

**Responses of the Honorable Stan Wise  
Chairman, Georgia Public Service Commission to the  
Dingell/Boucher Letter of October 11, 2006  
Regarding the House Subcommittee on Energy and Air Quality Hearing on Nuclear  
Waste Disposal Held September 13, 2006**

***1. What is the procedural status of the Georgia PSC's Notice of Inquiry Concerning Nuclear Waste Fund payments? What, if any, actions has the Georgia PSC taken based on what it learned in this proceeding?***

On May 24, 2000, the Commission issued its Notice of Inquiry (NOI) in Docket No. 12269-U to solicit comments from stakeholders regarding the issue of Georgia ratepayer payments into the Nuclear Waste Fund (NWF). Comments and reply comments were received from various parties and the Commission took these comments under advisement, but took no further action at that time.

At our Administrative Session on January 17, 2006, I directed the staff to come back to the Commission with a review of a number of options to address concerns with Georgia ratepayer contributions to the Nuclear Waste Fund given that the Federal government has already breached its contract to begin taking spent nuclear fuel as of January 31, 1998. These options included the potential for this Commission to order Georgia Power Company to escrow the money collected from Georgia ratepayers in lieu of making payments into the NWF; the possibility of this Commission filing suit against the Federal government, consistent with what Southern Company has filed on behalf of Georgia Power in other jurisdictions, against the DOE for reimbursement of additional costs incurred for storage of spent nuclear fuel due to DOE's failure to take the waste; and, the possibility of the Commission adopting a resolution (possibly one of the resolutions passed at the 2006 NARUC Winter Meetings) addressing Nuclear Waste Fund Reform and/or Spent Nuclear Fuel Take Title.

Based upon information gathered during this proceeding and upon the recommendations of staff and the state Attorney General's office, the Commission decided to hold off on ruling on the escrow option until more information/experience can be obtained from other state commissions. Further, delaying a decision on the escrow option would give the Commission the opportunity to more fully develop (in partnership with other stakeholders) the legislative option whereby congress could address many of the funding concerns by passing legislation to take the Nuclear Waste Fund off budget (NWF Reform).

However, at the February 21, 2006 Administrative Session, the Commission voted to file an amicus curiae brief related to this issue in a timely fashion and at the appropriate time in the Southern Nuclear case against DOE (Case No. 98-614C). The Commission also voted to adopt both of the Resolutions on the Nuclear Waste issue passed by the National Association of Regulatory Utility Commissions ("NARUC") at its 2006 Winter Meetings. A copy of the GPSC's March 1, 2006 Order is included as Attachment A.

**2. Are you aware of any similar inquiry undertaken by other States?**

A number of States have reviewed the option of withholding further payments into the NWF. In this alternative, the States would direct ratepayer payments into an interest accruing **escrow account**, unless and until the U.S. DOE meets its obligations to dispose of nuclear waste. States that have conducted some level of investigation into escrowing NWF payments includes: Michigan, Minnesota, Georgia, Florida, Virginia, South Carolina, Iowa, and Texas. I am not aware that any of the States that have reviewed the option for escrowing ratepayer NWF payments have taken further action beyond the initial investigation, other than the Order issued by the Georgia PSC pursuant to the Commission's February 21, 2006 vote as described in the response to Question 1 above.

**3. Does the Georgia PSC have the authority to suspend ratepayer payments that would otherwise be due in connection with utilities' obligations with respect to the Nuclear Waste Fund (under contracts they entered into with DOE pursuant to the Nuclear Waste Policy Act of 1982)?**

As the question calls for a legal opinion, please see attachment B which is the May 17, 1999 Memorandum from the state Attorney General's office in response to the Commission's Request for Legal Advice Regarding the Nuclear Waste Policy Act

**4. Does the Georgia PSC have authority to place into an escrow account utility payments that would otherwise be made into the Nuclear Waste Fund? If so, please indicate how and by whom such an account should be administered.**

As the question calls for a legal opinion, please see attachment B which is the May 17, 1999 Memorandum from the state Attorney General's office in response to the Commission's Request for Legal Advice Regarding the Nuclear Waste Policy Act

**5. Has the Georgia PSC reached any conclusions about the risks utilities might face if payments into the Nuclear Waste Fund were suspended, as outlined in Question 6 of its Notice of Inquiry?**

The Commission has not officially reached any conclusions about the risks utilities might face if payments into the NWF were suspended. However, having investigated this issue extensively, I am cognizant of the utilities' perceived risks.

