

**UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION
 ATOMIC SAFETY AND LICENSING BOARD**

Before Administrative Judges:

ASLBP BOARD 09-876-HLW-CAB01 William J. Froehlich, Chairman Thomas S. Moore Richard E. Wardwell	ASLBP BOARD 09-877-HLW-CAB02 Michael M. Gibson, Chairman Lawrence G. McDade Nicholas G. Trikouros	ASLBP BOARD 09-878-HLW-CAB03 Paul S. Ryerson, Chairman Michael C. Farrar Mark O. Barnett
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In the Matter of:)	February 10, 2009
)	
U.S. Department of Energy)	
)	Docket No. 63-001
(High Level Waste Repository)	
Construction Authorization Application))	

**U.S. DEPARTMENT OF ENERGY’S ANSWER OPPOSING
 STATE OF NEVADA’S
MOTION TO AMEND PETITION TO INTERVENE AS A FULL PARTY**

The U.S. Department of Energy (DOE) hereby files its Answer Opposing the State of Nevada’s January 16, 2009 Motion to Amend Petition to Intervene as a Full Party (Motion). In its Motion, Nevada seeks leave to amend one of its contentions—contention “NEV-SAFETY-03-Quality Assurance Implementation” (NEV-SAFETY-03)¹—and submits the proposed amendment pursuant to 10 C.F.R. § 2.309(f)(2).

Nevada’s Motion and amended contention should be rejected for numerous reasons. First, while Nevada conferred with DOE regarding its Motion and amended

¹ Nevada originally filed this contention as part of its Petition to Intervene as a Full Party (Petition) on December 19, 2008.

contention, as required by 10 C.F.R. § 2.323(b), it did not certify that it also conferred with the NRC Staff (or any other potential parties). Nevada's filing "must be rejected" for this reason alone. 10 C.F.R. § 2.323(b). Nevada is represented by experienced counsel and strict adherence to applicable procedural requirements is essential if this proceeding is to be prosecuted in a timely and efficient manner.

Second, as discussed further below, Nevada's filing is neither timely, nor made with the requisite "good cause" for a non-timely filing, contrary to 10 C.F.R. §§ 2.309(f)(2) and (c)(1). Indeed, the filing is based on information that was available to Nevada long before it filed its Petition on December 19, 2008 and that in any event is not material to the proceeding.

Finally, the filing must also be rejected, because it fails to meet all of the requirements for admissibility set forth in 10 C.F.R. § 2.309(f)(1). Accordingly, Nevada's request to amend contention NEV-SAFETY-03 should be denied.

I. NEVADA'S BASIS FOR THE AMENDED CONTENTION

The sole basis for Nevada's Motion and late-filed amended contention is a document containing "close-out information regarding [DOE's] . . . Condition Report CR-6330 at LSN# DEN001606280." Motion at 1-2. The document relates to the implementation of DOE's Augmented Quality Assurance Program (AQAP), which is described below. Nevada states that the related close-out document was "recently made available" and that the information contained in the document "was not previously available," "is materially different from information previously available," and that Nevada's "amended contention is being submitted in a timely fashion." *Id.* Nevada then

argues that “CR-6330 and its closure illustrate a current, profound lack of competence by DOE in implementing its QA program and constitutes persuasive evidence that there exists no basis for accepting DOE’s representations with respect to the soundness of its future QA program.” *Id.*

DOE issued the AQAP in 2004. It was developed under, and intended to ensure compliance with, DOE Order 414, “Quality Assurance,” which sets out QA requirements for DOE and its contractors that are separate and distinct from the requirements of 10 C.F.R. Part 63, Subpart G.² Indeed, the AQAP specifically stated:

The provisions of this AQAP apply to items and activities performed by the Office of Repository Development, the Civilian Radioactive Waste Management System Management and Operating Contractor, the U.S. Geological Survey, national laboratories, and OCRWM direct-support contractors while performing work in support of ORD that is *not governed by 10 CFR 63, Subpart G.*

Augmented Quality Assurance Program, DOE/RW-0565, Rev. 0, LSN# DN2001622219, at 11 (emphasis added).³

10 C.F.R. Part 63, Subpart G requires that DOE establish a QA program applicable to structures, systems, and components (SSCs) that are important to safety (ITS), the design and characterization of barriers that are important to waste isolation (ITWI), and related activities. The AQAP only applied to *non-ITS* and *non-ITWI* items and activities. ITS and ITWI items and activities and, therefore, compliance with

² DOE Order 414 is a department-wide order. The AQAP is the implementing document for DOE’s Office of Civilian Radioactive Waste Management (OCRWM).

