

Testimony on behalf of the
National Association of Regulatory Utility Commissioners (NARUC)

by

The Honorable Anthony J. O'Donnell
Commissioner, Maryland Public Service Commission
Chairman, NARUC Subcommittee on Nuclear Issues-Waste Disposal

before the

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Committee on Oversight and Government Reform
Subcommittee on the Interior, Energy and Environment

hearing entitled

**“Examining America’s Nuclear Waste Management and
Storage”**

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National Association of Regulatory Utility Commissioners
1101 Vermont Ave, N.W., Suite 200
Washington, D.C. 20005
Telephone (202) 898-2207, Facsimile (202) 898-2213
Internet Home Page <http://www.naruc.org>

Good morning Chairman Farenthold, Ranking Member Plaskett, and members of the Subcommittee on the Interior, Energy, & Environment. Thank you for the opportunity to testify today on the lack of progress on nuclear waste disposal and its effect on ratepayers. My name is Tony O'Donnell, and I am a Commissioner on the Maryland Public Service Commission. I also serve as the Chairman of the National Association of Regulatory Utility Commissioners (NARUC) Subcommittee on Nuclear Issues – Waste Disposal.

NARUC is a non-profit organization founded in 1889. Our members are the public utility commissions in all 50 States and the U. S. territories. NARUC's mission is to serve the public interest by improving the quality and effectiveness of public utility regulation. Our members regulate the retail rates and services of electric, gas, water, and telephone utilities. We are obligated under the laws of our respective States to assure the establishment and maintenance of essential utility services as required by public convenience and necessity and to ensure that these services are provided under rates, terms, and conditions of service that are just, reasonable, and non-discriminatory.

State economic utility regulators are responsible for ensuring the safe, reliable, and affordable delivery of essential electric utility service in every State across the country. The success of the federal nuclear waste management program, funded by the consumers of electricity generated from the nation's nuclear power plants, is necessarily of keen interest. Both NARUC and its member commissions have dedicated a tremendous amount of time and resources to ensure that electricity consumers receive the services they have paid for.

NARUC and its State Commission members were at the table when the Nuclear Waste Policy Act of 1982 (NWPA) was developed and passed. At that time, and today, State regulators agree that users of electricity from nuclear power plants should pay for the federal nuclear waste management and disposal program and the consumers have already paid generously into the fund. Since 1982, more than \$40 billion in direct payments and interest have been paid into the U.S. Nuclear Waste Fund (NWF).

In fact, the \$40 plus billion that consumers have contributed to the NWF is only part of the entire amount they have spent on nuclear waste. First, the consumers paid for the original waste storage at the facilities through their rates. Second, they paid into the NWF, as already mentioned. Third, the consumers paid to rerack, or consolidate, used fuel pools, again through their rates, because the federal government failed to remove the waste by statutory deadline. Fourth, they had to pay for on-site, out-of-pool dry cask storage, again through rates, again due to federal failure. Finally, consumers pay a fifth time, through taxes paid for Judgment Fund disbursement to cover damages caused by the failure of the federal nuclear waste program. A brief discussion of Judgment Fund disbursement will be discussed below.

Yet, for those billions, so far, ratepayers – and the country – have nothing to show for it. The federal government missed its statutorily mandated deadline to start accepting nuclear waste in 1998. In the 1990s and early 2000s, at least the program had shown progress, notwithstanding the missed deadline. However, since that time, efforts to block funding for the geologic disposal of nuclear waste at Yucca Mountain, as well as the U.S. Department of Energy's unlawful refusal to support the project's licensing application, has kept the country in the exact same situation

we occupied 30 years ago when Congress decided that Yucca Mountain should be the first site considered for the United States permanent repository.

In 2010, after decades of scientific study and an investment of over \$11 billion in the Yucca Mountain repository, the Obama Administration – without any record of public process – unilaterally declared the site not “practical” and “unworkable,” purported to withdraw the Yucca Mountain license application, and began dismantling the program, closing the DOE Office of Civilian Radioactive Waste Management. NARUC was one of many voices that opposed this attempt and was a petitioner in the mandamus action that required the Nuclear Regulatory Commission to expend outstanding appropriations on the Yucca Mountain license review.

Today, there is no nuclear waste program worthy of the name, despite the exhaustive studies and billions in ratepayer and taxpayer dollars spent. All that remains is the nuclear waste, which sits on site at nuclear reactors, some of which are now closed. This is not only uneconomic. It undermines confidence in nuclear power.

The repercussions of the previous Administration’s failure to take possession of and remove nuclear waste, as well as develop the Yucca Mountain site have been substantial. Taxpayers from every State, even those whose utilities have no stake in nuclear-generated electricity, continue to fund court-awarded damages from the Department of Justice Judgment Fund for DOE’s partial breach of its contracts with electric companies that required DOE to take title to used fuel.