In most, if not all of the State proceedings investigating the option of escrowing ratepayer payments into the NWF, nuclear utilities have resisted endorsing the escrow concept due to 1) general concerns that withholding payments may somehow undermine any progress or the future of the program, and 2) concerns surrounding the disposition of their nuclear

plant operating licenses under the scenario where they would no longer be making NWF payments to the Federal government.

While it is unclear whether the utility licenses would be at risk, those who believe the escrow option is viable point to areas in which the stated reasons for utility opposition appear to be weak. First, addressing the licensing issue, the NWPA only requires the "entering into a contract" with the DOE, but does not address the maintenance of the contract as necessary to keep the license valid

Second, the NRC has not faced an appeal for license removal due to utility non-payment, and according to the Staff of the NRC, there are no rules or other provisions at the NRC that address this matter. Moreover, the escrow option may not, in and of itself, violate the terms of the contract, because 1) the utility retains the option to continue making payments to the DOE using shareholder earnings, and 2) some escrow instruments, when applied, are not considered "non-payments," but rather are considered payments made in lieu of a pending service or obligation, in this case, the DOE's obligation to begin taking waste from the utilities plant sites.

Finally, regarding the nuclear industry concern that exercise of an escrow-type option may somehow undermine any current or future progress of the Federal nuclear waste program; there is no evidence of a lack of full funding having any adverse effects on the progress of the program.

***6. Section 302(a) (4) of the Nuclear Waste Policy Act of 1982 directs the Secretary of Energy to annually review the amount of fees required to provide sufficient revenues for the repository program. This provision also directs the Secretary to adjust the fee in the event he or she "determines that either insufficient or excess revenues are being collected."***

***In light of the substantial existing balance in the Nuclear Waste Fund (currently more than \$19 billion), do you believe the Secretary should adjust or suspend the fee that utilities currently are required to pay into the Fund?***

If I believed that there was a surplus of \$19 billion in a fund (established for the sole purpose of financing nuclear waste disposal that is going to be at least another ten years before disposal might begin) and further, that Congress appropriates less than one fifth of the amount of annual fee revenue, I would certainly ask what is being done with that surplus. It is my understanding that the Nuclear Waste Policy Act allows the NWF to accrue interest – to the point where presently the amount of interest credited to the Fund exceeds the total fee revenue.

Upon further investigation, I learn all is not as it appears on paper. Experts point out that the \$19 billion has already been spent on other government uses unrelated to nuclear

waste disposal or even energy in any form. In simple terms, the \$19 billion is in the form of an IOU payable by a future Congress.

***If so, how much of a reduction would be appropriate, and how long should such a reduction or suspension of payments last?***

The most recently available Nuclear Waste Fund Fee Adequacy Assessment of 2001 avoids that most obvious aspect of the status of the Fund's fiscal health. Instead, the report uses two different interest rates to forecast a continuous surplus of nine to as much as forty-five billion dollars through the peak construction cash flow period to 2042. Accepting this forecast, it looks to me that the fee could be eliminated since the supposed interest (which seems to continually be underestimated) appears adequate to pay for repository program costs based on the total future costs. These future costs were estimated in the Assessment at \$49.7 billion, with a 27.3/72.7 percent funding cost allocation between defense and the Nuclear Waste Fund. The Assessment concludes that the fee is "adequate."

