

1. Introduction

A. Request and Party Identity

The State of South Carolina hereby petitions to intervene as a full party to this proceeding. The purpose of the requested intervention is to oppose, as a matter of law, the anticipated motion of the Department of Energy to withdraw, with prejudice, the application in this case. Because this Petition is being filed after the normal deadline for such petitions, although not untimely under the circumstances set forth herein, South Carolina also requests that this Petition be granted as timely for the reasons set forth herein, or if it is deemed untimely, that it be permitted to be filed untimely, also for the reasons set forth herein. Those reasons, in summary, are that only within the past thirty days or less has the Department of Energy made it clear that it would seek to withdraw the application in this matter with prejudice.

The name of the party and its address (and related contact information) are as follows:

Name of Party:	State of South Carolina
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The State of South Carolina designates Henry Dargan McMaster, or such legal counsel as he designates, including the counsel listed immediately above, as its single representative for any hearings.

B. Basis for assertion of standing.

As the Commission has held in its Memorandum and Order dated May 11, 2009, at p. 9,

[A] petition to intervene must provide information supporting the petitioner's claim to standing, including: (1) the nature of the petitioner's right under the governing statutes to be made a party; (2) the nature of the petitioner's interest in the proceeding; and (3) the possible effect of any decision or order on the petitioner's interest. In determining whether an individual or organization should be granted party status "as of right," the NRC applies judicial standing concepts that require a participant to establish: (1) it has suffered or will suffer "a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statute[s]" (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury is fairly traceable to the challenged action; and (3) the injury is "likely to be redressed by a favorable decision."

(Footnotes omitted.)

While South Carolina's standing will be discussed in more detail below, it can be summarized as follows, in connection with the situation that would exist if DOE's anticipated motion to withdraw were to be granted.

First, South Carolina would suffer a distinct and palpable harm, constituting injury-in-fact within the zone of interests sought to be protected by the applicable statutes, particularly the Nuclear Waste Policy Act of 1982. The abandonment of the Yucca Mountain site would place South Carolina on the list of candidate states for a waste disposal facility, and more so than many other states, because South Carolina has the Savannah River Site (SRS) within its boundaries, as well as seven commercial reactors with onsite storage. The NWPA provides for extensive participation by states in the site selection and characterization process, a process that would be reopened for the first time since 1987 if the application in this matter is permitted to be withdrawn. *See e.g.*, 42 U.S.C. §§ 10131(a)(6) and 10134(a)(1)(F), discussed

more fully herein. The NWPA therefore places South Carolina firmly within the zone of interests to be protected if the nation's nuclear waste disposal efforts revert back to their pre-1987 status as a result of dismissal of the license application in this matter. South Carolina would also suffer harm by the continuing delay of the opening of a repository, now already more than a decade behind schedule, including the continuing potential hazard of the onsite storage at the seven commercial reactors, the storage of foreign spent nuclear fuel at SRS, and the need to have emergency preparedness and transportation plans in place in connection with that spent fuel.

Secondly, the aforementioned potential harm is obviously traceable to the challenged action. DOE's motion to withdraw the license application with prejudice, and any decision of the Commission to grant that motion, would have the effect of causing the site selection process to revert back to the situation that existed prior to the 1987 amendments to the NWPA that limited site characterization activities to the Yucca Mountain site.

Thirdly and finally, the injury is likely to be redressed by a favorable decision on the issues presented by the Petition herein, because if South Carolina is successful with respect to those issues, the present proceeding will continue, and South Carolina would not be back on the list of potential disposal sites.

2. Timeliness

DOE's application was noticed for hearing on October 22, 2008 (73 Fed. Reg. 63029, 10/22/2008). South Carolina's Petition to Intervene was not filed within 60 days of publication of that notice, but nevertheless should be granted for the reasons set forth herein.

