IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,	)	
Petitioner,	)	
v.	)	
	)	Case No. _____
THE UNITED STATES DEPARTMENT OF ENERGY AND THE UNITED STATES OF AMERICA,	)	
Respondents,	)	

PETITION FOR REVIEW

The National Association of Regulatory Utility Commissioners (NARUC) respectfully petitions this Court pursuant to Section 119 of the Nuclear Waste Policy Act (NWPA), 42 U.S.C. § 10139, as amended, Section 702 of the Administrative Procedure Act (APA), 5 U.S.C. § 702, and Rule 15(a) of the Federal Rules of Appellate Procedure, for review of the action of, and/or failure to act by the United States Department of Energy (DOE) by its belated release of the somewhat inaccurately captioned "*Secretarial Determination of the Adequacy of the Nuclear Waste Fund Fee*" (Determination), attached as Exhibit 1.

The NWPA requires DOE to perform an assessment of funds needed to support the waste disposal program.[1] The determination must demonstrate whether "excess or insufficient revenues" are being collected. Id.

The not-quite-eight page "Determination", which shares little of the approach, intellectual rigor, content or empirical support that characterizes all previous fee assessments,[2] was *apparently* compiled, drafted and filed in a pending appeal within two months.

DOE filed the "Determination" to moot an earlier NARUC petition for review on *procedural grounds*.

---

[1] The NWF fee was established to recoup government's costs for radioactive waste disposal. NWPA § 302(d); 42 U.S.C. § 10222(d). The NWPA set the fee for nuclear electricity generators at 1.0 mil per kilowatt-hour. NWPA § 302(a)(2), 42 U.S.C. § 10222(a)(2). The NWPA directs the Secretary of Energy to annually review whether the collection of the fee will provide sufficient revenues to offset the programs costs and to propose a fee adjustment if excess or insufficient revenues are being collected. NWPA § 302(a)(4); 42 U.S.C. § 10222(a)(4).

[2] For example, unlike previous fee assessments, this "Determination" does not contain any analysis of the programs needs, does not reflect the impact of either DOE's termination of the Yucca Mountain program or the $24 billion current value (and interest payments generated by) the current NWF. Instead, DOE posits a novel and self serving series of legal arguments for its failure/inability to provide empirical support for its position.

In 2010, NARUC challenged DOE's failure to conduct a statutorily mandated and long overdue annual assessment of the fee's adequacy as well as its rejection of NARUC's requests to do so.

Although the challenge was dismissed on procedural grounds, the Court noted "petitioners may now be able to properly raise this claim through a challenge to" the "Determination". See, the December 13, 2010 Judgment in *National Association of Regulatory Utility Commissioners v. DOE*, D.C. Circuit Case 20-107.

DOE's elimination of the Yucca Mountain Repository program Congress specified those fees are collected to support – simultaneously eradicated any empirical support for continued collection of any fee. Under these circumstances, any rational assessment should have resulted in a recommendation to suspend the fee.

Instead, DOE released the "Determination."

The "Determination" fails to meet and/or is inconsistent with the NWF fee review requirements of section 302(a)(4) of the NWPA, 42 U.S.C. § 10222(a)(4).

NARUC represents the interests of State utility commissions that oversee nuclear utility rates including the pass-through cost of the nuclear waste fee. The association has been recognized both by Congress in several statutes[3] and consistently by Article III courts[4] as the proper entity to represent the collective interests of the State utility commissions.

---

[3] 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.).

[4] 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) (The Supreme Court noted: "[t]he 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 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 program; 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).

This Court has jurisdiction pursuant to NWPA Sec. 119(a)(1), 42 U.S.C. § 10139(a)(1).[5] Venue is proper in the court pursuant to 42 U.S.C. § 10139(a)(2). Id. NARUC has its principal office of business in this circuit, and in any case, the statute allows a petition to be lodged before this Court. The petition is timely filed within the 180 days specified in NWPA Sec. 119(c), 42 U.S.C. § 10139(c), based upon the November 1, 2010 date of the "Determination." Id. Moreover, DOE is a proper respondent under Rule 15(a) of the Federal Rules of Appellate Procedure.