I am uncertain as to what reaction Congress would have if the Secretary of Energy were to propose to Congress that the fee be reduced. Since during FY 2006 the fee revenue was in the range of \$750 million, but only \$99 million was appropriated for the repository program, most of the fee revenue was diverted to other purposes. If the fee gets reduced there would be less money to use in those other ways.

Attachments

Cc: The Honorable Joe Barton, Chairman  
Committee on Energy and Commerce

The Honorable Ralph M. Hall, Chairman  
Subcommittee on Energy and Air Quality



**RECEIVED**

MAR 01 2006

Attachment A

DEBORAH K. FLANNAGAN  
EXECUTIVE DIRECTOR

COMMISSIONERS:  
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DOCKET # <u>12269</u>
DOCUMENT # <u>90152</u>

Docket No. 12269-U

In Re: **Notice of Inquiry into Issues Concerning Ratepayer Payments into Nuclear Waste Fund**

**ORDER**

BY THE COMMISSION:

At the January 17, 2006 Administrative Session, options for action by the Georgia Public Service Commission ("Commission") with regard to the issue of ratepayer payments into the nuclear waste fund were discussed. At the February 21, 2006 Administrative Session, the Commission voted to file an amicus curiae brief related to this issue in a timely fashion and at the appropriate time. The Commission also voted at the February 21, 2006 Administrative Session to adopt both of the Resolutions on the Nuclear Waste issue passed by the National Association of Regulatory Utility Commissions ("NARUC") at its 2006 Winter Meetings. The Resolutions are attached as Exhibits "A" and "B" to this Order.

\* \* \* \* \*

**WHEREFORE**, it is

**ORDERED**, that the Commission will file an amicus curiae brief related to this issue in a timely fashion and at the appropriate time.

**ORDERED FURTHER**, that the Commission hereby adopts the resolutions attached as Exhibits "A" and "B" to this order, which were approved by NARUC at its 2006 Winter Meetings.

**ORDERED FURTHER**, that all findings, conclusions and decisions contained within the preceding sections of this Order are adopted as findings of fact, conclusions of law, and decisions of regulatory policy of this Commission.

**ORDERED FURTHER**, that any motion for reconsideration, rehearing or oral argument shall not stay the effectiveness of this Order unless expressly so ordered by the Commission.

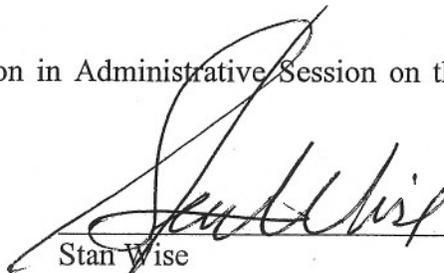
**ORDERED FURTHER**, that jurisdiction over this proceeding is expressly retained for the purpose of entering such further order or orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 21st day of February, 2006.



Reece McAlister  
Executive Secretary

Date: 2-28-06



Stan Wise  
Chairman

Date: 2-28-06

*Resolution Supporting Reform of the Nuclear Waste Fund*

**WHEREAS**, In 1982 the Nuclear Waste Policy Act established policy that the federal government is responsible for safe, permanent disposal of all high-level radioactive waste, including spent nuclear fuel from commercial power reactors; *and*

**WHEREAS**, Since 1983 ratepayers in States using nuclear-generated electricity have paid over \$25 billion in fees and interest, via their electric utility bills, to the Nuclear Waste Fund (NWF) in the U.S. Treasury in what was to have been a self-financed waste disposal program; *and*

**WHEREAS**, Consumers are projected to pay more than \$750 million into the NWF each year, based on electricity generated at the Nation's 103 commercial reactors; *and*

**WHEREAS**, Congress historically has only appropriated a small fraction of the amount of revenue going into the NWF to develop the waste repository—resulting in a balance in the Fund, now over \$17 billion, which must be available to meet future disposal program needs; *and*

**WHEREAS**, The Energy Policy Act of 2005 acknowledges that nuclear energy must continue to be a critical component of our nation's fuel mix for national security, energy independence from foreign sources and price stability; *and*