³ As would later be clarified in a subsequent revision to the AQAP, the AQAP applied to “work . . . that is *not governed by 10 CFR Part 63 or Part 71.*” Augmented Quality Assurance Program (AQAP), DOE/RW-0565, Rev. 1, LSN# DN2002405144, at 6 (emphasis added).

10 C.F.R. Part 63, Subpart G, were addressed in a different QA document, the Quality Assurance Requirements and Description (QARD). (The QARD would later address compliance with *both* 10 C.F.R. Part 63, Subpart G *and* DOE Order 414).

In 2005, DOE performed an audit of the AQAP and found that implementation of the AQAP was unsatisfactory.⁴ DOE's findings resulted in the entry of two similar condition reports into DOE's Corrective Action Program (CAP): CR-6330 and CR-6215. CR-6330 addressed DOE's implementation of the AQAP, whereas CR-6215 was limited in scope to the implementation of the AQAP by DOE's contractor, Bechtel SAIC Company, LLC.⁵

As recorded in the close-out document regarding CR-6330, upon which Nevada relies, DOE initiated various corrective actions associated with the unsatisfactory implementation of the AQAP. As noted by Nevada, these corrective actions ultimately culminated in the integration of the AQAP into Rev. 20 of the QARD, which became effective on October 1, 2008. Motion at 4. As a result, the AQAP ceased to exist as of that date. Prior versions of the QARD had addressed only compliance with 10 C.F.R. Part 63, Subpart G. As of Rev. 20, however, the QARD now addresses DOE's compliance with both 10 C.F.R. Part 63 *and* DOE Order 414. This is explained in the

⁴ See U.S. Department of Energy, Office of Civilian Radioactive Waste Management, Office of Quality Assurance, Report for Audit OCRWMC-OQA-05-14 of the Quality Assurance Requirements Description and the Augmented Quality Assurance Program, Including National Laboratory Support Activities at Bechtel SAIC Company, LLC Yucca Mountain Site (Sept. 7, 2005) (Audit Report), LSN# DN2002213251, at 8-9.

⁵ This explains why DOE later concluded, in evaluating CR-6330, that there were no other condition reports, *relative to DOE's own scope of operations*, "identified with the same or similar issue." Motion at 4. It also should be noted that the fact that the Audit Report resulted in two condition reports, one related to DOE's implementation of the AQAP and the other to its contractor's, demonstrates that DOE recognized and understood the extent of the condition identified.

QARD itself. *See* QARD at 19 (“This document . . . integrates the requirements of 10 C.F.R. § 63.142 and DOE O 414.1C.”).

II. ARGUMENT

A. Applicable Legal Standards

The standards governing Nevada’s Motion are set forth in 10 C.F.R. § 2.309 and the Commission’s Notice of Hearing and Opportunity for Permission for Leave to Intervene on an Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain. 73 Fed. Reg. 63,029, 63,030 (Oct. 22, 2008) (Hearing Notice). A petitioner may amend a contention only if:

- (i) The information upon which the amended or new contention is based *was not previously available* [i.e., is new];
- (ii) The information upon which the amended or new contention is based is *materially different* than information previously available; and
- (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)-(iii) (emphasis added).

