



U.S. Department of Justice

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April 21, 2010

Mr. Mark J. Langer
Clerk of Court
U.S. Court of Appeals for the D.C. Circuit
333 Constitution Ave., N.W.
Washington, DC 20001

Re: *In re: Aiken County, Ferguson v. DOE, South Carolina v. DOE*
Consolidated Case Nos. 10-1050, 10-1069, 10-1082

Dear Mr. Langer:

Pursuant to Fed. R. App. P. 28(j) and D.C. Cir. R. 28(f), the federal respondents hereby alert this Court to the "NRC Staff Answer to U.S. Department of Energy Petition for Interlocutory Review" filed before the Nuclear Regulatory Commission (NRC) on April 20, 2010 (Attached). This document articulates the NRC Staff's support for the Commission's review of the NRC Licensing Board's April 6, 2010, interlocutory order suspending briefing and consideration of various intervention motions and DOE's motion to withdraw the licensing application pending before the NRC. The NRC Staff maintains that it would be "reasonable" for the Commission either to "provide guidance or direction to the Board regarding the matters raised," or for it to "decide the pending matters itself." This document thus shows that administrative proceedings before the NRC are ongoing and supports the federal respondents' April 12, 2010, motion to hold the above-referenced cases in abeyance pending the Commission's final determination on the motions. It also demonstrates why this matter is not ripe for review and why petitioners should exhaust their administrative remedies prior to filing in federal court.

Sincerely,

/s/ Allen M. Brabender
Counsel for Department of Energy

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c), D.C. Circuit Rule 25(c), and this Court's Administrative Order of May 15, 2009, I hereby certify that on this date, April 21, 2010, I caused the foregoing 28(j) letter to be filed upon the Court through the use of the D.C. Circuit CM/ECF electronic filing system, and thus also served on counsel of record. The resulting service is consistent with the preferences articulated by counsel of record in the Service Preference Report.

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April 20, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF ANSWER TO U.S. DEPARTMENT OF ENERGY PETITION FOR INTERLOCUTORY REVIEW

INTRODUCTION

On April 12, 2010, the U.S. Department of Energy (DOE) requested that the Commission take immediate interlocutory review of the Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) ("Order") issued by Construction Authorization Board-04 ("the Board") on April 6, 2010. U.S. Department of Energy's Petition for Interlocutory Review, dated April 12, 2010 at 1 ("Petition"). Although DOE has not followed the procedures set forth in 10 C.F.R. Part 2, Subpart J, the Staff does not object to DOE's request that the Commission undertake review of the Order pursuant to its inherent supervisory authority with respect to adjudications.

BACKGROUND

On March 3, 2010, DOE filed a motion to withdraw its license application for a high-level waste repository at Yucca Mountain, Nevada. U.S. Department of Energy's Motion to Withdraw, dated March 3, 2010 ("Motion to Withdraw"). Following the Motion to Withdraw, five entities, the states of South Carolina and Washington; Aiken County, South Carolina; the Prairie Island Indian Community; and the National Association of Regulatory Utility Commissioners, filed

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petitions to intervene in the above-captioned proceeding.¹ The Board issued orders scheduling briefing on the petitions to intervene and delaying briefing on the Motion to Withdraw until after it ruled on the petitions to intervene.² The parties completed briefing on the first three petitions, South Carolina, Washington, and Aiken County, on April 5, 2010.³

On April 6, 2010, the Board issued the Order suspending "further briefing of the new petitions to intervene and consideration of DOE's motion, pending guidance from the Court of Appeals on the relevant legal issues." Order at 3.⁴ DOE filed its Petition on April 12, 2010 seeking "immediate interlocutory review" of the Order, Petition at 1, either in response to DOE's request or by the "exercise of its supervisory authority," *id.* at 5. The Staff's response follows.

DISCUSSION

DOE seeks review and reversal of the April 6 Order claiming that the Board has "abdicate[d] its obligation to rule on critical motions properly pending before it – namely, DOE's motion to withdraw its license application and five petitions by putative intervenors that oppose DOE's motion." Petition at 1. According to DOE, the Order would prevent the Commission from "apply[ing] its expertise and perspective on important questions involving the interpretation of statutes and regulations within its jurisdiction," prior to consideration of the same issues before

¹ Petition of the State of South Carolina to Intervene, dated February 26, 2010; State of Washington's Petition for Leave to Intervene and Request for a Hearing, dated March 3, 2010; Petition of Aiken County, South Carolina to Intervene, dated March 4, 2010; Petition to Intervene of Prairie Island Indian Community, dated March 15, 2010; and National Association of Regulatory Utility Commissioners' Petition to Intervene, dated March 15, 2010.

² Order (Concerning Scheduling), dated March 5, 2010; Order, dated March 16, 2010.

³ See Order (Concerning Scheduling), dated March 5, 2010, at 2.

⁴ The Board noted that "[t]wo of the five petitioners—Aiken County and South Carolina—have filed in the United States Courts of Appeals actions under Section 119 of the NWPA that challenge withdrawal of the Application on many of the same grounds asserted in the petitions before" the Board. Order at 9. Both actions are currently pending before the District of Columbia Circuit. *Id.*

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the Court of Appeals. *Id.* at 5-6. As set forth below, although the Petition does not comply with the applicable procedural requirements for a petition for interlocutory review, DOE's failure to properly seek review is not a bar to Commission review of the Order *sua sponte*.