A. The Petition is timely under 10 C.F.R. § 2.309(f)(2).

This Petition is timely submitted in accordance with 10 C.F.R. § 2.309(f)(2) because it is submitted within 30 days of the date on which new and material information on which the contentions set forth herein are based became available. *See* CAB Case Management Order #1, at 3-4 (January 29, 2009). The information on which the State's contentions are based includes:

(a) The Administration decision, announced as early as January 29, 2010, that the Department would seek to withdraw the application in this matter. Attachment 1 hereto (Second National Report on Safety, DOE/EM0654, Rev. 1, October 2005, Annexes D-1, D-2.)

(b) In addition, on February 1, 2010, the Department filed a motion with this Board announcing that it would soon seek to withdraw the application.¹

(c) Also on February 1, 2010, the Administration's budget was announced, in which the President directed the Department to discontinue the present application. Pertinent parts of the executive budget document were attached to the Department's February 1, 2010 motion.

The regulation at 10 C.F.R. § 2.309(f)(2), and CAB Case Management Order #1, at 3-4 (January 29, 2009) both provide that new contentions may be filed upon a showing that:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and

¹ As of the time of this filing, DOE has not yet filed such a motion.

- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2)(i) through –(iii). All three of these criteria are satisfied in this matter. First, the recently-announced Administration decision to withdraw the application “was not previously available.” 10 C.F.R. § 2.309(f)(2)(i). Instead, it is a completely new and unanticipated development. Secondly, the information on which South Carolina’s contention is based is “materially different than the information previously available,” 10 C.F.R. § 2.309(f)(2)(ii), because previously the Department had intended to pursue the application, and now it does not. Finally, this Petition is being submitted in a timely fashion, 10 C.F.R. § 2.309(f)(2)(iii) and CAB Case Management Order #1, Paragraph B(1), because it is being “filed within 30 days of the date when the new and material information on which it is based first became available.”

For all of these reasons, South Carolina therefore respectfully submits that its Petition to Intervene should be granted pursuant to 10 C.F.R. § 2.309(f)(2).

B. Alternatively, the Amended Petition should be granted based on the factors in 10 C.F.R. § 2.309(c).

In the alternative, if South Carolina’s Petition is deemed to be non-timely, then it should be granted in accordance with 10 C.F.R. § 2.309(c) for the reasons set forth below.

1. There is “good cause” to grant the Petition (10 C.F.R. § 2.309(c)(i)).

10 C.F.R. § 2.309(c)(i) provides that an untimely Petition to Intervene may be granted where “[g]ood cause, if any, for the failure to file on time” is shown. Here, as already set forth above, the Administration’s decision to withdraw the application was announced less than thirty days ago. Prior to that announcement, South Carolina had no specific reason to

seek to participate in the Yucca Mountain licensing application proceeding, because its general interests in public health and safety, and other matters under review by the Board, were being adequately protected by the existing parties. The Administration's recent announcement of its intent to abandon the application is a new and unexpected development that gives rise, for the first time, to a reason for South Carolina to have an interest in participating in this matter. As a result, there is good cause for South Carolina to seek to intervene at this time, and not earlier.

2. The nature of South Carolina's right to be made a party (10 C.F.R. § 2.309(c)(ii)).

10 C.F.R. § 2.309(c)(ii) requires consideration of "[t]he nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding." The interest of South Carolina and other states, even those in which no repository has been proposed for siting, has been recognized by a number of provisions in the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101, et seq. These provisions include the following:

a. 42 U.S.C. §10131(a)(6), the legislative findings section, contains a finding that "State and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel. . . ."

b. 42 U.S.C. § 10134(a)(1)(F) provides that at the pre-site selection phase of the process, the Department must consider "the views and comments of the Governor and legislature of any State, or the governing body of any affected Indian tribe, as determined by the Secretary, together with the response of the Secretary to such views. . . ."

c. As noted above and as discussed more fully elsewhere herein in discussions of standing, the Nuclear Waste Policy Act provides for broad and full participation by states and

others in the siting process. The Department's proposal to withdraw the application, if it were to be granted, would have the effect of taking the site selection process back to the situation that existed prior to 1987, when the Act was amended to make Nevada the only state in which site characterization would occur. 42 U.S.C. §10133. The pre-1987 situation would be restored because no one state would be the identified likely disposal site, and all states would be potential candidates for a repository. This would especially be true for South Carolina, which houses the Savannah River Site, a location that has received at least some consideration in the past, that is, in the early 1980's, as a potential disposal site.