If an amended contention meets the above three requirements, then it is considered “timely” and the petitioner is not required to satisfy the additional requirements of 10 C.F.R. § 2.309(c)(1) for “non-timely” filings.⁶ If, however, the information underlying the amended contention is not “new,” “materially different,” or filed in a “timely fashion,” then to be admitted, the amended contention must also satisfy

⁶ *See* CAB Case Management Order #1 (unpublished) (slip op. at 3-4) (Jan. 29, 2009) (CAB CMO #1); *see also Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 574 (2006).

the eight factor balancing test for non-timely filings in 10 C.F.R. § 2.309(c)(1).⁷ These eight factors are not of equal importance: absence of “good cause” (factor 1) and the likelihood of substantial broadening of the issues and delay of the proceeding (factor 7) weigh the heaviest.⁸

Assuming that the requirements established by 10 C.F.R. §§ 2.309(f)(2) or (c)(1) are satisfied, an amended contention still must satisfy the admissibility requirements of 10 C.F.R. § 2.309(f)(1).

As described below, Nevada’s amended contention fails to meet any of the above requirements and its Motion should be denied.

B. Nevada’s Amended Contention Is Non-Timely

Nevada’s Motion and amended contention are “non-timely” under 10 C.F.R. § 2.309(f)(2). Although Nevada claims that its amendment to NEV-SAFETY-03 is based on new, materially different information, and is being submitted in a timely fashion, Nevada offers nothing beyond these conclusory statements to support its position.

With respect to the first requirement of 10 C.F.R. § 2.309(f)(2), which requires Nevada to show that the amended contention is based on information that was not previously available, Nevada makes only a vague reference to the information “having been posted by DOE on its LSN database *within the last few weeks.*” Motion at 1

⁷ See Hearing Notice, 73 Fed. Reg. at 63,030 (“A *non-timely* petition or contention will not be entertained unless . . . the late petition or contention meets the late-filed requirements of a 10 CFR § 2.309(c)(1)(i)-(viii).”) (emphasis added); see also CAB CMO #1 at 4.

⁸ See, e.g., *Project Mgmt. Corp.* (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 395 (1976).

(emphasis added). In fact, the close-out document cited by Nevada as the basis for its amended contention, LSN# DEN001606280, was posted on the LSN on or about December 8, 2008—*14 days before Nevada’s Petition was due and 39 days before Nevada filed its Motion. See Attachment NEV-SAFETY-03-01, Affidavit of Bradford Stillman at ¶ 4.c (Feb. 10, 2009) (Stillman Affidavit).* Consequently, Nevada cannot credibly maintain that the information on which the amendment is based became available within the “last few weeks.”⁹

It also should be noted that even though the close-out document Nevada cites allegedly prompted Nevada’s amended contention, the information in that document has been available to Nevada for even longer. Simply because a *document* has allegedly come to light does not satisfy 10 C.F.R. § 2.309(f)(2), if the *information* in that document is not new information. *AmerGen Energy Co., LLC (License Renewal for Oyster Creek Nuclear Generating Station) (Memorandum and Order) (unpublished) (slip op. at 6-7) (Apr. 10, 2007).*

In its Motion, Nevada cites to the close-out document as new information showing that DOE identified issues with the implementation of its AQAP. However, this is not “new” information. In fact, as Nevada admits, DOE already had identified these issues during an audit. Motion at 3. Nevada references the audit findings and the Audit

² In addition to the “close-out” document, the other documents referenced in Nevada’s Motion were available on the LSN *long before* Nevada filed its Petition and made the instant filing. For example, the Augmented Quality Assurance Program, DOE/RW-0565, *Rev. 0*, LSN# DN2001622219, became available on or about April 30, 2007. Stillman Affidavit at ¶ 4.a. The Augmented Quality Assurance Program, DOE/RW-0565, *Rev. 1*, LSN# DN2002405144, became available on September 8, 2007. *Id.* at ¶ 4.b. The Audit Report, LSN# DN2002213251, also became available on or about April 30, 2007. *Id.* at ¶ 4.a.

