ORAL ARGUMENT SCHEDULED FOR MARCH 22, 2011

Case Nos. 10-1050, 10-1052, 10-1069, and 10-1082 (Consolidated)

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

IN RE AIKEN COUNTY, et al.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY, et al.,

Respondents.

On Petitions for Review and for Other Relief With Respect to Decisions of the President, the Secretary of Energy, the Department of Energy, and the Nuclear Regulatory Commission

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FINAL BRIEF OF AMICUS CURIAE NUCLEAR ENERGY INSTITUTE IN SUPPORT OF THE PETITIONERS

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DATED: February 4, 2011

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

All parties, intervenors, and *amici* appearing in this Court are listed in the Brief of Petitioners Aiken County, Robert L. Ferguson, William Lampson, Gary Petersen, State of South Carolina, State of Washington, and Intervenor-Petitioner, National Association of Regulatory Utility Commissioners ("Brief of Petitioners and Intervenor-Petitioner").

B. Rulings Under Review

References to rulings giving rise to matters at issue in this case appear in the Brief of Petitioners and Intervenor-Petitioner.

C. Related Cases

These consolidated cases have not previously been before this Court and, to the Nuclear Energy Institute's knowledge, there are no related cases.

Respectfully submitted,

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NUCLEAR ENERGY INSTITUTE'S
CORPORATE DISCLOSURE STATEMENT

The Nuclear Energy Institute Inc. ("NEI"), a not-for-profit 501(c)(6) corporation, is a trade association representing the nuclear energy industry. Its objective is to ensure the development of policies that promote the beneficial uses of nuclear energy and technologies in the United States and around the world. NEI does not have any parent companies, and no publicly held company has a 10 percent or greater ownership interest in NEI.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

DOE	Department of Energy
FY	Fiscal Year
IPCC	Intergovernmental Panel on Climate Change
NEI	Nuclear Energy Institute, Inc.
NEPA	National Environmental Policy Act of 1969
NRC	Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act of 1982
SNF	Spent Nuclear Fuel

STATUTES AND REGULATIONS

Except for those set forth below, all applicable statutes, *etc.*, are contained in the Revised Addendum to Brief of Petitioners, Aiken County, Robert L. Ferguson, William Lampson, Gary Petersen, State of South Carolina, State of Washington, and Intervenor-Petitioner, National Association of Regulatory Utility Commissioners.

42 U.S.C. § 2133.a

a. The Commission is authorized to issue licenses to persons applying therefor to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export under the terms of an agreement for cooperation arranged pursuant to section 123, utilization or production facilities for industrial or commercial purposes. Such licenses shall be issued in accordance with the provisions of chapter 16 and subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this Act.

42 U.S.C. § 2239.a(1)(A)

a.(1)(A) in any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award, or royalties under section 153, 157, 186c., or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding , and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 103 or 104b. for a construction permit for a facility, and on any application under section 104c. for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but

upon thirty days' notice and publication once in the Federal Register, of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

42 U.S.C. § 10101(12)

(12) The term "high-level radioactive waste" means --

(A) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentrations; and

(B) other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.

42 U.S.C. § 10172(a)(1)

(a) IN GENERAL -- (1) The Secretary shall provide for an orderly phase-out of site specific activities at all candidate sites other than the Yucca Mountain site.

42 U.S.C. § 10222(c)

(c) ESTABLISHMENT OF NUCLEAR WASTE FUND -- There hereby is established in the Treasury of the United States a separate fund to be known as the Nuclear Waste Fund. The Waste Fund shall consist of --

(1) all receipts, proceeds, and recoveries realized by the Secretary under subsections (a), (b), and (e), which shall be deposited in the Waste Fund immediately upon their realization;

(2) any appropriations made by the Congress to the Waste Fund; and

(3) any unexpended balances available on the date of the enactment of this Act for functions or activities necessary or incident to the disposal of civilian high-level radioactive waste or civilian spent nuclear fuel, which shall automatically be transferred to the Waste Fund on such date.

IDENTITY, INTEREST, AND SOURCE OF AUTHORITY TO FILE OF *AMICUS CURIAE*

The Nuclear Energy Institute, Inc. ("NEI") represents the commercial nuclear energy industry in regulatory and other matters. NEI has a clear interest in and unique perspective concerning the instant proceeding. NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of operational and technical issues, and represents the industry in regulatory and other matters. Among NEI's members are all companies licensed to operate commercial nuclear power plants in the United States. Used nuclear fuel from nuclear power plants operated by these companies will be disposed of at Yucca Mountain if the site is licensed by the Nuclear Regulatory Commission. Accordingly, the Yucca Mountain project is of unique interest.

In addition, NEI members pay more than $700 million per year in fees into the Nuclear Waste Fund, established under section 302(a) of the Nuclear Waste Policy Act, 42 U.S.C. § 10222(c), to cover all costs associated with used nuclear fuel disposal. Thus far more than $34 billion has been or is committed to be paid into the Fund, including interest.

