

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

No. 10-1050

In re Aiken County,
Petitioner

No. 10-1052

Robert L. Ferguson, et al.,
Petitioners

v.

United States Department of Energy, et al.,
Respondents

**Case Nos. 10-1050,
10-1052 & 10-1069**

No. 10-1069

State of South Carolina,
Petitioners

v.

United States Department of Energy, et al.,
Respondents

State of Nevada,
Intervenor

BEFORE: Ginsburg, Griffith, and Kavanaugh,
Circuit Judges

MOTION FOR LEAVE TO INTERVENE OUT OF TIME OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS
IN SUPPORT OF PETITIONERS

Pursuant to Federal Rules of Appellate Procedure (FRAP) 15(d) and 26(b), the National Association of Regulatory Utility Commissioners (NARUC) respectfully requests leave to intervene in the above-captioned proceeding¹ out-of-time in support of the Petitioners.

NARUC has Article III Standing, states both adequate interests and grounds for interventions, infra, and demonstrates good cause excusing its failure to timely intervene. No party will be prejudiced by the granting of NARUC's motion.

In support of this motion, NARUC states as follows:

Procedural Background

In the now consolidated cases, Petitioners South Carolina and Robert L. Ferguson et al. seek judicial review under Nuclear Waste Policy Act (NWPA) Section 119, 42 U.S.C. § 10139, Administrative Procedure Act (APA), 5 U.S.C. § 706, and Rule 15(a) of the Federal Rules of Appellate Procedure, while Aiken County seeks judicial review and a writ of mandamus under NWPA 42 U.S.C. § 10101 et seq.; NWPA section 114(b), 42 U.S.C. §10134(b); NWPA section 114(d), 42 U.S.C. §10134(d); the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq.; and the Administrative Procedure Act (APA), 5 U.S.C. § 706, of the

¹ The three petitions before this Circuit for judicial review of DOE and the Administration's decision to withdraw the pending Yucca Mountain application and otherwise terminate the repository have been consolidated by the Courts own motion in an order issued on April 8, 2010.

Secretary of Energy's final action to abandon and/or not proceed with plans to pursue a license for a repository for high-level radioactive waste at Yucca Mountain, Nevada. Department of Energy (DOE) filed the Yucca Mountain license application on June 3, 2008; the U.S. Nuclear Regulatory Commission (NRC) docketed it September 8, 2008, and published notice of the filing on October 22, 2008. 73 Fed. Reg. 63029. On January 29, 2009, DOE announced it would convene a "Blue Ribbon Commission on America's Nuclear Future" to explore options in light of the Administration's decision not to proceed with the Yucca Mountain repository. The DOE Budget for Fiscal year 2011 zeros out the budget for the Yucca Mountain repository and asserts that the Administration will discontinue its program to create a repository at Yucca Mountain in 2010.

On February 1, 2010, after the President announced the budget for Yucca Mountain would be zeroed out, DOE moved to stay NRC's Yucca Mountain license approval proceedings pending DOE's motion to withdraw *with prejudice* the pending application for the repository. The NRC Atomic Safety and Licensing Board (Board) granted the stay. On March 3, 2010, DOE filed a motion to withdraw the application with prejudice. NRC ASLB, U.S. Dep't of Energy Motion to Withdraw, Docket No. 63-001 ASLBP No. 09-892-HLW-CAB04 (March 3, 2010).

NARUC immediately petitioned to intervene in the NRC proceeding to contest the legality of DOE's motion to withdraw, filing our petition on March 15, 2010. This motion followed the motions of the State of Washington, the State of South Carolina, and Aiken County to intervene. A March 16, 2010 Board order scheduled responses to NARUC's petition.

Before responses to NARUC's (and another intervenor - Prairie Island Indian Community) could be filed, the Board issued another order on April 6, 2010 unexpectedly suspending its proceedings pending the resolution of the actions pending in this Circuit that challenge the legality of DOE's motion to withdraw the licensing application. The Order stated that "the pending actions in the Court of Appeals will likely yield quicker and more authoritative resolution if most if not all relevant legal issues than if the Board were to address them without waiting for the Court's guidance." NRC ASLB, Memorandum and Order, Docket No. 63-001-HLW, ASLBP No. 09-892-HLW-CAB04 at 9 (April 6, 2010).

NARUC Has Clear Interests in this Appeal

No other party can adequately represent the national scope of State interests provided though NARUC's participation in this proceeding. NARUC represents the interests of State public 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 statutes² and consistently by Article III courts³ as the proper entity to represent the collective interests of the State utility commissions.