d. The Supreme Court has held that States have standing to challenge federal agency action that presents a risk of harm to the State that is both actual and imminent, and where there is substantial likelihood that the judicial relief requested will prompt the federal agency to take steps to reduce that risk. *Massachusetts v. EPA*, 549 U.S. 497, 518-519 (2007) (stating that in its capacity of "quasi-sovereign" "the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.") (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 & 607 (1982) ("[A] State has a quasi-sovereign interest in the health and economic well-being – both physical and economic – of its residents in general.") In addition, with respect to this licensing decision, Congress and NRC have granted states the procedural opportunity to protect their rights. 42 U.S.C. § 2239; 10 C.F.R. § 2.309(d)(2). The provision of this procedural right and South Carolina's stake in protecting its quasi-sovereign interests entitles California to "special solicitude" in standing analysis. *See Massachusetts v. EPA*, , 549 U.S. at 519-521. The

continuing presence of large quantities of spent fuel and high level nuclear waste in South Carolina also requires the State to regulate the transportation of nuclear materials and, among other things, to maintain certain emergency preparedness plans that would not be necessary in the absence of such quantities of nuclear material.

e. The citizens of South Carolina have paid approximately \$1.2 billion in fees levied pursuant to the NWPA for the development of a permanent storage site. In addition, the citizens of South Carolina have a substantial interest in the proper and permanent disposal of spent nuclear fuel and high level nuclear waste now being temporarily stored in the state. The citizens of South Carolina also derive economic, health, safety, professional, recreational, conservation and aesthetic benefits from the existence of the natural environment of the region.

For all of these reasons, as well as those set forth elsewhere in the discussion of standing, South Carolina has an interest in insuring that the Yucca Mountain license application remains under active consideration. That interest entitles South Carolina to intervene in the present proceeding.

3. The nature of South Carolina's interest in the proceeding (10 C.F.R. § 2.309(c)(iii)).

10 C.F.R. § 2.309(c)(iii) requires consideration of the “nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding.”

DOE issued a Final Environmental Impact Statement with the conclusion that not building the Yucca Mountain geologic repository could result in “widespread contamination at the seventy-two commercial and five DOE sites across the United States, with resulting human health impacts.” (DOE/EIS -- 0250, Section S.12). The five DOE sites include the Savannah River Site near Aiken, South Carolina, which houses foreign spent fuel as well as

defense high level nuclear waste. Further, there are seven nuclear power plants in South Carolina, under licenses which invoke a Waste Confidence Ruling by the Commission, based on the fact that Yucca Mountain is being developed as a final resting place for spent nuclear fuel from the reactors. *See* Attachment 2.. South Carolina has an interest in this matter in insuring that the Yucca Mountain licensing proceedings continue, so that the spent fuel and other nuclear material now being temporarily stored in South Carolina will be safely placed in the Yucca Mountain repository.

4. Effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest (10 C.F.R. § 2.309(c)(iv)).

10 C.F.R. § 2.309(c)(iv) provides that consideration should be given to “[t]he possible effect of any order that may be entered in the proceeding on the requestor’s/petitioner’s interest.”

South Carolina’s concern is that if the Department files its anticipated motion to withdraw its application with prejudice, and if the Commission were to grant that motion, South Carolina, unless made a party to this proceeding, might be held not to have a right to petition for review of such a decision by a Court of Appeals. Because of the uncertain state of the law on this point, South Carolina does not necessarily believe that it will be entirely without a remedy if not permitted to intervene in this proceeding. However, it is a certainty that if South Carolina is afforded intervenor status in this case, such status will render unnecessary the argument of a number of procedural objections that others might later raise to any effort by South Carolina to review such Commission action.