NEI is authorized to file the instant brief pursuant to Fed. R. App. P. 29(a), which provides for such filing upon the consent of all parties. NEI's intent to submit the instant brief was indicated in the Notice of Participation of Nuclear

Energy Institute, Inc. as *Amicus Curiae* and Representation of Consent, filed with this Court on April 22, 2010.

SUMMARY OF ARGUMENT

Issues raised in the instant litigation are identified and addressed in the Brief of Petitioners Aiken County, Robert L. Ferguson, William Lampson, Gary Petersen, State of South Carolina, State of Washington, and Intervenor-Petitioner, National Association of Regulatory Utility Commissioners. *Amicus curiae* Nuclear Energy Institute, Inc., however, wishes to emphasize two points. First, while withdrawal of an application is not uncommon in Nuclear Regulatory Commission ("NRC") licensing proceedings, *e.g.*, those associated with nuclear power plants, such proceedings are conducted pursuant to the Atomic Energy Act of 1954 and involve voluntary applications by private entities for commercial purposes. They are, however, are in no way pertinent to the NRC Yucca Mountain licensing proceeding and matter at issue here, where the submittal of an application by the Department of Energy and subsequent NRC proceedings are specifically directed by statute.

Second, the significance of the Yucca Mountain repository project is not theoretical or hypothetical. Nuclear power facilities are a vital, integral part of the nation's energy production infrastructure with important operational, economic, and environmental advantages. The ultimate disposal of radioactive waste generated by nuclear plants, however, depends upon the existence of a geologic

repository. Abandonment of the Yucca Mountain project will significantly delay the availability of such a facility.

ARGUMENT

I.

Standard of Review

The standard of review pertinent to each of the issues presented in this case is set forth in the "Standard of Review" portion of Petitioners' opening brief under "ARGUMENT."

II.

The Yucca Mountain Licensing Proceeding Differs from Other Nuclear Regulatory Commission Proceedings Where Application Withdrawal Is Permissible

This case involves an attempt by the Department of Energy ("DOE" or "Department") to withdraw its license application, now pending before the Nuclear Regulatory Commission ("NRC"), for a disposal repository at Yucca Mountain in Nevada. While withdrawal of a license application is, in general, not unusual and completely proper in NRC licensing proceedings, it is impermissible in the case of the Yucca Mountain repository at issue here.

In 1982 Congress enacted the Nuclear Waste Policy Act 42 U.S.C. § 10101, *et seq.* ("NWPA"), establishing the federal policy and schedule for the funding, siting, licensing, construction, and operation of one or more repositories for the geologic disposal of used nuclear fuel, typically referred to as "spent nuclear fuel"

or "SNF".[1] *See generally* 42 U.S.C. § 10131(b). In accordance with Section 112 of the NWPA, DOE was required to evaluate and nominate candidate sites for further characterization. 42 U.S.C. § 10132.

Under the 1987 amendments to the NWPA, however, DOE was instructed to "provide for an orderly phase-out of site specific activities at all candidate sites other than the Yucca Mountain site." 42 U.S.C. § 10172(a)(1). DOE was further directed to carry out "appropriate site characterization activities at the Yucca Mountain site," and "only such site characterization activities as the Secretary [of Energy] considers necessary to provide the data required for evaluation of such site for an application to be submitted to the [Nuclear Regulatory] Commission for a construction authorization for a repository at such site, and for compliance with the National Environmental Policy Act of 1969." 42 U.S.C. §§ 10133(a), (c)(1).

On June 3, 2008, DOE filed its application with the NRC for a license authorizing construction of the Yucca Mountain repository. On October 22, 2008, the NRC published a Notice of Hearing and Opportunity to Petition for Leave to Intervene. 73 Fed. Reg. 63,029, SJA049. Following submittal of the license application, DOE diligently pursued issuance of the license through the NRC

[1] The repository is also to accommodate the disposal of high-level radioactive waste which, as defined, is basically the waste material resulting from reprocessing SNF. *See* NWPA § 10101(12), 42 U.S.C. § 10101(12). It is disposal of SNF, however, that is of primary interest to NEI.

hearing process. However, in a filing with the NRC Licensing Board on February 4, 2010,[2] DOE indicated that the Obama Administration's budget request for Fiscal Year ("FY") 2011, released on February 1, 2010, stated that DOE would discontinue its pursuit of a license and that all funding for development of the Yucca Mountain facility and the Office of Civilian Radioactive Waste Management will be eliminated at the end of FY 2010.[3] Accordingly, DOE announced its intent to withdraw the license application. Subsequently, in its motion dated March 3, 2010, DOE confirmed that intent and now unilaterally seeks to walk away from pursuing the license application for Yucca Mountain.[4] Further, by requesting withdrawal with prejudice, DOE seeks to "provide finality" and foreclose any renewed application in the future.[5]

Withdrawal of an application is not uncommon in NRC proceedings, such as those associated with nuclear power plant licensing.[6] Such proceedings are

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[2] "The Department of Energy's Answers to the Board's Questions at the January 27, 2010 Case Management Conference."