Report in its Motion. *Id.* at 2-3. The Audit Report, LSN# DN2002213251, became available on the LSN on or about April 30, 2007. Stillman Affidavit at ¶ 4.a.¹⁰

The second requirement of 10 C.F.R. § 2.309(f)(2) requires Nevada to show that its amended contention is based on information that is “materially different” from any other previously available information. 10 C.F.R. § 2.309(f)(2)(ii). Because, as discussed above, the information that Nevada relies on in its Motion was available before Nevada filed its Petition, it has not demonstrated that this information is “materially different.” *It is the same information.*

In fact, Nevada cannot show that the information it relies on is “material” in any way, because, as discussed above, the AQAP never addressed QA activities governed by 10 C.F.R. Part 63, which establishes QA requirements for ITS SSCs and ITWI barriers. The AQAP only covered *non*-ITS SSCs and *non*-ITWI barriers. Thus, Nevada’s claims regarding the AQAP are not even within the scope of or material to this proceeding.¹¹

¹⁰ To the extent Nevada may argue that the Audit Report does not also address the resolution of the issues associated with the implementation of the AQAP, that information was not necessary for Nevada to file its Motion or amended contention. Nevada could have made the same allegations based on the *absence* of any close-out information on the LSN (if such information actually were absent). In any event, the License Application provided this information and identified how and when DOE resolved the issues regarding the AQAP. As explained, the AQAP was intended to ensure compliance with DOE Order 414. DOE later decided, however, to ensure compliance with Order 414, currently at revision 414.1C, through Rev. 20 of the QARD (part of the License Application). Rev. 20 of the QARD states this explicitly (QARD at 19), which should have made clear to Nevada that, in so doing, DOE had integrated the AQAP into the QARD.

¹¹ As noted, the AQAP has been integrated into Rev. 20 of the QARD, which is part of DOE’s License Application. DOE’s decision to integrate the AQAP into the QARD was based on, among other things, DOE’s desire to have a single, controlling QA document governing its Yucca Mountain activities. Only parts of the QARD, however, are intended to ensure compliance with 10 C.F.R. Part 63, Subpart G by addressing ITS SSCs, ITWI barriers, and related activities. As noted, the AQAP did not address these items and activities, but instead focused on the implementation of separate and unrelated *DOE* requirements, in particular DOE Order 414. DOE never relied upon the AQAP to comply with 10 C.F.R. Part 63, Subpart G. Accordingly, the mere fact that DOE integrated the AQAP into Rev. 20 of the QARD does not place the AQAP, which has ceased to exist, within the scope of this proceeding or make it material to any of the determinations that the NRC must make.

Not only is the information regarding CR-6330 and the AQAP immaterial, it is no different than the information that already appears in NEV-SAFETY-03. It is at most another “example” of a QA audit finding used by Nevada to allege that DOE has failed to correct the conditions it identifies in a timely manner. Motion at 2-3. Nevada included a list of numerous similar “examples” in Table 1 and Table 2 of NEV-SAFETY-03.

Without discussing those examples or distinguishing between them in any way, Nevada argued, in discussing the contents of Table 2, that:

The documents and findings enumerated in Table 2 . . . illustrate the poor QA performance of DOE . . . in the area[] of Corrective Action Program . . . in the face of newly adopted procedures and programs supposedly designed to fix those very problems, symptomatic of DOE’s QA shortcomings for the last two decades. *The OQA organization demonstrates an ability to locate and articulate problem areas, but DOE’s lack of quality culture results in the deficiencies not being timely corrected*

Petition at 58 (emphasis added). In its Motion, Nevada recycles this claim without ever explaining what exactly this “new” alleged example adds to the discussion. Therefore, Nevada has not satisfied the second requirement of 10 C.F.R. § 2.309(f)(2).

Nevada also has failed to satisfy the third requirement of 10 C.F.R. § 2.309(f)(2). Nevada must show that it sought to amend its contention in a “timely fashion,” based on the availability of the information it now relies upon. 10 C.F.R. § 2.309(f)(2)(iii). But because Nevada had access to this information well before it filed its Petition, it cannot make this showing.