The Hobbs Act, 28 U.S.C. § 2342(4), applies to certain final orders of the Nuclear Regulatory Commission, and presumably would apply to any final order in the present proceeding as well. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985). It has been

held generally under the Hobbs Act that nonparties to an agency proceeding do not, at least for certain types of challenges, have standing to seek review of the final agency action. *See, e.g., Professional Reactor Operator Soc. v. U.S. Nuclear Regulatory Com'n*, 939 F.2d 1047, 1049 n.1 (D.C. Cir. 1991). At the same time, however, there is also a general rule that agency action may be challenged on appeal even by a party to the agency action where, as here, the contention is that the agency action exceeded the agency's statutory authority. *American Trucking Associations, Inc. v. I. C. C.*, 673 F.2d 82, 85 n. 4 (5th Cir. 1982); Wright and Miller, *Federal Practice and Procedure*, § 8302.² Finally, it is possible, and perhaps even likely, that the NWSA, 42 U.S.C. § 10139(a), would permit review of a Commission action by a nonparty. That section provides that courts of appeals have original jurisdiction over "any civil action" for review of any final decision or action of the Secretary, the President or the Commission alleging the failure of any of them "to make any decision, or take any action, required under this part." It is just such a failure that South Carolina alleges in this matter with respect to the announced action of the Department of Energy to withdraw the application.

Accordingly, assuming without conceding that South Carolina's right to review of Commission action in this proceeding is best preserved by South Carolina being made a party to this proceeding, then South Carolina should be made a party in order to preserve its interests with respect to the new issues that have arisen only very recently.

5. The availability of other means whereby the petitioner's interest will be protected (10 C.F.R. § 2.309(c)(v)).

² On the other hand, the Seventh Circuit has held that the Hobbs Act "limits review to petitions filed by parties, and that is that." *Matter of Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 799 F.2d 317, 335 (7th Cir. 1986)

10 C.F.R. § 2.309(c)(v) provides that consideration should be given to “[t]he availability of other means whereby the requestor’s/petitioner’s interest will be protected.”

This issue has been discussed in the preceding section. It is possible that South Carolina would be able to challenge a dismissal of this action by the Commission either via Petition for Review, on the ground that the agency acted beyond its statutory authority, or via a civil action in a Court of Appeals as permitted by 42 U.S.C. § 10139(a). While either or both of these remedies might be available to seek review of any Commission action, it cannot be disputed that intervention in the present case would be the most conventional way in which to proceed. It would also permit this Board to hear and rule upon South Carolina’s contentions on the merits, rather than not being given such an opportunity, as would be the case if South Carolina were to seek review of Commission action initially in a Court of Appeals.³

As already noted above, this Petition for Intervention is being filed within less than thirty days after the Administration’s announcement that it would seek to withdraw its application with prejudice. As will be shown below, there is no reason why granting intervention to South Carolina should slow down the present case in any substantial way.

6. The extent to which the Petitioner’s interests will be represented by existing parties (10 C.F.R. § 2.309(c)(vi)).

10 C.F.R. § 2.309(c)(vi) provides for consideration of “[t]he extent to which the requestor’s/petitioner’s interests will be represented by existing parties.”

South Carolina is not aware of any party to this proceeding whose interest is similar or identical to that of South Carolina. Many of the parties, of course, are persons or entities

³ It is anticipated, however, that South Carolina will seek review of the Secretary’s action in a Court of Appeals.

whose interest in the proceeding is directly tied to the repository being licensed at Yucca Mountain. Presumably, the vast majority of the existing parties are more interested in having the facility sited somewhere other than Yucca Mountain. As far as can be discerned, there is no state or other governmental unit that is a party to this proceeding that is not either in Nevada or in the adjacent state of California. South Carolina therefore submits that it is not aware of any other party that will protect its interest in this matter.

7. The extent to which the Petitioner's participation will broaden the issues or delay the proceeding; (10 C.F.R. § 2.309(c)(vii)).

10 C.F.R. § 2.309(c)(vii) provides for consideration of “[t]he extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding. . . .”

