

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 NYE COUNTY NEVADA'S PETITION
FOR INTERLOCUTORY REVIEW OF CAB04 APRIL 6, 2010 ORDER

INTRODUCTION

On April 15, 2010, Nye County, Nevada ("Nye") 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, 2010.¹ Nye County Nevada's Petition for Interlocutory Review of CAB04 April 6, 2010 Order, dated April 15, 2010 at 1 ("Petition"). Although Nye has not followed the procedures set forth in 10 C.F.R. Part 2, Subpart J, the Staff does not object to Nye'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

¹ Nye also indicates that it joins the U.S. Department of Energy ("DOE") "in its Petition for Interlocutory Review filed on April 12, 2010, on procedural grounds," and supports DOE's request for Commission review of the Order. Petition at 1.

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 petitions to intervene in the above-captioned proceeding.² 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.³ The parties completed briefing on the first three petitions, South Carolina, Washington, and Aiken County, on April 5, 2010.⁴

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 3.⁵ Nye filed its Petition on April 15, 2010 stating that it "supports DOE's request that the [Commission] expeditiously review the [Order], and reverse it," or, in the alternative, "that the Commission exercise its authority, *sua sponte*, to act upon the remaining Petitions to Intervene and to decide DOE's Motion to Withdraw after appropriate briefing by the parties." Petition at 1-2; see *also* Petition at 16. The Staff's response follows.

² 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.

³ Order (Concerning Scheduling), dated March 5, 2010; Order, dated March 16, 2010.

⁴ See Order (Concerning Scheduling), dated March 5, 2010, at 2.

⁵ 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.*

DISCUSSION

Nye seeks review and reversal of the Order because the Board's decision to defer ruling on both the Motion to Withdraw and the new intervention petitions until after a decision by the Court of Appeals "ignor[es] settled justiciability principles." Petition at 6. According to Nye, the Order will prevent the Commission from reaching a final agency position prior to judicial review, contrary to established principles of administrative procedure.⁶ *Id.* at 8. As set forth below, although the Petition does not comply with the applicable procedural requirements for a petition for interlocutory review, Nye'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).⁷ Although Nye'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).

⁶ Nye also raised several arguments related to the merits of DOE's Motion to Withdraw. See Petition at 11-15. The Staff herein addresses only the threshold question of whether the Commission may take review of the Board's Order. The Staff will address the merits of DOE's Motion to Withdraw after a briefing schedule has been set by the Commission or the Board.

⁷ 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), Nye 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 Nye 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).

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.⁸ *See Vermont Yankee*, 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.

Nye 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 1-2, 16. 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

⁸ 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 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).

[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 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.

CONCLUSION

For the foregoing reasons, the Commission may take 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
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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO NYE COUNTY NEVADA'S 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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