Boards often have deemed it acceptable for a party to file a new or amended contention within 30 days of receiving new information. *See, e.g., Entergy Nuclear Vt.*

Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 574 (2006); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC 226, 231 (2000). Since the filing of Nevada’s amended contention, the three Boards presiding in this proceeding issued CAB CMO #1 specifically applying this principle. CAB CMO #1 at 3-4.

Contrary to this principle, Nevada knew or should have known about the information that DOE had identified issues with implementation of the AQAP as early as April 2007 (i.e., when DOE’s Audit Report identifying issues with the implementation of the AQAP became available on the LSN). Nevada failed to include that information in its Petition. Even assuming *arguendo* that the close-out document contains “new” information, which it does not, that document became available on the LSN on or about December 8, 2008, 39 days before Nevada made the instant filing. The Motion is therefore “non-timely,” and consequently, Nevada bears the additional burden of demonstrating that it meets the requirements for non-timely contentions in accordance with 10 C.F.R. § 2.309(c)(1).

C. Nevada Does Not Meet The Additional Requirements For Non-Timely Contentions

As previously discussed, non-timely amended contentions must pass the eight factor test contained in 10 C.F.R. § 2.309(c)(1). Nevada does not even address, let alone meet, this test. The most important factors—factors 1 and 7—overwhelmingly favor

rejecting Nevada's Motion and amended contention. Another factor, factor 8, also favors rejection.¹²

With respect to factor 1, which "is accorded the greatest weight," Nevada has not shown the requisite "good cause" for filing its non-timely amended contention.

Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 564 (2005). Nevada asserts that the information on which its amended contention is based "was not previously available" and was posted on the LSN "within the last few weeks." Motion at 1. As discussed above, however, the close-out document Nevada claims to rely on became available two weeks before Nevada's deadline for filing its Petition and 39 days before Nevada filed its Motion. Other documents containing the same information (e.g., the Audit Report discussed above) were available more than one year ago. Nevada, therefore, lacks the requisite good cause under factor 1 of 10 C.F.R. § 2.309(c)(1).

An examination of Nevada's filing under factor 7 leads to the same conclusion. This factor considers the extent to which the admission of the amended contention will broaden or delay the proceeding. 10 C.F.R. § 2.309(c)(1)(vii). As noted above, the AQAP, which has ceased to exist, addressed items and activities covered by DOE Order 414, not 10 C.F.R. Part 63. As a result, the AQAP, the issues associated with its implementation, and the timeliness of the resolution of those issues, are all matters that are immaterial to, and outside the scope of, this proceeding. Allowing Nevada to amend

¹² The other five factors generally address a petitioner's standing or the protection of its interests and, therefore, are limited in applicability to Nevada's instant filing. See *Entergy Nuclear Vt. Yankee, LLC*, LBP-06-14, 63 NRC at 581.

NEV-SAFETY-03 based on the implementation of AQAP, therefore, would unreasonably broaden the issues in this proceeding.

Finally, because the AQAP is immaterial to DOE's compliance with 10 C.F.R. Part 63, Nevada's litigation of NEV-SAFETY-03, *as amended*, would be unlikely to assist in developing a sound record, the subject of factor 8.

10 C.F.R. § 2.309(c)(1)(viii). Because Nevada has failed to demonstrate that the factors set forth in 10 C.F.R. § 2.309(c)(1) warrant further consideration of its non-timely amended contention, its Motion should be denied.

D. The Amended Contention Also Does Not Meet Applicable Admissibility Requirements

Nevada's amended contention fails to meet the six admissibility requirements in 10 C.F.R. § 2.309(f)(1). In addition, Nevada fails to separately and specifically address each of these requirements, as specified by the Advisory Pre-License Application Presiding Officer (PAPO) Board.¹³ In keeping with the Advisory PAPO Board's instructions, DOE addresses these requirements, and Nevada's non-compliance with them, below.