South Carolina submits that if permitted to intervene, it would be able to file its objections to the Department’s anticipated motion to withdraw its application within ten days of such motion being filed, or within ten days of being granted intervenor status, if the latter event were to occur after the Department’s motion was filed. Under 10 C.F.R. § 2.309(h)(1), the parties to this proceeding have twenty-five days in which to respond to this Petition for Intervention, but any delay as a result of this Petition would be minimal, and would not outweigh the desirability of permitting at least one party to the case to present argument against the anticipated motion to withdraw. Any such minor delay would also be nonprejudicial, this proceeding already having been stayed.

8. The extent to which the Petitioner’s participation may reasonably be expected to assist in developing a sound record (10 C.F.R. § 2.309(c)(vii)).

Finally, 10 C.F.R. § 2.309(c)(vii) provides for consideration of “[t]he extent to which the requestor’s/petitioner’s participation may reasonably be expected to assist in developing a sound record.”

For the reasons already mentioned above, South Carolina’s participation in the case could be expected to assist with the development of a sound record, because such participation would provide for full, contested consideration by this tribunal of the issue of whether the Commission can order the withdrawal of an application with prejudice in light of the provisions of 42 U.S.C. § 10134(d)(“[t]he Commission shall consider an application for a construction authorization of all or part of a repository. . . .” (Emphasis added.)

3. Standing.⁴

A. South Carolina has standing under the Nuclear Waste Policy Act to challenge the efforts of DOE to have the high level waste management program revert to its pre-1987 status.

As noted earlier, the NWPA was intended to create a process in which DOE’s actions in siting and developing a repository would be open to full public participation, particularly including participation by states. Congress recognized that states have special interests in the waste management program. DOE’s anticipated attempt to have this proceeding dismissed with prejudice would have the effect of reverting the waste management program to its status prior to Congress’s 1987 identification of Yucca Mountain as the only site that would be studied. As a result, the role of the states other than Nevada in the process should be evaluated as if, as the Administration desires, the Nevada site had never been chosen by Congress to be the sole site for further studies, as the 1987 amendments to the Act provided. The role of the states, and their rights to participate in the site selection process prior to the 1987 amendments were very broad. With specific reference to South Carolina, moreover, the Administration’s proposal would have the effect of making South Carolina more vulnerable

⁴ Because the issue of standing arises in several different sections of this Petition, and in order to avoid undue repetition, South Carolina incorporates by reference herein all arguments made elsewhere in this Petition with regard to standing.

than most states to being studied as a potential disposal site, simply because of the existence of the Savannah River Site in South Carolina as a potential repository site for both defense and commercial spent fuel and high level waste.

An example of the participatory powers granted to the states by the Act is found in 42 U.S.C. §10131(a)(6), the legislative findings section, which contains a finding that “State and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel. . . .”

In addition, 42 U.S.C. § 10134(a)(1)(F) provides that at the pre-site selection phase of the process, the Department must consider “the views and comments of the Governor and legislature of any State, or the governing body of any affected Indian tribe, as determined by the Secretary, together with the response of the Secretary to such views. . . .” As noted above, the Administration proposal would, in practical effect, cause the site selection process to revert back to its pre-1987, pre-Yucca Mountain status.

The legislative history of the Act provides further evidence of the intent of Congress to permit the states full participation in the siting process. In the House Report, H.R. Rep. 97-491, the following was stated:

During repository site studies, prior to such time as a site has been approved for licensing and repository construction, states and tribes have rights to receive all relevant information from investigations, to participate in planning of environmental assessments and site characterization activities and to make recommendations regarding other aspects of conduct of the investigations which affect the social and economic well-being of citizens of the state or tribe.

H.R. Rep. 97-491 at 46 (emphasis added). Again, while this language pertains to activities prior to site selection, the Administration proposal is simply an effort to reopen the site selection process, and the Act clearly gives the states a role in that process. Such a role

clearly should include the right to participate in the present proceeding in order to argue that the site selection activities of the past fourteen or more years should not be undone by unauthorized executive action. In particular, a state such as South Carolina, which could once again be a candidate state for a disposal under the Administration's proposal, should by analogy be held to possess the same standing as Nevada, the candidate state which was given automatic standing by 10 C.F.R. § 2.309(d)(2).

