

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

State of Washington,

Petitioners

v.

UNITED STATES DEPARTMENT OF ENERGY,
DR. STEVEN CHU, Secretary of the U.S. Department
of Energy, NUCLEAR REGULATORY
COMMISSION,

Respondents.

No. 10-1082

**MOTION FOR LEAVE TO INTERVENE 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 proceeding in support of the Petitioners.¹

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

In support of this motion, NARUC states as follows:

Procedural Background

In their petition for review, the State of Washington (Washington) seeks a declaratory judgment that the Respondents', United States Department of Energy and its Secretary, Dr. Steven Chu (hereinafter DOE), decision to cancel the Yucca Mountain nuclear waste repository, including its motion to withdraw with prejudice the Nuclear Regulatory Commission (NRC) license application violates the Nuclear Waste Policy Act (NWPA), 42 U.S.C. §§ 10101-10270; the National Environmental Policy Act (NEPA), 42 U.S.C. 4321-4370(f), its implementing regulations applicable to all agencies including DOE, 40 C.F.R. Parts 1500-1508,

¹ NARUC filed an intervention out of time in the consolidated cases of In Re Aiken County, No. 10-1050; Ferguson v. Obama, No. 10-1052; and South Carolina v. U.S. Dept. of Energy, No. 10-1069. Washington moved to consolidate its petition with those cases (Motion Filed April 13, 2010). According to Circuit Rule 15(b), NARUC's petition to intervene in the consolidated cases will be construed as a motion to intervene in this case as well. NARUC files this intervention as an extra precaution, as this intervention will fall within the time prescribed under FRAP § 15(d) (see below), while the motion to intervene in the consolidated cases was a motion out of time.

and DOE's own NEPA implementing procedures, 10 C.F.R. Part 1021; and the Administrative Procedure Act (APA), 5 U.S.C. § 701-706. Based on the same statutory violations, Washington further seeks to have the Court permanently enjoin DOE from implementing its decision to irrevocably terminate the Yucca Mountain repository, and direct DOE to continue to undertake its obligation with respect to Yucca Mountain under the NWPA, and all other relief that the Court deems necessary and proper. Washington also seeks a declaratory judgment that the NRC is without authority to consider DOE's motion to withdraw its Yucca Mountain license application or to grant that motion.

In a separate motion, Washington seeks preliminary injunctive relief pursuant to 28 U.S.C. § 1651, 42 U.S.C. § 10139(a)(1)(A)-(D), and 5 U.S.C. § 706 enjoining DOE from taking any further actions to terminate or dismantle operations related to the siting and licensing of a permanent nuclear waste repository at Yucca Mountain, Nevada until this Court has ruled on the merits of Washington's petition for review.

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. NARUC's 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 through 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

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.).

consistently by Article III courts³ as the proper entity to represent the collective interests of the State public 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 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 member commissions, 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,

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).

Office of Business Management Summary of Program Financial & Budget Information at 4, (January 31, 2010), available online 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's Intervention is Timely

Under the FRAP 15(d), the petition to intervene was due 30 days after the petition for review. Washington filed its petition on April 13, 2010, making petitions to intervene due by May 13, 2010.

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.

Respectfully submitted,

_____/s/_____

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DATED: April 19, 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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CERTIFICATE OF SERVICE

I certify that on April 19, 2010, the Motion of the National Association of Regulatory Utility Commissioners for Leave to Intervene 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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