[3] *Id.* at 1.

[4] "U.S. Department of Energy's Motion to Withdraw" ("DOE Motion").

[5] *Id.* at 3.

[6] *See, e.g.*, *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2) ALAB-657, 14 NRC 967 (1981); *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1) ALAB-662, 14 NRC 1125 (1981); *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 and 3) LBP-82-81, 16 NRC 1128 (1982).

conducted pursuant to the Atomic Energy Act of 1954 and involve applications by private entities for commercial purposes. *See* 42 U.S.C. §§ 2239.a(1)(A), 2133.a. In fact, NRC regulations specifically provide for withdrawal of an application and termination of associated proceedings.[7]

In the case of reactor licensing, the filing of an application to construct a nuclear power plant is wholly voluntary. Any decision to withdraw an application is purely a business judgment. The law on withdrawal requires no inquiry or determination concerning whether such an independent decision is sound.[8]

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[7] Specifically, 10 C.F.R. § 2.107 provides, in pertinent part:

> (a) The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. If the application is withdrawn prior to issuance of a notice of hearing, the Commission shall dismiss the proceeding. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.
>
> * * * *
>
> (c) The Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, will cause to be published in the Federal Register a notice of the withdrawal of an application if notice of receipt of the application has been previously published.

[8] *See Pacific Gas & Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 51-52 (1983).

Nuclear power plant licensing under the Atomic Energy Act of 1954, however, is in no way pertinent to the NRC Yucca Mountain licensing proceeding and matter at issue here. As is discussed in detail in Petitioners' brief, the submittal of a license application by DOE for Yucca Mountain and subsequent NRC proceedings are specifically directed by statute. Neither involve voluntary actions or independent decisions by DOE, the NRC, or other entity.[9]

III.

The Importance of the Yucca Mountain Project to the Nuclear Energy Industry and the Nation

The significance of the Yucca Mountain repository project is not theoretical or hypothetical. The repository is intended for the disposal of SNF from all commercial nuclear power plants in the United States. Nuclear power facilities are an important, integral part of the nation's energy production infrastructure.

There are currently 104 operating nuclear units in the United States. These plants generate approximately 20% of the nation's electricity. Along with coal and natural gas, nuclear energy is a foundational part of the nation's power supply.

Nuclear power is a particularly important source of generation because of its cost, stability, and output reliability. The cost and supply of nuclear power do not

[9] *See, e.g.*, Brief of Petitioners Aiken County, Robert L. Ferguson, William Lampson, Gary Petersen, State of South Carolina, State of Washington, and Intervenor-Petitioner, National Association of Regulatory Utility Commissioners, pp. 35-46.

fluctuate significantly because of weather or climate conditions, fuel costs, or the availability of imported energy supplies. Nuclear plants are capable of operating without interruption for extended periods -- up to 24 months at a time without shutting down. As a result, nuclear power is an important component of the "baseload" electric power generation that is necessary for the national electric power grid to function. Indeed, the stability of the grid depends on nuclear power.

Nuclear energy is also comparatively inexpensive. Nuclear plants are currently estimated to be the lowest-cost producers of baseload electricity.[10] The consistent availability of nuclear power at predictable prices also has a stabilizing effect on the electricity market as a whole.

Nuclear power also has important environmental advantages over other forms of electricity production. The world is confronted with serious threats from climate change.[11] The United Nations Intergovernmental Panel on Climate Change ("IPCC"), which shared the Nobel Peace Prize in 2007 for its work on global warming, has concluded that "[w]arming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global

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[10] *See Costs: Fuel, Operation, and Waste Disposal*, available at http://www.nei.org/resourcesandstats/nuclearstatistics/costs/.

[11] *See Massachusetts v. EPA*, 127 S.Ct. 1438, 1455-56 (2007).

average sea level."[12] "Average Northern Hemisphere temperatures during the second half of the 20th century were *very likely* higher than during any other 50-year period in the last 500 years and *likely* the highest in at least the past 1300 years."[13]

Many believe that climate change is caused in significant part by the emission of greenhouse gases, including carbon dioxide.[14] It has been estimated that in 2004 about one-quarter of global greenhouse gas emissions were from energy production.[15] Nuclear power plants, however, emit no greenhouse gases. Nuclear plants -- not other alternative sources -- generate approximately 70% of all carbon-free electricity in America.[16] By contrast, hydropower and solar, wind, and geothermal sources together account for about 30%. Increased electricity

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[12] *Summary for Policymakers of the Synthesis Report of the IPCC Fourth Assessment Report* 2 (2007), available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf.