It is a long-settled principle that "Congress may enact statutes creating legal rights, the invasion of which creates standing. . . ." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). For these reasons, it is clear that the Act creates standing in states, and especially in South Carolina, to contest an action that would have the effect of reopening the site selection process.

B. Standing requirements under 10 C.F.R. § 2.309(d)(2).

In addition to the reasons set forth above, South Carolina has standing under more general principles as well. These are measured by the tests set forth in 10 C.F.R. § 2.309(d)(2)(i) through –(d)(iv). Except for the test in Section 2.309(d)(2)(i), which is met by Part I(A) of this Petition, the other three tests have already been discussed above in connection with Section 2.309(c)(ii) through –(iv), and the above discussion is incorporated by reference herein.

C. Standing through discretionary intervention under 10 C.F.R. § 2.309(e).

Even if for some reason South Carolina is not permitted to intervene as a party in this proceeding as a matter of right for the reasons set forth above, South Carolina would urge that it be permitted to intervene as a matter of discretion under Section 2.309(e). Each of the requirements of Section 2.309(e) is met, for reasons discussed above in connection with

Section 2.309(c)(ii) through –(c)(viii). The above discussion is incorporated by reference herein. A section-by-section comparison table is set forth in the footnote.⁵

4. Hearing Requested

In the event that DOE files its anticipated motion to withdraw the application, South Carolina, if granted intervenor status, hereby formally requests a formal adjudicatory hearing on the merits of its contentions herein submitted. Those contentions are not anticipated to involve any contested issue as to any material fact, and would involve only legal argument.

5. Subpart J

Because South Carolina seeks to intervene solely to argue the legal issues presented herein, which are based on undisputed facts, South Carolina is not in the possession of any “documentary material,” as defined in 10 C.F.R. § 2.1001, as modified by 10 C.F.R. § 2.1005 (excluding noticeable materials and standard reference material).

6. Joint Contentions.

At this time, South Carolina is not aware of any other party that would have the same contentions as are being presented by South Carolina.

7. Contentions

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Section No. in 2.309(c)	Section No. in 2.309(e)
2.309(c)(iii)	2.309(e)(1)(ii)
2.309(c)(iv)	2.309(e)(1)(iii)
2.309(c)(v)	2.309(e)(2)(i)
2.309(c)(vi)	2.309(e)(2)(ii)
2.309(c)(vii)	2.309(e)(2)(iii)
2.309(c)(viii)	2.309(e)(1)(i)

In accordance with the Pre-License Application Presiding Officer Board's June 20, 2008 Memorandum and Order (LBP-08-10), South Carolina submits the following contentions.

I.

SOC⁶-MISC-01-WITHDRAWAL OF APPLICATION WITHOUT CONGRESSIONAL AUTHORITY

1. Specific statement of the issue of law or fact to be raised or controverted.

The anticipated action by the Secretary in moving to withdraw the application with prejudice is beyond the authority of the Secretary. It is contrary to the requirement of Section 114(b) of the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10134(b), which requires that if the site designation is permitted to take effect (as has happened with the enactment of Public Law 107-200 (2002)), then “the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site. . . .” (Emphasis added.) This statute prohibits the Secretary from unilaterally withdrawing the application in the absence of further Congressional action, and thus any motion to that effect by the Secretary should be denied as void and without authority.⁷

2. Brief explanation of the basis for the contention.

Again, the Act specifically provides that “the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site. . . .” (Emphasis added.) Conversely, no provision of the Act suggests that the Secretary may

⁶ As used herein, “SOC” is an abbreviation for South Carolina.

⁷ The Act imposes other related duties on the Secretary as well. For instance, it requires the Secretary to annually update Congress as to the status of such application, 42 U.S.C. § 10134(c), and to prepare and update a project decision schedule that “portrays the optimum way to attain the operation of the repository .” 42 U.S .C. § 10134(e)(1). These provisions cannot be harmonized with the announced intent of the Secretary to abandon the project.

withdraw the application. Contrary to the views of the Administration, which appear to be that the mere proposal of an Executive budget excuses noncompliance with a statutory duty, the Supreme Court has held that

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

* * *

The Constitution did not subject this law-making power of Congress to presidential or military supervision or control.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952). The same case holds that the presidential order therein invalidated was beyond the power of the executive because it did "not direct that a congressional policy be executed in a manner prescribed by Congress- it directs that a presidential policy be executed in a manner prescribed by the President." *Id.* The Court then held that the presidential order in that case, like the executive actions in the present case, merely

sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution.

