capital in Columbia. Order No. 2009-104(A) (March 2, 2009) (Docket No. 2008-196-E) Like many of my NARUC colleagues, limiting both the expense and the risks¹ of on-site storage of spent nuclear fuel is a part of my broader regulatory responsibilities under the laws of my State.

5. The Nuclear Waste Policy Act (NWPA), enacted in 1982, made the federal government responsible for safe and final disposal of such waste. Under the Act, utilities pay fees for disposal through the Nuclear Waste Fund (NWF). *Those fees are passed through to ratepayers.* Although

¹ Safe operation of electric facilities, including nuclear plants, is a key focus of my Commission's oversight. See, e.g., CHAPTER 103 South Carolina Code of Regulations, ARTICLE 3. ELECTRIC SYSTEMS: 26 S.C. Code Ann. Regs. 103-312(2)(D)(e). "The electrical utility shall advise the commission . . . of the name, address and telephone number of the . . . persons, to be contacted in connection with . . . c. Engineering and/or Operations. . . e. Emergencies during non-office hours."; 26 S.C. Code Ann. Regs. 103-313. "Inspection of Utility Plant. - A. Each utility shall . . . provide . . . a statement regarding the condition and adequacy of its plant, equipment, facilities and service . . . [and] . . . keep sufficient records to give evidence of compliance with its inspection programs."; 26 S.C. Code Ann. Regs. 103-315. "A. Each electrical utility shall . . . report . . . each material incident [to] the operation of the electrical utility's property, facilities, or service including, but not limited to: (a) serious injury or death of any person; (b) evacuation; and (c) damage to a customer's or third party's property . . . Such first report shall later be supplemented . . . by a statement of the cause . . . and the measures, if any . . . taken to reduce the risk of similar incidents . . . B. Each electrical utility shall establish . . . procedures for analyzing, reporting, and minimizing the possibilities of any future incidents." 26 S.C. Code Ann. Regs. 103-347. "Each electrical utility . . . shall operate and maintain in a safe, efficient and proper condition all of the facilities and equipment." 26 S.C. Code Ann. Regs. 103-360. "The electric plant . . . shall be constructed, installed, maintained and operated in accordance with good engineering practice to assure, as far as reasonably possible, continuity of service . . . and the safety of persons and property. SubArticle 8 "SAFETY 26 S.C. Code Ann. Regs. 103-390. "As criteria of accepted good safety practice of the electrical utility, the commission shall use the applicable provisions of the standards listed in regulation 103-361." 26 S.C. Code Ann. Regs. 103-391. "A. Each electrical utility shall exercise reasonable care to reduce the hazards to which its employees, its customers and the general public may be subjected. B. The electrical utility shall give reasonable assistance to the ORS in the investigation of the cause of incidents and shall give reasonable assistance to the commission . . . in the determination of suitable means of preventing incidents. C. Each electrical utility shall maintain a summary of all reportable incidents." 26 S.C. Code Ann. Regs. 103-392. "Safety Program. Each electrical utility shall adopt and execute a safety program, fitted to the size and type of its operations. As a minimum, the safety program should: a. Require employees to use suitable . . . equipment in order that they may perform their work in a safe manner. b. Instruct employees in safe methods of performing their work. . . . d. Establish liaison with appropriate public officials . . . in anticipation of a potential emergency. e. Establish an educational program to enable customers and the general public to recognize and report an electrical emergency."(emphasis added) These regulations are available online at: <http://www.scstatehouse.gov/coderegs/c103.htm#103-305>

utilities and their ratepayers continue to pay these charges, the United States Department of Energy (DOE), which manages the disposal program, failed to meet its statutory and contractual obligation to begin waste acceptance in 1998. To date, South Carolina's ratepayers have paid about \$1.2 billion dollars in fees levied pursuant to the NWPA to develop a permanent storage site and *effectively bear both the increased costs and risks of onsite storage*. Cumulatively, ratepayers across the country, protected by my fellow NARUC Commissioners in other States, have contributed about \$17 billion in fees.