1. Statement Of Issue Of Law Or Fact To Be Controverted

The first admissibility requirement (10 C.F.R. § 2.309(f)(1)(i)) requires that Nevada "provide a specific statement of the issue of law or fact to be controverted" by

¹³ The Advisory PAPO Board made it clear that in this proceeding, a petitioner who submits a late-filed new or amended contention must, "[i]nsofar as practicable, and in addition to demonstrating compliance with other applicable requirements set forth in 10 C.F.R. § 2.309, . . . follow the prescribed format for initial petitions and contentions." *U.S. Dep't of Energy (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board), LBP-08-10, 67 NRC* ___ (Memorandum and Order (Case Management Order Concerning Petitions to Intervene, Contentions, Responses and Replies, Standing Arguments, and Referencing or Attaching Supporting Materials)) (slip op. at 10) (June 20, 2008) (Advisory PAPO Board CMO) (emphasis added).

“articulat[ing] at the outset the specific issues [it] wish[es] to litigate.” *Duke Energy Corp.* (Oconee Nuclear Stations, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999). As was the case with NEV-SAFETY-03, as initially filed, the contention, as amended, fails to take issue with any specific section of the License Application, not even the QARD, and, therefore, fails to provide a specific statement of an issue of law or fact to be controverted.

2. Brief Explanation Of Basis

The second admissibility requirement (10 C.F.R. § 2.309(f)(1)(ii)) requires that Nevada provide “a brief explanation of the basis for the contention.” But NEV-SAFETY-03, as amended, is not supported by an adequate basis for the same reasons as those given in DOE’s response to NEV-SAFETY-03 as originally filed. In brief, Nevada’s “basis” is an argument that DOE’s past and present implementation of its QA program somehow is deficient. Nevada does not, however, allege any non-compliance with 10 C.F.R. Part 63.

3. Whether The Issue Is Within The Scope Of The Proceeding

The third admissibility requirement (10 C.F.R. § 2.309(f)(1)(iii)) requires that Nevada demonstrate “that the issue raised in the contention is within the scope of the proceeding.” The scope of this proceeding is defined by the Commission’s Hearing Notice, which provides that the matter of law and fact to be considered “are whether the application satisfies the applicable safety, security, and technical standards . . . for [a] construction authorization.” 73 Fed. Reg. at 63,029. As with NEV-SAFETY-03 as originally filed, however, Nevada’s proposed amendment is outside this scope.

First, as discussed above, the subject of Nevada’s amended contention, the AQAP, relates exclusively to activities that are not covered by the part of DOE’s QA program that is subject to 10 C.F.R. Part 63, Subpart G and is, therefore, outside the scope of the proceeding for this reason alone.

Second, Nevada never argues that any portion of DOE’s License Application, including Rev. 20 of the QARD, fails to comply with 10 C.F.R. Part 63, Subpart G, or any other subpart thereof. Instead, Nevada attempts to redirect the focus of the proceeding from the substance of the License *Application* to the past practices and character of the *applicant*.

Finally, Nevada also alleges that there is “no basis for any anticipation that [DOE’s] promises of future improvement will be successful.” Motion at 5. This is sheer speculation, which also renders the contention inadmissible.¹⁴

4. Whether The Issue Is Material To The Findings That The NRC Must Make

The fourth admissibility requirement (10 C.F.R. § 2.309(f)(1)(iv)) requires that Nevada “[d]emonstrate 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.” (Emphasis added). This means that resolution of the issue would “make a difference in the outcome of the licensing proceeding.” *Duke Energy Corp.*, CLI-99-11, 49 NRC at 333-34. The Advisory PAPO Board CMO states that this regulation “requires [among other things]

¹⁴ Cf. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 294 (2002) (explaining that “[a]n NRC proceeding considers the application presented to the agency for consideration and not potential *future* amendments that are a matter of speculation at the time of the ongoing proceeding”) (emphasis added).

citation to a statute or regulation that, explicitly or implicitly, has not been satisfied by reason of the issue raised in the contention.” Advisory PAPO Board CMO at 7. Nevada cites to no such regulation.

5. Statement Of Alleged Facts Or Expert Opinion Supporting Petitioner's Position And Supporting References

The fifth admissibility requirement (10 C.F.R. § 2.309(f)(1)(v)) requires that Nevada present the factual information or expert opinions necessary to support its contention. Nevada’s amendment contains only unsupported assertions of counsel. It offers no expert opinion or other evidence to connect the close-out of the AQAP issue to a safety-significant finding under 10 C.F.R. Part 63.