**WHEREAS**, The Department of Energy, as recently as 2004, estimated annual appropriations will need to average \$1.3 billion from 2005-2010 to enable construction, waste package procurement and transportation to meet its statutory and contractual obligation to remove spent fuel from nuclear plant sites; *and*

**WHEREAS**, Previous attempts to address the gap between NWF revenue and annual appropriations have been either embroiled in nuclear waste politics or faced other insurmountable obstacles; *and*

**WHEREAS**, The National Commission on Energy Policy, in its 2004 report *Ending the Energy Stalemate* in its policy recommendations for nuclear energy, says the "Administration and Congress should act immediately to reform the budget treatment of the Nuclear Waste Fund;" *now therefore be it*

**RESOLVED**, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened in its February 2006 Winter Meetings in Washington, D.C., urges that the Department of Energy again propose legislation to reclassify fees paid by utilities to the Nuclear Waste Fund as discretionary offsetting collections equal to the annual appropriations from the Fund or by other means that achieves the result of having appropriations match Fund revenue; *and be it further*

**RESOLVED**, That NARUC urges the 109th Congress to enact legislation this year that would enable total fee payments into the Nuclear Waste Fund to be fully available as annual appropriations to finance the civilian radioactive waste management program funding needs each year, with any shortfall made up from the Defense budget, or the existing balance in the Fund.

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*Sponsored by the Committee on Electricity*  
*Adopted by the NARUC Board of Directors February 15, 2006*

*Resolution Opposing Having the Federal Government Take Title to Spent Nuclear Fuel in Dry Cask Storage and Keep it at Reactor Sites*

**WHEREAS**, It has been national policy since 1982 for the federal government to remove spent fuel from commercial nuclear power plants and to transport it to a permanent underground repository to be built and operated for disposal; *and*

**WHEREAS**, The government under the Nuclear Waste Policy Act (NWPA) also set up the Nuclear Waste Fund to pay for the permanent disposal and has been collecting fees from nuclear utilities and their ratepayers for the Fund since 1983; *and*

**WHEREAS**, Over \$25 billion in fees and interest have been collected to date, yet the repository is years behind schedule, and regular fee payments continue to be made; *and*

**WHEREAS**, Fee payments continue to flow into the Nuclear Waste Fund at a rate of around \$750 million per year, even though the government has failed to meet its statutory obligation to remove spent fuel for disposal; *and*

**WHEREAS**, Legislation has been proposed in the Congress that would direct the transfer of title of all spent fuel in dry cask storage to the U.S. Department of Energy (DOE) and provides that all spent fuel that has been outside the reactor for six years be put in dry casks and also become the responsibility of DOE at present reactor sites; *and*

**WHEREAS**, Since such legislation, as proposed, establishes no conditions under which the spent fuel would ever be removed for permanent disposal under NWPA, such a government takeover would have the effect of perpetual spent nuclear fuel storage at 72 surface repositories in 35 States that were never designed or permitted for that purpose; *and*

**WHEREAS**, Such an open-ended commitment to indefinite spent fuel storage at reactor sites—despite ratepayers having already paid for removal and disposal—is an exceedingly unsound alteration of existing federal policy; *and*

**WHEREAS**, Just as the nuclear industry seems poised to expand needed power generation in an emissions-free form, continued lack of a satisfactory solution to the spent fuel disposal problem—as this legislation would perpetuate—may inhibit access to needed capital to expand nuclear generation; *now therefore be it*

**RESOLVED**, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened in its February 2006 Winter Meetings in Washington, D.C., opposes having the federal government take title to spent fuel while continuing to store it indefinitely at reactor sites, since it serves no purpose and is contrary to the compact in law between ratepayers and the federal government; *and be it further*

**RESOLVED**, That NARUC convey this position to Congress and collaborate with State-based organizations and others to gather support to defeat attempts to legislate a perpetuation of the continued on-site spent fuel storage, whether managed by the utilities or the government.