6. Nuclear power supplies electricity to one out of every two homes and businesses in South Carolina. It accounts for 51.2 percent of the State's electricity according to the U.S. Energy Information Administration. There are seven nuclear power plants in South Carolina along with a DOE site near Aiken, South Carolina that houses foreign spent fuel as well as defense high level nuclear waste.²

7. Because nuclear power fuels about 20 percent of the nation's electricity supply, it raises both cost and safety issues for NARUC member State Commissioners across the country, especially for those where nuclear plants are located, *i.e.*, in Arizona, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Iowa, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Tennessee, Texas, Vermont, Virginia, Washington, and Wisconsin. *See*, U.S. Energy

² *See, State Profiles*, U.S. Energy Information Administration (Independent Statistics and Analysis) at: <http://www.eia.doe.gov/cneaf/nuclear/page/at_a_glance/reactors/states.html> (last accessed March 15, 2010) (Lists 31 states that have commercial nuclear reactors, the generation and capacity trends, general locations, and State emissions levels. Profiles updated with 2007 emissions data on November 6, 2009.)

Information Administration, Independent Statistics and Analysis, States with Commercial Nuclear Industries, available online at:

http://www.eia.doe.gov/cneaf/nuclear/page/at_a_glance/reactors/states.html (Accessed March 12, 2010).

8. DOE's Final Environmental Impact Statement for the Yucca Mountain Geological Repository concludes that not building the repository could result in "widespread contamination of the seventy-two commercial and five DOE sites across the United States, with resulting human health impacts." (DOE/EIS—0250, Section 2.12).³

9. Continued operation of existing nuclear plants *requires* some *safe* and secure method of disposing of the high level radioactive waste and spent nuclear fuel generated. Effective management and *permanent* disposal of nuclear waste is essential to minimize the life cycle costs of these facilities. The rising expenses of expanding on-site storage while simultaneously funding reactor decommissioning accounts and the long promised DOE centralized waste repository continues to increase the costs of nuclear energy.

10. Many of NARUC's State commission members scrutinize these costs of electric utilities to ensure ratepayers pay only for expenses that are reasonable and prudent. Utility plans for *interim* on-site storage involve large sums and raise significant financial issues.

³ See, generally, *Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2)*, ALAB-342, 4 NRC 98, 105-6 (1976) (Zone of interests created by the AEA is avoidance of a threat to health and safety of the public). Cf. footnote 1 *supra*.

11. Spent fuel continues to pile up at 73 locations in 35 States at sites that were never intended for long-term storage, and State-regulated utilities (along with numerous State commissions) expend significant resources on related protracted litigation over DOE's non-performance. Ratepayers ultimately bear not only the cost of utility payments to DOE intended to cover the cost of the disposal program *and* the costs of the additional on-site storage required by DOE's refusal to take that waste, but also the costs of the associated protracted litigation over DOE's refusal to take the waste, as well as litigation to block new plants exacerbated by DOE's delay in approving a repository.

12. Delays in the repository program, such as the Department of Energy's (DOE) recent motion to scrap the application for the Yucca Mountain facility that sparked the need for this NARUC intervention, necessarily results in the owners and operators of nuclear power plants having to store greater quantities of used nuclear fuel for longer periods of time, increasing both costs and risks associated with interim storage and also providing additional reasons to delay construction of new plants. Ratepayers in my State (and many other NARUC member States) continue to pay for a national storage "solution", enhanced litigation costs, and the increased costs of interim storage. History suggests if the DOE withdrawal motion is successful, it will effectively set the date the Federal government can finally begin to accept waste back at least 25 years. As State Commissioners, my NARUC colleagues across the country and I have an obvious interest in this proceeding – protecting ratepayers – an interest no other party will adequately represent. There is no question that our respective statutory duties to protect ratepayers are impacted by whatever action the NRC takes on the motion to withdraw.