Id.

Justice Jackson, concurring, noted that

The example of . . . unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.

Id. at 641.

Subsequently, the Court has reiterated these principles, holding, for instance, that “[w]e ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.” *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986). The present case is precisely just such a case in which the Executive Branch has disobeyed the commands of Congress, and in which a court, or in this case, this tribunal, should grant relief from such refusal to carry Congressional policy into execution. As the D.C. Circuit has held, with specific reference to Congress’s decision that Yucca Mountain would be the repository site, “Congress has settled the matter, and we, no less than the parties, are bound by its decision.” *Nuclear Energy Institute, Inc. v. Environmental Protection Agency*, 373 F.3d 1251, 1302 (D.C. Cir. 2004).

If the Department should argue that its duty ended once it simply filed the application, such an argument would propose a result that would be not only absurd, but also at odds with other parts of the NWPA. As held in such cases as *E.E.O.C. v. Commercial Office Products Co.* 486 U.S. 107, 120-121 (1988), a court should not countenance a reading of a statute that leads to “absurd or futile results . . . plainly at variance with the policy of the legislation as a whole. . . .” It would be absurd in the extreme to hold that after Congress had directed a fifteen-year program (198702002) of site study and development at Yucca Mountain costing in excess of ten billion dollars, the Department could then thwart any further action on the selected repository site simply by filing, and then later withdrawing, the license application. Such an interpretation is also at odds with the overall policy and purpose of the NWPA and with the 2002 Congressional selection of Yucca Mountain as the

repository site. Congress anticipated that further action, especially action by the Commission, would be necessary before the repository could open, but such further action was clearly limited to normal license application review and subsequent approval or disapproval of the application by the Commission following a review of the application's merits. *See, e.g.*, 42 U.S.C. § 10134(d). Congress did not intend for the Department to abandon, or the Commission to dismiss, the license application.

3. Demonstration that the issue raised in the contention is within the scope of the proceeding.

It goes without saying that the question of whether this proceeding should continue is one that is “within the scope of the proceeding.” DOE can hardly contend otherwise, because it plans to file a motion that will raise the issue.

4. Demonstration that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding.

Likewise, it goes without saying that the issue of whether this proceeding should continue is “material to the findings the NRC must make.”

5. Concise statement of the alleged facts or expert opinions supporting South Carolina's position on the issue and on which South Carolina intends to rely, and references to the specific sources and documents on which South Carolina intends to rely to support its position on the issue.

The factual underpinnings of South Carolina's position are simple, consisting of only those documents that go to show that DOE intends to withdraw the application. These consist of the announcement of the fact, Attachment 1 attached, and (so far) the February 1, 2010 motion to stay and the excerpt from the executive budget that was attached to that motion. The facts, simply put, are that Congress has mandated that the Department of Energy pursue

a license application for the Yucca Mountain repository, and the Administration has announced its intention to abandon the duty imposed upon it by Congress.

6. Showing of a genuine dispute with DOE on a material issue of law or fact.

As is indicated from the discussions above, there is no disputed material issue of fact of which South Carolina is presently aware, given that DOE clearly intends to seek withdrawal of the application. Equally clear, however, is the existence of a material issue of law, that is, the question of whether DOE has the power to withdraw the application, as discussed above.

II.

SOC-MISC-02--WITHDRAWAL OF APPLICATION IN VIOLATION OF SEPARATION OF POWERS

1. Specific statement of the issue of law or fact to be raised or controverted.

For the same reasons set forth in the preceding question, the doctrine of the separation of powers provides another basis for denying DOE the power to withdraw the application. The proposed withdrawal is not only directly contrary to the governing statute, it also seeks to have the Executive Branch determine matters which have already been determined by Congress, and thereby would constitute an executive encroachment on legislative power, as held in the authorities previously cited.