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*Sponsored by the Committee on Electricity*

*Adopted by the NARUC Board of Directors February 15, 2006*

**ATTORNEY-CLIENT PRIVILEGED**

Writer's Direct Dial:  
404-656-4190  
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May 17, 1999

**MEMORANDUM**

TO: Sheree Williams  
Unit Director, Electric Section  
Georgia Public Service Commission

FROM: Daniel S. Walsh  
Assistant Attorney General

RE: Request for Legal Advice Regarding the Nuclear Waste Policy Act

Pursuant to the Nuclear Waste Policy Act (NWPA), Georgia Power Company (Georgia Power) entered into a Standard Contract with the Department of Energy (DOE), under which it has a continuing obligation to pay fees into the Nuclear Waste Fund (NWF). The DOE has failed to meet its obligation to dispose of spent nuclear fuel beginning by January 31, 1998. The Georgia Public Service Commission (Commission) requested advice on whether it has the legal authority to require Georgia Power Company to divert payments due to the NWF into an escrow account.

Ordering Georgia Power to place these fees into an escrow account rather than into the NWF raises both legal and policy concerns. The primary legal concern is that such an order may conflict with federal law, and may therefore be preempted. The policy concern relates to the potential consequences of directing Georgia Power to breach its agreement with the DOE.

A state action is preempted if federal law indicates the intent to control that particular subject matter. Even if the state is not entirely displaced in a particular area, state law is still preempted if it is impossible to comply with both state and federal law. Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984). Federal law authorizes the DOE to enter into contracts with "any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel". 42 U.S.C. § 10222(a)(1). The language for the Standard Contract is set forth in 10 C.F.R. 961.11. Further, federal law states the specific fee to be paid by a public utility for electricity generated by a civilian nuclear power reactor. 42 U.S.C. § 10222(a)(2). Pursuant to 42 U.S.C. § 10222(c), the payments that the DOE receives under the contracts are deposited into the NWF.

May 17, 1999

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A Commission order requiring Georgia Power to escrow these fees, rather than pay the fees to the DOE, may conflict with federal law and result in Georgia Power breaching its agreement with the DOE. Therefore, even if the NWPA is not read to displace entirely state regulation in the area of nuclear waste management, the escrow account that is the subject of the Commission's inquiry is still preempted because Georgia Power would be unable to comply with both the NWPA and the Commission-ordered escrow account.

In addition to the legal issue, a Commission order that directs Georgia Power to escrow the fees due to the NWF may have unintended consequences. For Georgia Power to stop making payments to the NWF may amount to a breach of its Standard Contract with the DOE. Breaching its agreement with the DOE may result in Georgia Power losing its ability to compel the DOE to dispose of its spent nuclear fuel.

The Commission still has opportunities to participate in an effort to protect Georgia Power's ratepayers from the DOE's failure to dispose of the nuclear fuel on schedule. In Northern States Power Company, et al., v. United States Department of Energy and United States of America, 128 F.3d 754 (D.C. Cir. 1997), the Court denied the petition for a writ of mandamus to force the DOE to begin acceptance of spent nuclear fuel by the January 31, 1998 deadline. The Court reasoned that the Standard Contract provided the petitioners with an adequate remedy for any failure on the part of the DOE to meet its obligations. The Standard Contract provides that if the DOE's delay is avoidable, then the DOE will be accountable for the additional costs incurred by utilities as a result of this delay. Under the contract, the DOE would not be liable for any unavoidable delay. An "unavoidable delay" is defined in the Standard Contract, as a failure that "arises out of causes beyond the control and without the fault or negligence of the party failing to perform." Article IX.A. The Commission may choose to participate in any proceeding on the Standard Contract relating to additional expenses incurred due to the DOE's delay. A finding that the DOE's delay was avoidable should help protect Georgia Power's ratepayers from having to shoulder undue additional expenses. Under the current accounting order, any monies received would accrue to the benefit of Georgia ratepayers.

I hope this has been responsive to your request. Please do not hesitate to contact me if you have any questions regarding the foregoing.

dsw