David Wright

Sworn and subscribed to before me this 15th day of March, 2010

Deborah Eastley Notary Public

My Commission expires: 5-28-2014

Resolution on National Policy for Management and Disposal of Spent Fuel from Commercial Nuclear Power Plants

WHEREAS, The Nuclear Waste Policy Act (NWPA) of 1982 sets national policy that the federal government is responsible for safe, permanent disposal of all government and commercial high-level radioactive waste, including spent nuclear fuel, in a geologic repository beginning in 1998; *and*

WHEREAS, Those who have benefitted from nuclear-generated electricity—reactor owners and ratepayers—under the NWPA were to pay for the commercial share of disposal costs through fees paid to the Nuclear Waste Fund; *and*

WHEREAS, Reactor owners and ratepayers made fee payments since 1983 totaling over \$16 billion to the Fund, which earned another \$13.5 billion in interest, to more than meet the needs of the repository development program, which encountered numerous managerial, financial, legal and political difficulties resulting in failure to meet the 1998 date set in statute and contracts with the reactor owners; *and*

WHEREAS, When the Department of Energy, as disposal program manager, failed to begin waste acceptance in 1998, the reactor owners sued for partial breach of contract for which the Federal Court of Appeals found the government liable; *and*

WHEREAS, DOE and the Justice Department estimate the liability for court-awarded damages and settlements could be as much as \$12.3 billion—if the waste were to be accepted for disposal by 2020; *and*

WHEREAS, The Obama Administration declared its intent to terminate the Yucca Mountain repository development program and instead has appointed the Blue Ribbon Commission on America’s Nuclear Future to evaluate alternative disposal strategies and recommend a new direction that does not involve Yucca Mountain; *and*

WHEREAS, NARUC believes current law regarding Yucca Mountain development must be followed, however the Association must prepare itself for the possibility that the Administration may succeed in canceling the repository project; *now, therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its 2010 Winter Committee Meetings in Washington, D.C., expresses its disappointment at having the federal government take 25 years and expend over \$10 billion on Yucca Mountain as the repository site only to have the repository project be proposed to be cancelled before the Nuclear Regulatory Commission made a safety and technical decision on the license application submitted in 2008; *and be it further*

RESOLVED, That NARUC call upon the Secretary of Energy not to withdraw the Yucca Mountain license application from the review process underway at the NRC; *and be it further*

RESOLVED, That NARUC and State utility commissions as stakeholders in the disposal policy on behalf of ratepayers—who continue to bear the ultimate cost of the fee payments to the Fund—should play an active role in representing their views to the Blue Ribbon Commission, drawing upon the multiple NARUC nuclear waste policy resolutions adopted over the past 25 years; *and be it further*

RESOLVED, That NARUC convey to the Commission that any alternative that leaves the spent nuclear fuel at present storage sites indefinitely, whether managed by the owners or by the government, is inconsistent with the NWSA findings of 1982 and would break faith with the communities which host those reactors with the understanding that the spent fuel would be removed by the government; *and be it further*

RESOLVED, That the Commission should seek to determine if there is something about a geological repository generally or Yucca Mountain specifically that makes either a poor choice, suggesting a search should begin for a new repository site; *and be it further*

RESOLVED, That if a new repository program is to be recommended, then a new, more transparent site selection process should be considered, a new organization might be better suited for managing it and a reformed financing means be established that more reliably supports the new disposal strategy instead of subsidizing unrelated government activities; *and be it further*

RESOLVED, That NARUC pro-actively inform the Commission, DOE and the Congress that there are benefits in taking an initial near-term action to provide government or industry-run central interim storage of used nuclear fuel from the nine shutdown reactor sites, since it seems that whatever new disposal or reprocessing strategy is pursued, it will be unlikely to be in operation for another twenty or more years; *and be it further*

RESOLVED, That the federal government and owners of spent nuclear fuel should be encouraged to simplify and make equitable settlements over the ongoing litigation that provides payment for past expenses that the owners should not have to have incurred had DOE provided the “disposal services” agreed in the Standard Contracts; and to develop a regime for forecasting future payments without court-ordered judgments including suspension of Nuclear Waste Fund fee payments unless and until a revised program is agreed upon or the Yucca Mountain Project is fully restarted.