The Commission's procedures "set a high bar for interlocutory review petitions." *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-1, 65 NRC 1, 3 (2007). For the above-captioned proceeding, a petition for interlocutory review must follow the procedure set out in 10 C.F.R. § 2.1015(d).⁵ Although DOE's Petition does not address the requirements of 10 C.F.R. § 2.1015(d), the Commission may still undertake review of the Order *sua sponte*. See *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 & 4), CLI-09-3, 69 NRC 68, 72 (2009).

The Commission may exercise its inherent "supervisory power over adjudications to step in at any stage of a proceeding and decide a matter itself." *Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 85 (1992) (reviewing Board order consolidating two licensing proceedings); see also *Duke Energy Corp.* (Catawba Nuclear Station Units 1 and 2), CLI-04-6, 59 NRC 62, 70 (2004) (overturning Board order granting intervenor access to a closed, safeguards-related meeting between Staff and license applicant). *Sua sponte* review does not require a showing of harm.⁶ See *Vermont Yankee*,

⁵ 10 C.F.R. § 2.1015(d) provides that, if a party wishes to seek interlocutory review of a Board order that is not immediately appealable to the Commission pursuant to 10 C.F.R. § 2.1015(b), the party must request that the Board certify the issue to the Commission in accordance with 10 C.F.R. § 2.319. A request that the Board certify an issue to the Commission must be made via motion. 10 C.F.R. § 2.319(l). Because the Order at issue is not immediately reviewable under § 2.1015(b), DOE should have moved for the Board to certify the issue to the Commission, but did not. That motion would have had to include a certification by counsel that DOE made a sincere effort to consult with the other parties in the proceeding prior to filing a motion for certification. 10 C.F.R. § 2.323(b).

⁶ Generally, a petition for interlocutory review must demonstrate that the issue for review either "[t]hreatens the party adversely affected by it with immediate and serious irreparable harm" or "[a]ffects the basic structure of the proceeding in a pervasive or unusual manner." 10 C.F.R. § 2.341(f)(2). The (continued. . .)

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CLI-07-1, 65 NRC at 3-4. Rather, *sua sponte* review allows the Commission to take various types of adjudicatory action, such as addressing unappealed issues or orders, addressing issues of wide implication, and providing guidance to a licensing board. *Id.* at 4-5. Thus, the Commission may exercise its inherent supervisory authority over adjudications to take review of the Board's Order.

DOE seeks expedited review and reversal of the Board's Order because it defers action on matters presently before the Board: DOE's Motion to Withdraw and the five new intervention petitions. Petition at 1. The Board delayed its rulings because "[t]he principal issues raised by the new petitioners, as well as by DOE's motion itself, are presently before the United States Court of Appeals for the District of Columbia Circuit." Order at 2. According to the Board, it would be "[i]n the interest of judicial efficiency" to await "guidance from the Court of Appeals on the relevant legal issues." *Id.* at 3. The Board noted that "'courts of appeals . . . have original and exclusive jurisdiction over any civil action' alleging specified violations of the [Nuclear Waste Policy Act] and certain related violations of the Constitution or [National Environmental Policy Act]." *Id.* at 9 (quoting 42 U.S.C. § 10139). The Board also noted that its authority over DOE is "especially problematic" and that the Board's own authority to adjudicate relevant issues has been challenged. *Id.* at 11-12.

Notwithstanding the concerns raised by the Board, a question regarding the scope of the Board's authority is an issue that warrants exercise of the Commission's inherent supervisory authority. The Commission could review and reverse the Board's decision to delay its ruling on

(. . .continued)

procedures in 10 C.F.R. Part 2, Subpart J, however, have taken precedence over that provision since 2004. 10 C.F.R. § 2.1000; Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2264 (Jan. 14, 2004).

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both the new petitions and the Motion to Withdraw. The NRC (and its licensing boards) routinely apply the Commission's rules governing license applications and adjudicates whether petitioners satisfy the Commission's rules governing intervention. There is no need to postpone rulings on the five new intervention petitions or the Motion to Withdraw until the Court of Appeals has acted. Thus, it is reasonable for the Commission to exercise its inherent supervisory authority and review the Board's Order, and, if necessary, provide guidance or direction to the Board regarding the matters raised. Or, the Commission may decide the pending matters itself. This could include the Commission ruling on both the Board's order to delay further consideration of DOE's motion to withdraw and, after completion of briefing by the parties, the merits of DOE's Motion to Withdraw.⁷

⁷ The Staff will present its views on the merits of the issues raised once the Commission (or the Board) establishes a schedule for such filings.

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CONCLUSION

For the foregoing reasons, the Commission is authorized to undertake review of the Board's Order and may also elect to provide guidance concerning or decide the issues pending before the Board, including the Motion to Withdraw and the new intervention petitions.

Respectfully submitted,

/Signed (electronically) by/

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/Executed in accord with 10 C.F.R. § 2.304(d)/

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Dated at Rockville, Maryland
this 20th day of April, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO U.S. DEPARTMENT OF ENERGY PETITION FOR INTERLOCUTORY REVIEW" in the above-captioned proceeding have been served on the following persons this 20th day of April, 2010, by Electronic Information Exchange.

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