

May 24, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
U.S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
)	
(High-Level Waste Repository))	ASLBP No. 09-892-HLW-CAB04
)	
)	

NRC STAFF ANSWER TO FLORIDA PUBLIC SERVICE
COMMISSION'S MOTION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission (“Staff”) hereby responds to “Motion of the Florida Public Service Commission for Leave to Participate as Amicus Curiae and File Memorandum” (“Motion”), dated May 14, 2010.¹ For the reasons set forth below, the Staff does not oppose Florida Public Service Commission’s Motion.²

DISCUSSION

Florida Public Service Commission seeks leave to participate as *amicus curiae* and file its memorandum regarding the “U.S. Department of Energy’s [DOE] Motion to Withdraw” the license application for a proposed high-level waste repository at Yucca Mountain, Nevada. See Motion at 1. Florida Public Service Commission claims it “has a clear interest in, and unique perspective concerning, the instant proceeding” as it is “responsible for the determination of

¹ Attached thereto was “The Florida Public Service Commission Amicus Curiae Memorandum,” dated May 14, 2010 (“Memorandum”).

² Pursuant to the Board’s May 18, 2010 Order, Florida Public Service Commission cannot participate in the June 3 and 4 oral argument as *amicus curiae*. Memorandum and Order (Logistics for Oral Argument), dated May 18, 2010 (unpublished), at 3 (“The Board will not hear argument from any amicus curiae or entertain any limited appearance statements pursuant to 10 C.F.R. § 2.315.”).

need for nuclear facilities of investor-owned utilities in Florida and for passing on the just and reasonable costs to the ratepayers.” Motion at 2. It also claims that its participation as *amicus curiae* “would benefit the Board in its deliberation on the Yucca Mountain repository.” See *id.*

The Commission’s regulations provide that the Commission may, in its discretion, allow a person who is not a party to file a brief “*amicus curiae*” regarding a matter being reviewed by the Commission under § 2.341 or *sua sponte*. 10 C.F.R. § 2.315(d) (“Such a person shall submit the amicus brief together with a motion for leave to do so which identifies the interest of the person and states the reasons why a brief is desirable.”). NRC case law, however, indicates that although the Commission’s rules do not explicitly authorize *amicus curiae* briefs before a licensing board, such briefs may be permitted.³ As the Atomic Safety and Licensing Appeal Board observed, the Commission’s rules do “not perforce preclude the granting of leave in appropriate circumstances to file briefs or memoranda *amicus curiae* (or to present oral argument) on issues of law or fact that still remain for Licensing Board disposition.” *Seabrook*, ALAB-862, 25 NRC at 150. The Appeal Board further stated that “there is no real difference between an appellate brief *amicus curiae* and a brief or other submission presented to a trial tribunal that is confined to a discussion of (1) legal issues that have been presented to that tribunal by the parties; and (2) factual issues covered in the evidentiary hearing.” *Id.* at 150.

The Staff does not oppose Florida Public Service Commission’s request to participate as *amicus curiae* and to file its Memorandum. DOE’s Motion to Withdraw presents the Board with legal issues. See *Dep’t of Energy* (High-Level Waste Repository), CLI-10-13, 71 NRC __ (slip

³ See, e.g., *Tennessee Valley Auth.* (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC __ (slip op. at 11) (March 26, 2010) (observing that petitioners appealing a licensing board’s denial of its intervention petition have the opportunity to participate, as appropriate, as *amicus curiae* to protect their interests); *Gen. Pub. Utils. Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 161 (1996) (providing petitioner an opportunity “to appear as *amicus curiae* and file a pleading providing the Board with its views on the legal issue” where petitioner failed to otherwise demonstrate standing); *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 150-51 (1987) (authorizing the participation of a state Senator, who the Appeal Board opined would “make a worthwhile contribution at this early stage of the deliberative process,” as *amicus curiae* in the proceedings before the licensing board).

op. at 3-4). As discussed above, a Board may authorize *amicus curiae* memoranda regarding legal issues. See *Seabrook*, ALAB-862, 25 NRC at 150. In addition, consistent with 10 C.F.R. § 2.315(d), Florida Public Service Commission submitted its *amicus curiae* Memorandum along with its Motion that identifies an interest in the proceeding and indicates that consideration of its Memorandum is desirable because its participation may benefit the Board in its deliberations. See Motion at 2.

CONCLUSION

For the reasons set forth above, the Staff does not oppose Florida Public Service Commission's Motion.

Respectfully submitted,

/signed (electronically) by/

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Dated at Rockville, Maryland
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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC Staff Answer to Florida Public Service Commission's Motion for Leave to Participate as Amicus Curiae" in the above-captioned proceeding have been served on the following persons this 24th day of May, 2010, by Electronic Information Exchange.

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