NARUC seeks an order and judgment that DOE's actions or failure to act in releasing the "Determination" fail to meet the requisites of Section 302(a)(4) of the NWPA, 42 U.S.C. 10222(a)(4), are arbitrary and capricious, 5 U.S.C. §706(2)(A), beyond DOE's jurisdiction, authority or power, 5 U.S.C. §706(2)(C), and/or otherwise not in accordance with law, 5 U.S.C. §706(2)(A).

---

[5] 49 U.S.C. § 10139. "Judicial review of agency actions: (a) Jurisdiction of United States courts of appeals . . . shall have original and exclusive jurisdiction over any civil action-- (A) for review of any final decision or action of the Secretary, the President, or the Commission under this part;(B) alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part; (C) challenging the constitutionality of any decision made, or action taken . . . (2) The venue of any proceeding . . . shall be in the judicial circuit in which the petitioner . . . has its principal office, or in the United States Court of Appeals for the District of Columbia. (c) Deadline for commencing action: A civil action for judicial review described under subsection (a)(1) of this section may be brought not later than the 180th day after the date of the decision or action or failure to act involved . ." Downloaded from the Government Printing Office: http://frwebgate1.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=058563466570+0+1+0&WAISaction=retrieve.

NARUC contends, *inter alia*, the purported fee assessment is facially deficient and lacks either intrinsic or record support. At a minimum, DOE should be directed to immediately (i) propose suspension of the collection of the fee to the NWF pending DOE's release of a fee review that complies with NWPA Section 302(a)(4), 42 U.S.C. § 10222(a)(4), and (ii) transmit such proposal for NWF fee suspension to Congress.

Ratepayers continue to pay for a federal program that was supposed to start taking waste in 1998, and has been first eviscerated and then eliminated by DOE. Ratepayers also are bearing the current costs of onsite storage caused by DOE's failure to comply with Congressional instructions. Ratepayers are also funding necessarily wasteful duplicative non-revenue producing waste sites pending consolidation at some central federal collection facility – again caused by DOE's failure to comply with Congressional instructions. At the same time, it *appears* that someone at DOE has determined, while electric ratepayers must be compelled continue to pay even more for a non-existent disposal program, the Department of Defense does not need to contribute anything this fiscal year to the NWF to cover its future "waste disposal" needs.

DOE's series of inactions and failures with respect to the program and, specifically – in the November 2010 "Determination", its effort to support the continued collection of unjustifiable fees – particularly during this severe economic downturn – is flatly inconsistent with Congress's instructions in the NWPA. Accordingly, we also respectfully request such other relief as this Court deems just and proper.

Respectfully submitted,

_____

James Bradford Ramsay
GENERAL COUNSEL
(JRAMSAY@NARUC.ORG) PHONE: 202.898.2207

Robin Lunt
ASSISTANT GENERAL COUNSEL
(RLUNT@NARUC.ORG) PHONE: 202-898-1350

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS
1101 VERMONT AVE., N.W., SUITE 200
WASHINGTON, D.C. 20005
(FAX) 202-384-1554

Dated: March 4, 2011

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the National Association of Regulatory Utility Commissioners (NARUC) respectfully submits this disclosure statement. NARUC is a quasi-governmental nonprofit organization founded in 1889 and incorporated in the District of Columbia. NARUC is a "trade association" as that term is defined in Rule 26.1(b). NARUC has no parent company. No publicly held company has any ownership interest in NARUC. NARUC represents those government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, *inter alia*, the regulated electric utilities within their respective borders.

Respectfully submitted,

_____

James Bradford Ramsay
GENERAL COUNSEL
Robin Lunt
ASSISTANT GENERAL COUNSEL
NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS
1101 VERMONT AVE., N.W., SUITE 200
WASHINGTON, D.C. 20005

Dated: March 4, 2011

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,	)	
Petitioner,	)	
v.	)	
	)	Case No. _____
THE UNITED STATES DEPARTMENT OF ENERGY AND THE UNITED STATES OF AMERICA,	)	
Respondents,	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March 2011, a copy of the foregoing Petition for Review was served by U.S. mail upon the following persons:

_____
James Bradford Ramsay

Scott Blake Harris
General Counsel
Office of the General Counsel
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, D.C. 20585

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Exhibit A

DOE
“Determination”
November 1, 2010