[13] *Id.*

[14] *Id.* at 5 ("Most of the observed increase in global average temperatures since the mid-20th century is *very likely* due to the observed increase in anthropogenic [greenhouse gas] concentrations.").

[15] *Id.*

[16] The factual points in the remainder of this paragraph are drawn from a more detailed discussion, *Nuclear Energy Plays Essential Role in Reducing Greenhouse Gas Emissions*, available on NEI's website at http://www.nei.org/resourcesandstats/documentlibrary/protectingtheenvironment/policybrief/nuclearenergyreducinggreenhousegasemissions/.

production by nuclear power plants was responsible for over one-third of all voluntary greenhouse gas reductions reported by the electric power sector in 2005. It is estimated that using nuclear power instead of fossil-fuel-burning power plants prevented almost 650 million metric tons of carbon dioxide emissions in 2006. The volume of greenhouse gas emissions avoided by the use of nuclear power in the United States is equivalent to taking more than 90% of all passenger cars off the nation's roadways. Globally, the use of nuclear energy prevents the emission of more than 2.6 billion metric tons of carbon dioxide each year.[17]

For these reasons, the United Nations IPCC in its Fourth Assessment Report listed "nuclear power" as a "key" technology for mitigating greenhouse gas emissions -- a technology, importantly, that is "currently commercially available."[18] It has also concluded that "[n]uclear power is . . . an effective [greenhouse gas] mitigation option."[19]

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[17] Even when greenhouse gas emissions are analyzed for the entire life cycle of a nuclear power plant -- from uranium mining to electricity production to used fuel management -- nuclear energy is comparable to solar, wind, and hydropower sources.

[18] *Summary for Policymakers of the Synthesis Report of the IPCC Fourth Assessment Report* 17.

[19] *Climate Change 2007: Mitigation, Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* 269 (Cambridge Univ. Press 2007), available at http://www.mnp.nl/ipcc/pages_media/AR4-chapters.html; *see also id.* ("Total

Notwithstanding the operational, economic, and environmental benefits of nuclear power, however, ultimate disposal of radioactive waste generated by nuclear plants depends upon the availability of a geologic repository. This is true whether SNF is disposed of directly, reprocessed, or otherwise recycled. Abandonment of Yucca Mountain project will significantly delay the availability of a repository, probably for decades. Such delay will not only unnecessarily complicate SNF management, but will likely result in increased costs to taxpayers as damages accrue based on DOE's failure to meet its obligation to commence accepting SNF from nuclear power plants.[20]

CONCLUSION

The foregoing supports the relief requested in the Brief of Petitioners Aiken County, Robert L. Ferguson, William Lampson, Gary Petersen, State of South

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life-cycle [greenhouse gas] emissions per unit of electricity produced from nuclear power are . . . similar to those for renewable energy sources.").

[20] In 1996 this Court held that DOE had an unconditional obligation to commence disposing of SNF not later than January 31, 1998. *Indiana Michigan Power Co. v. DOE*, 88 F.3d 1272. *See also Northern States Power Co. v. DOE*, 128 F.3d 754 (D.C. Cir. 1997) (finding that companies should pursue claims for damages resulting from DOE's failure to meet its obligation under the terms of contracts with the Department). According to the Congressional Budget Office, companies have been awarded $1.3 billion in compensation, and DOE estimates liabilities to utilities will total more than $12 billion assuming that the Department begins accepting SNF by 2020. *See Statement of Kim Cawley, Chief, Natural and Physical Resources Cost Estimates Unit before the Committee on the Budget, U.S. House of Representatives* 6-7 (July 16, 2009), available at http://www.cbo.gov/doc.cfm?index=10456.

Carolina, State of Washington, and Intervenor-Petitioner, National Association of Regulatory Utility Commissioners. Said relief should be granted.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Cir. Rule 32(a)(3)(C), I hereby certify that this brief complies with the type-volume limit prescribed in the Court Order of May 13, 2010. In reliance on the word count of the word processing system used to prepare the brief, I hereby certify that the portions of this brief subject to the type-volume limitation contain 2,685 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 pt. and Times New Roman type style.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25 and D.C. Cir. Rule 25, I hereby certify that on this date, February 4, 2011, I caused the foregoing "Final Brief of Amicus Curiae Nuclear Energy Institute in Support of the Petitioners" to be filed with the Court through the use of the D.C. Circuit CM/ECF electronic filing system, and thus also served on counsel identified below, as well as one original and eight hard copies sent by U.S. mail, first-class, postage prepaid, to the Court. In addition, as indicated below, Mr. James Conwell Kilbourne and Mr. William Henry Davidson II were served this same date by U.S. mail, first-class, postage prepaid.

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