6. Existence Of A Genuine Dispute On A Material Issue Of Law Or Fact, With Supporting References To The License Application

The final admissibility requirement (10 C.F.R. § 2.309(f)(1)(vi)) requires that Nevada “provide sufficient information to show . . . a genuine dispute . . . with the applicant . . . on a material issue of law or fact.” The Commission has stated that a petitioner must “read the pertinent portions of the license application, . . . state the applicant’s position and the petitioner’s opposing view,” and explain why it disagrees with the applicant. Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989); *Dominion Nuclear Conn. Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358, *recons. denied*, CLI-02-01, 55 NRC 1 (2002). Contentions challenging a QA program also must establish that the alleged errors have not been cured and that they

demonstrate a pervasive breakdown of QA that impacts safety performance.¹⁵ Nevada's filing does not meet any of these standards.

The amended contention fails to raise a genuine dispute on a *material* issue of law or fact because, as explained above, the AQAP, the subject of Nevada's amended contention, is immaterial to this proceeding. Nevada has not drawn a connection between the AQAP and any of the determinations that the NRC must make in this proceeding. Likewise, Nevada fails to demonstrate the existence of a QA breakdown that impacts safety performance.

Notwithstanding Nevada's complaints about the issues associated with the implementation of the AQAP, the documents cited by Nevada, namely the close-out document and Audit Report, demonstrate that DOE identifies potential deficiencies, initiates corrective actions, and tracks those actions. These are attributes of a functioning QA program, not a failing QA program.¹⁶

For the above reasons, Nevada fails to demonstrate that NEV-SAFETY-03, as amended, meets any of the six requirements for admissibility set forth in 10 C.F.R. § 2.309(f)(1).

¹⁵ See *Ga. Power Co.* (Vogtle Electric Generating Plants, Units 1 and 2), ALAB-872, 26 NRC 127, 142 (1987) (rejecting challenges to QA program where "no pervasive breakdown or pattern of failures" had been presented).

¹⁶ See *id.* ("[T]he fact that deficiencies occur during the course of construction of a nuclear power plant does not mean that there has been a pervasive failure of the quality assurance program . . . [and could] constitute[] evidence that the applicant's program was working as intended.").

III. CONCLUSION

Nevada's Motion and its late-filed amended contention are non-timely under 10 C.F.R. § 2.309(f)(2) and fail to meet the requirements for non-timely contentions in 10 C.F.R. § 2.309(c)(1). Further, the amended contention does not meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1). For the reasons discussed above, Nevada's Motion should be denied.

Respectfully submitted,

Signed (electronically) by Lewis M. Csedrik

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Dated in Washington, DC
this 10th day of February 2009

**UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION
 ATOMIC SAFETY AND LICENSING BOARD**

Before Administrative Judges:

ASLBP BOARD 09-876-HLW-CAB01 William J. Froehlich, Chairman Thomas S. Moore Richard E. Wardwell	ASLBP BOARD 09-877-HLW-CAB02 Michael M. Gibson, Chairman Lawrence G. McDade Nicholas G. Trikourous	ASLBP BOARD 09-878-HLW-CAB03 Paul S. Ryerson, Chairman Michael C. Farrar Mark O. Barnett
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In the Matter of:)) U.S. Department of Energy)) (High Level Waste Repository) Construction Authorization Application))	February 10, 2009 Docket No. 63-001
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AFFIDAVIT OF BRADFORD STILLMAN

I, Bradford Stillman, the undersigned affiant, at the request of the U.S. Department of Energy (DOE), do hereby make the following statements in support of DOE's Answer Opposing State of Nevada's Motion to Amend Petition to Intervene as a Full Party.

1. My name is Bradford Stillman. I am a technical analyst with CACI, Inc.-Commercial (CACI). CACI is the Automated Litigation Support contractor that maintains the computerized databases and equipment for DOE's production of electronic files of documentary material on the Licensing Support Network (LSN). I have responsibility for operation of those databases and equipment.