NARUC's members maintain a significant interest in this proceeding. The Nuclear Waste Policy Act, 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

² 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.).

³ 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).

nuclear waste through a fee paid into the Nuclear Waste Fund (NWF) NWPA Section 302(a)(2) 42 U.S.C. § 10222(a)(2), 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, (January 31, 2010), available online at DOE's website at: <http://www.ocrwm.doe.gov/uploads/1/financialandbudgetsummary.pdf>.

NARUC and its members have been involved in the development of nuclear waste policy for many years. In 1988, in NARUC v. DOE, 851 F.2d 1424 (D.C. Cir. 1988), NARUC was the lead petitioner in a case focused on DOE's duty to accept nuclear waste. More recently, NARUC supported DOE in the 2002 Congressional debate that resulted in Congress again sanctioning the selection of Yucca Mountain as the site for the geological repository. DOE's intention to abandon the Yucca Mountain repository at this late stage, in the absence of any rational explanation or record-based findings to justify it, is a 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.

NARUC Has Good Cause for its Untimely Intervention

Under the FRAP and Circuit Rules 15(d), the petition to intervene was due 30 days after the petition to review. The last petition in the consolidated cases was South Carolina’s, which was filed on February 26, 2010, making the due date for intervention March 29, 2010.⁴ Under FRAP and Circuit Rules 26(b) the court may for good cause permit an act to be done after that time expires. NARUC has good cause for failing to intervene on or before the deadline. At that time, NARUC had filed its petition to intervene in the NRC licensing proceeding which was moving forward.

Appellate courts typically hold in abeyance appeals while agency proceeding are ongoing—pending the exhaustion/completion of the Board proceedings either granting or denying DOE’s motion to withdraw. NARUC devoted our limited staff resources to complying with the NRC’s complex procedural rules. NARUC’s interests would have been addressed in the Board hearings and in the inevitable appeal that would follow any dispositive Board action on the motion to withdraw. However, the Board’s unexpected April 6th decision to suspend the proceeding

⁴ See FRAP and Circuit Rule 26(a)(1)(C).

pending the resolution of this and related appeals pending before this Court *requires* NARUC to intervene here to protect our interests. Key issues presented to the Board authority to consider the both the DOE motion to withdraw and DOE's discretion to file that motion will now be decided in this forum.

Granting NARUC's Intervention Will Not Delay the Appeal or Prejudice Any Party

NARUC's participation will not delay the proceedings or prejudice any party because, (a) less than two weeks have elapsed since the March 29th deadline for intervention, and (b) NARUC will accept and abide by any procedural orders this Court has released to date. If the motion to intervene is granted, NARUC will cooperate fully with the parties and the Court to promote efficient and timely adjudication of the case.

Moreover, although the time for filing interventions has lapsed, NARUC has 180 days from DOE's March 3, 2010 motion to withdraw its application, or until August 30, 2010, to petition for an appeal the final agency action under the NWPA Section 119, 42 U.S.C. § 10139. If NARUC's motion to intervene is not granted, we will likely file our own timely independent appeal of the DOE motion to withdraw to protect our interests. Granting our late intervention will conserve scarce Court resources that might otherwise be diverted to duplicative, and if this intervention is granted, unnecessary, scheduling and consolidation orders.

Conclusion

Absent intervention, NARUC's interests will not be adequately represented in this case. No other party can adequately represent the State public utility commissions, and our members' fiduciary responsibility to the ratepayers who fund the Nuclear Waste Fund. For the forgoing reasons, NARUC respectfully requests that this Court grant this motion to intervene out-of-time.

Respectfully submitted,

_____/s/_____

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DATED: April 9, 2010

CORPORATE DISCLOSURE STATEMENT

NARUC is a quasi-governmental non-profit association incorporated in the District of Columbia. NARUC has no parent corporation nor is there any publicly held corporation that owns stock or other interest in NARUC. NARUC is supported predominantly by dues paid by its State public utility commissioner members and through revenues generated by meetings of those members held three times each year.

Respectfully submitted,

_____/s/_____
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DATED: April 9, 2010

CERTIFICATE OF SERVICE

I certify that on April 9, 2010, the Motion of the National Association of Regulatory Utility Commissioners for Leave to Intervene Out of Time and a Disclosure Statement pursuant to Circuit Rule 26.1 were served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy via U.S. Mail.

_____/s/_____

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