*Sponsored by the Committees on Electricity and Energy Resources and the Environment
Adopted by the NARUC Board of Directors February 17, 2010*

Attachment 2

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:
U.S. DEPARTMENT OF ENERGY
(High Level Waste Repository)

Docket No. 63-001-HLW
ASLBP NO. 09-892-HLW-CAB04
March 15, 2010

DOE Office of Civilian Radioactive Waste Management, Office of Business
Management Summary of Program Financial & Budget Information²⁷

Nuclear Waste Fund Income Sources and Disbursements¹

Nuclear Waste Fund Income Sources (dollars in thousands)

Fiscal Year	Spent Nuclear Fuel Fees			Defense Fees	Treasury Loan	Investment Returns ^{3,5}	Total Annual Income	Annual Disbursements ⁶	MWF Balance
	One-Mil Fees ^{2,4}	One-Time Fees ²	Cumulative Fees ²	High-Level Waste Fees ²	Principal (Payment)				
1983	74	0	74	0	254	0	327	178	149
1984	330	0	404	0	5	0	334	276	207
1985	367	1,427	2,198	0	-258	-74	1,462	316	1,353
1986	362	6	2,566	0	0	73	441	399	1,395
1987	435	6	3,007	0	0	89	530	469	1,456
1988	498	6	3,511	0	0	165	669	402	1,723
1989	513	6	4,030	0	0	196	715	349	2,089
1990	570	6	4,606	0	0	161	737	337	2,489
1991	594	6	5,206	5	0	241	846	322	3,013
1992	560	6	5,772	8	0	268	842	350	3,505
1993	466	11	6,249	0	0	296	773	294	3,984
1994	418	4	6,671	0	0	210	632	310	4,306
1995	615	0	7,286	0	0	246	861	408	4,759
1996	633	1	7,920	0	0	212	846	209	5,396
1997	596	0	8,516	0	0	471	1,067	159	6,304
1998	600	0	9,116	0	0	743	1,343	211	7,436
1999	662	0	9,778	0	0	106	768	175	8,029
2000	702	0	10,480	0	0	883	1,585	289	9,325
2001	689	0	11,169	0	0	1,243	1,932	199	11,058
2002	712	0	11,881	0	0	1,862	2,574	120	13,512
2003	731	0	12,612	0	0	446	1,177	154	14,535
2004	732	0	13,344	0	0	1,315	2,047	193	16,389
2005	736	0	14,080	0	0	1,178	1,914	324	17,979
2006	752	0	14,832	0	0	542	1,294	192	19,081
2007	754	0	15,586	0	0	794	1,548	236	20,393
2008	763	0	16,349	0	0	1,117	1,680	226	22,047
2009	770	0	17,119	0	0	1,054	1,824	223	23,648
FY 10 thru 1/31/2010	327					391	718	90	24,276
Cum-to-date	15,961	1,485	17,446	13	0	14,228	31,686	7,410	24,276
Forecast for End of FY 2010	769	0	17,118	0	0	1,172	1,941	220	25,369 ⁴

²⁷ Available at <http://www.ocrwm.doe.gov/uploads/1/financialandbudgetsummary.pdf>, at 4.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:
U.S. DEPARTMENT OF
ENERGY
(High Level Waste Repository)

Docket No. 63-001-HLW
ASLBP NO. 09-892-HLW-CAB04
March 15, 2010

CERTIFICATE OF SERVICE

I, James Bradford Ramsay, hereby certify that copies of the National Association of Regulatory Utility Commissioner's (NARUC) Petition for Leave to Intervene and Request for Hearing and Affidavit of David Wright in Support of NARUC's Petition for Leave to Intervene dated March 15, 2010, have been served upon the following persons by Electronic Information Exchange.

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[Signed Electronically by James Bradford Ramsay]

Dated at Washington, DC
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ADDITIONAL CERTIFICATION

Availability of Material

As required by 10 C.F.R. § 2.1012(b) and 10 C.F.R. §2.1003, the undersigned also has made a good faith effort to substantially comply with the “Availability of Material” requirements, 10 C.F.R. § 2.1003. NARUC has been in communication with Daniel J. Graser, the NRC’s Licensing and Support Network Administrator to obtain technical guidance to comply with this provision.

[Signed Electronically by James Bradford Ramsay]

Dated at Washington, DC
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