2. Brief explanation of the basis for the contention.

This contention is based on the same authorities cited under the preceding contention (SOC-MISC-01).

3. Demonstration that the issue raised in the contention is within the scope of the proceeding.

It goes without saying that the question of whether this proceeding should continue is one that is “within the scope of the proceeding.” DOE can hardly contend otherwise, because it plans to file a motion that will raise the issue.

4. Demonstration that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding.

Likewise, it goes without saying that the issue of whether this proceeding should continue is “material to the findings the NRC must make.”

5. Concise statement of the alleged facts or expert opinions supporting South Carolina’s position on the issue and on which South Carolina intends to rely, and references to the specific sources and documents on which South Carolina intends to rely to support its position on the issue.

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III.

SOC-MISC-03--IF THE COMMISSION WERE TO GRANT DOE'S ANTICIPATED APPLICATION TO WITHDRAW THE APPLICATION, THAT GRANT WOULD EXCEED THE COMMISSION'S POWERS UNDER THE NWPA.

1. Specific statement of the issue of law or fact to be raised or controverted.

If the Commission were to grant a motion to withdraw the application, such a grant would exceed the powers of the Commission, just as much as the Department's filing of the motion would exceed the powers of the Department. Section 114(d) of the Act, 42 U.S.C. § 10134(d), provides that

The Commission shall consider an application for a construction authorization for all or part of a repository [and] shall issue a final decision approving or disapproving the issuance of such application. . . .

2. Brief explanation of the basis for the contention.

The above-quoted provision of the statute does not vest the Commission with power to permit the abandonment of the application by the Department, in the absence of further authorization from Congress. In other words, Congress provided that the Department must apply for a license, and the Commission must render a decision that either approves or disapproves the issuance of a license. Congress did not offer the Commission the option of merely nonsuiting the case with prejudice, as the Department would have the Commission do. The statute created a power and a duty in the Commission only to hear and determine the merits of the application. As with the federal courts, the Commission has "a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). There is no suggestion that this duty can be avoided in this matter, in which Congress addressed this particular license application proceeding, specifically providing that the Commission must either approve or disapprove the application, as opposed to dismissing it. As a result, any dismissal of this matter pursuant to

the anticipated motion of the Department would be an action beyond the statutory power of the Commission to take, in addition to being action upon a motion that itself would be filed in excess of the authority of the Department.

3. Demonstration that the issue raised in the contention is within the scope of the proceeding.

It goes without saying that the question of whether this proceeding should continue is one that is “within the scope of the proceeding.” DOE can hardly contend otherwise, because it plans to file a motion that will raise the issue.

4. Demonstration that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding.

Likewise, it goes without saying that the issue of whether this proceeding should continue is “material to the findings the NRC must make.”

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The factual underpinnings of South Carolina’s position are simple, consisting of only those documents that go to show that DOE intends to withdraw the application. These consist of the announcement of the fact, Attachment 1 attached, and (so far) the February 1, 2010 motion to stay and the excerpt from the executive budget that was attached to that motion. The facts, simply put, are that Congress has mandated that the Department of Energy pursue a license application for the Yucca Mountain repository, and the Administration has announced its intention to abandon the duty imposed upon it by Congress.

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As is indicated from the discussions above, there is no disputed material issue of fact of which South Carolina is presently aware, given that DOE clearly intends to seek withdrawal of the application. Equally clear, however, is the existence of a material issue of law, that is, the question of whether DOE has the power to withdraw the application, as discussed above.

8. Consultation

The undersigned counsel has made a good faith effort to consult with counsel for the other parties prior to filing this Petition, by circulating a copy of a draft Petition substantially similar to the version being filed, along with a cover memo, to the e-mail addresses on the most current service list. The result of that consultation is that _____.

CONCLUSION

For the foregoing reasons, the State of South Carolina respectfully submits that the Board should grant its Petition to Intervene, and permit further argument as necessary, both in writing and at a hearing, on the legal issues presented herein.

Respectfully submitted,

Signed (electronically) by Kenneth P. Woodington

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February __, 2010