2. Pursuant to direction from DOE under its contract with CACI, CACI provides electronic files of documentary material to the U.S. Nuclear Regulatory Commission (NRC) for indexing onto the LSN. Indexing is the last step necessary to make a document publicly available on the LSN; and, in general, once a file has been indexed onto the LSN, the documents in that file are publicly available on the LSN. The NRC notifies CACI by email once indexing of a given file is complete. This, in turn, gives CACI notice that the documents in the file are publicly available on the LSN.

3. Also pursuant to DOE's contractual direction, CACI records for each item of documentary material that DOE makes available on the LSN, (i) the file in which it was provided to the NRC, (ii) the date that the file was provided to the NRC, and (iii) the date that the NRC notified CACI that indexing of the file was complete. The date a file was provided to the NRC, and the date the NRC notified CACI that indexing of the file was complete, is reflected in email exchanges between CACI and AT&T, the NRC's contractor for the LSN. Those dates are contemporaneously recorded in the databases that CACI maintains under its contract with DOE.

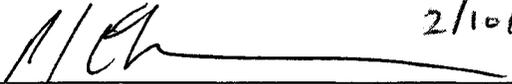
4. I have reviewed these databases and email archives to determine when the NRC notified CACI that indexing of the files containing the following 5 documents referenced in Nevada's Motion to Amend Petition to Intervene as a Full Party (identified in this affidavit by LSN accession number (LSN#)) was complete and, therefore, when those documents became publicly available on the LSN. Those sources show the following:

a. LSN# DN2001279442, LSN# DN2001622219, and LSN# DN2002213251 were in files that the NRC notified CACI were indexed onto the LSN on, respectively: June 2, 2005; June 28, 2005; and April 26, 2006. These documents did not become publicly available on the LSN at the time indexing was complete, however, because they were subject to an access

control restriction. Access control restriction is a feature of the NRC's LSN system that prevents public access to a LSN participant's document collection. That access control restriction was removed, and these documents became publicly available on the LSN, on or about April 30, 2007.

b. LSN# DN2002405144 was in a file that the NRC notified CACI was indexed onto the LSN on September 8, 2007. No access control restriction was placed on this file, and thus this document became publicly available on the LSN on, or no more than one or two days after, September 8, 2007.

c. LSN# DEN001606280 was in a file that the NRC notified CACI was indexed onto the LSN on December 8, 2008. No access control restriction was placed on this file, and thus this document became publicly available on the LSN on, or no more than one or two days after, December 8, 2008.

 2/10/09

Bradford Stillman

The above-named affiant personally appeared before me this 10th day of February, 2009, and executed this affidavit.



Notary Public PARVIZ NOWZARI

My Commission expires: 1 JAN. 2011

**UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION
 ATOMIC SAFETY AND LICENSING BOARD**

Before Administrative Judges:

ASLBP BOARD 09-876-HLW-CAB01 William J. Froehlich, Chairman Thomas S. Moore Richard E. Wardwell	ASLBP BOARD 09-877-HLW-CAB02 Michael M. Gibson, Chairman Lawrence G. McDade Nicholas G. Trikouros	ASLBP BOARD 09-878-HLW-CAB03 Paul S. Ryerson, Chairman Michael C. Farrar Mark O. Barnett
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In the Matter of:)	February 10, 2009
U.S. Department of Energy)	
(High Level Waste Repository)	
Construction Authorization Application))	Docket No. 63-001

CERTIFICATE OF SERVICE

I hereby certify that copies of the “**U.S. DEPARTMENT OF ENERGY’S ANSWER OPPOSING STATE OF NEVADA’S MOTION TO AMEND PETITION TO INTERVENE AS A FULL PARTY**” and the accompanying attachment have been served on the following persons this 10th day of February 2009 by the Nuclear Regulatory Commission’s Electronic Information Exchange.

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 Washington, D.C. 20555-0001

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
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Administrative Judge
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