Let's examine those damages. According to a September 2014 audit, \$4.5 billion in damages has already been paid as a result of federal government inaction. DOE estimates the total liability for the federal government will be about \$27 billion, but that estimate includes the optimistic assumption that the department can begin to accept used nuclear fuel in 2021. Industry estimates almost double that projection. Even former President Obama's Blue Ribbon Commission (BRC) estimated that every year of delay in accepting used nuclear fuel will increase this liability by approximately \$500 million. All told, we are facing damages in the tens of billions of dollars.

The 31 States with retired and operating nuclear reactors have an even greater incentive to press for some reform in how the federal program is funded. There are currently over 74,000 metric tons of commercial spent fuel at reactor sites in the US. America's nuclear power reactors continue to produce roughly 2,000 tons of waste every year. The ratepayers in each of those States have contributed millions to the corpus of the Nuclear Waste Fund (NWF).

Access to the billions of dollars collected by the NWF is essential for any interim or permanent solution to nuclear waste disposal to succeed. As the BRC Report acknowledged, at 74:

[F]or the waste management program to succeed, the nuclear waste funding mechanism must be allowed to work as intended so that the ability to implement the waste program is not subject to unrelated federal budget constraints.

Congress holds the keys to make that progress happen. The budgeting and appropriations process for the waste disposal program must change. Currently, appropriations from the NWF are considered as part of the total federal

government budgeting process – not as allocation of the funds collected in the NWF.

That means any appropriations will score and increase the deficit. Appropriations for the waste disposal program remain under the spending cap applicable to all domestic programs, even though the NWF is self-financed.

This forces spending from the NWF to compete with other spending programs that never had a dedicated funding stream. This approach is unfair to ratepayers and inappropriate for a fund designed to finance the extremely protracted life-cycle of a capital-intensive disposal program. It makes no sense to treat funds collected specifically to support the disposal of used commercial reactor fuel as discretionary. Over the life of the program, this approach necessarily led to lower appropriations than were requested. (*BRC Report* at 72). Reduced funding contributed to project and schedule delays (and obviously undermined the Yucca Mountain license review process.) Inadequate funding can only hamper efficient scheduling and planning thereby driving up costs.

NARUC believes that the NWF must be managed responsibly and be used only for its intended purpose. The program must have full access to the revenues generated by consumers' fee payments, if they resume, and to the balance of the NWF. This requires legislative changes to the NWPA.

As related previously, the U.S. government has not lived up to the promises made under the NWPA and subsequent Congressional enactments. This is not a matter of opinion, but of legal record, and of particular relevance to any discussion of the

NWF is the November 2013 D.C. Circuit decision granting NARUC's request that the DOE suspend collection of the NWF fees.

The NWPA required electricity ratepayers to fund a one mil (one tenth of a cent) per kilowatt-hour fee to fund the NWF. Under the NWPA, the Secretary of Energy is obligated to evaluate whether collection of the fee will provide sufficient revenues to offset program costs. In response to a suit filed by NARUC and the Nuclear Energy Institute (NEI), the United States Court of Appeals for the D.C. Circuit reasoned that the Secretary was not only responsible for reviewing the fee's adequacy, but also had an affirmative obligation to conduct an annual fee analysis. The court examined the last DOE fee assessment and found the Secretary's "determination" legally inadequate. The court identified many flaws in the DOE analysis. Among other things, it specified that the Administration could not logically deem Yucca Mountain unworkable and in the same sentence utilize it as a proxy to estimate the fee. The court chose, however, to remand and give the Secretary six months to comply with the NWPA by producing a revised fee assessment.

On January 16, 2013, DOE released its updated fee adequacy analysis. NARUC and NEI immediately filed a motion to reopen the proceeding. The court determined the updated assessment was also flawed. Ultimately, on November 19, 2013, in a sharply worded opinion, the court ordered DOE to request Congress set the fee to zero, rejecting its request for yet another chance to "redo" the assessment as "so obviously disingenuous that we have no confidence another remand would serve any purpose." The decision compares DOE's analysis to the musical "Chicago," where the lawyer sings "give them the old razzle dazzle." DOE's last

gasp request for both rehearing and rehearing *en banc* was denied on March 18, 2014. The fee was suspended shortly thereafter.

NARUC is open to the idea of interim solutions where nuclear fuel is stored, not at reactor sites, but at one or more central locations, pending the final development of a permanent repository once the application process begins again at the Nuclear Regulatory Commission. However, this approach must not become the same kind of accidentally long-term approach that on-reactor-site storage has become, due to an Administration's unwillingness or inability to permit Yucca Mountain. The United States needs, and consumers have paid for, a permanent storage solution – and nothing less. To put it bluntly, the citizens of States and localities have the federal government's waste and the federal government has our money.

Thank you again for the opportunity to be part of this critical discussion.