

**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 J. Farrar Mark O. Barnett
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In the Matter of	)	
	)	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY	)	
(High-Level Waste Repository)	)	February 13, 2009
	)	

**THE NUCLEAR ENERGY INSTITUTE’S MOTION TO STRIKE NEVADA’S ANSWER  
TO THE NUCLEAR ENERGY INSTITUTE’S PETITION TO INTERVENE**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.323(c), the Nuclear Energy Institute (“NEI”) hereby moves to strike the February 9, 2009 “Answer of the State of Nevada to Nuclear Energy Institute’s Petition To Intervene” (“Nevada’s Answer”).<sup>1</sup> Commission regulations explicitly provide that answers to intervention petitions and contentions may only be filed by “the applicant/licensee, the NRC Staff, and any other party to a proceeding.” 10 C.F.R. § 2.309(h) (emphasis added). Non-parties may not file answers. Id. Whether or not Nevada has legal standing pursuant to 10 C.F.R. § 2.309(d)(2)(i), it has no admitted contentions pursuant to 10 C.F.R. § 2.309(f)(1) and therefore is not a party to this proceeding. 10 C.F.R. §§ 2.309(d)(2)(iii), 2.1001 (definition of “party”).

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<sup>1</sup> NEI certifies that it has made a sincere effort to contact counsel for the Department of Energy (“DOE”), the Nuclear Regulatory Commission Staff (“NRC Staff”), and the State of Nevada (“Nevada”) to resolve the issues raised in this Motion, but has been unsuccessful. DOE takes no position on the motion at this time. The NRC Staff does not object to the filing of the Motion, but takes no position on the motion at this time. Nevada opposes the Motion.

Thus, whereas DOE and the NRC Staff are permitted to file answers to NEI's intervention petition and contentions, Nevada is not. Consequently, Nevada's Answer should be struck from the record.

## **II. DISCUSSION**

### **A. Nevada Has No Right to File an Answer to Petitions or Contentions at the Initial Intervention Stage of This Proceeding**

10 C.F.R. § 2.309, "Hearing requests, petitions to intervene, requirements for standing, contentions," establishes who may answer a request for hearing, a petition to intervene, and/or contentions:<sup>2</sup>

The applicant/licensee, the NRC staff, and any other party to a proceeding may file an answer to a request for hearing, a petition to intervene and/or proffered contentions within twenty-five (25) days after service of the request for hearing, petition and/or contentions.

10 C.F.R. § 2.309(h)(1) (emphasis added).<sup>3</sup> The regulations permit a petitioner to file a reply to the DOE and/or NRC Staff answers, but do not provide that a "requestor/petitioner" may file answers to intervention petitions. Indeed, the regulations are clear that "[n]o other written answers or replies will be entertained." 10 C.F.R. § 2.309(h)(2)-(3). Thus, at this stage of the proceeding, only DOE and the NRC Staff are permitted to answer initial petitions for intervention and contentions.<sup>4</sup>

In addition to the clear and unambiguous language of the regulation itself, the same conclusion is clearly set forth in the Statement of Considerations accompanying the

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<sup>2</sup> 10 C.F.R. § 2.309 applies to the high-level waste proceeding pursuant to 10 C.F.R. § 2.1000.

<sup>3</sup> Section 2.309(h) provides that the limitation in Section 2.309(h)(1), as well as the provisions in the other subsections of 2.309(h), apply absent authorization by the Commission, presiding officer, or the Atomic Safety and Licensing Board Panel designated to rule on petitions to intervene. In this proceeding, no such authorization has been issued.

<sup>4</sup> Under this reading of the regulation, the authority contained in Section 2.309(h)(1) for "any other party to a proceeding" to file an answer would not apply at the outset of a proceeding. However, that phrase would not be surplusage once there are "other parties" in the proceeding. The provision will apply to late-filed requests for hearing, petitions to intervene, or contentions.

promulgation of the intervention rules. The Commission there states that only the DOE and the NRC Staff may answer initial petitions for intervention and contentions:

*Answers and Replies.* Section 2.309(h) allows the applicant or licensee and the NRC Staff twenty-five (25) days to file written answers to requests for hearing/petitions to intervene and contentions, and allows the petitioner to file a written reply to the applicant/licensee and staff answers within seven (7) days after service of any answer. No other written answers or replies will be entertained.

Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,222 (Jan. 14, 2004) (emphasis added). Accordingly, no answers from other non-party petitioners should be entertained. Had the Commission wanted to permit petitioners to answer other petitioners' intervention petitions, the Commission would have so stated – just as it stated that a “requestor/petitioner” may file replies to any answer to its request or petition. 10 C.F.R. § 2.309(h)(2). Therefore, only DOE, NRC Staff, and admitted parties may file answers to petitions to intervene and contentions.

This limitation makes eminent sense. As the Commission has repeatedly noted, this proceeding has the potential to be one of the most expansive proceedings in agency history.<sup>5</sup> Under such circumstances, adding unnecessary elements – such as a multitude of answers by entities not even established as parties, as well as related replies – would simply be contrary to sound policy.

#### **B. Nevada Has Not Been Admitted as a Party**

Nevada is not a party to this proceeding. Commission regulations clearly state that no petitioner achieves party status unless it has at least one contention admitted in the proceeding. The Commission's intervention regulation provides that

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<sup>5</sup> See *U.S. Department of Energy* (High-Level Repository: Pre-Application Matters) CLI-08-18, 68 N.R.C. \_\_\_, slip op. at 4-5 (Aug. 13, 2008).

the Commission shall permit intervention by the State and local governmental body (county, municipality or other subdivision) in which [a geologic repository operations area] is located and by any affected Federally-recognized Indian Tribe as defined in parts 60 or 63 of this chapter if the requirements of paragraph (f) of this section are satisfied with respect to at least one contention. All other petitions for intervention in any such proceeding must be reviewed under the provisions of paragraphs (a) through (f) of this section.

10 C.F.R. 2.309(d)(2)(iii) (emphasis added). This language clearly requires the host State, localities, and Federally recognized Indian tribes to have at least one admissible contention in order to be a party in this proceeding. All other petitioners must demonstrate standing as well as have an admitted contention to be a party. This same threshold requirement is essentially repeated in the Commission's Subpart J regulations, which define "Party" to include "DOE, the NRC staff, the host State, any affected unit of local government . . . , and any affected Indian Tribe . . . , and a person admitted under § 2.309," provided that "a host State, affected unit of local government, or affected Indian Tribe files a list of contentions in accordance with the provisions of § 2.309." 10 C.F.R. § 2.1001 (emphasis added). The Commission has since reiterated this threshold requirement for attaining party status in its notice of opportunity for hearing for this proceeding.<sup>6</sup>

Therefore, at this stage of the proceeding, only the DOE and NRC Staff are parties because the Atomic Safety Licensing Board has not yet admitted any contention from any petition according to the standards in 10 C.F.R. § 2.309. Nevada is not a party and, pursuant to 10 C.F.R. § 2.309, it is not permitted to file an answer to any other petitioner's intervention request or contentions in this proceeding.

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<sup>6</sup> "Pursuant to 10 CFR 2.309(d)(2)(iii), the Commission shall permit intervention by the State and local governmental body (county, municipality or other subdivision) in which the geologic repository operations area is located, and by any affected Federally-recognized Indian Tribe, as defined in 10 CFR Part 63, if the contention requirements in 10 CFR 2.309(f) are satisfied with respect to at least one contention." U.S. Department of Energy (High Level Waste Repository), CLI-08-25, 68 N.R.C. \_\_\_, slip op. at 7 (Oct. 17, 2008) (emphasis added).

### III. CONCLUSION

For the reasons discussed above, Nevada's Answer should be struck from the record. None of Nevada's contentions has been admitted into the proceeding. Thus, Nevada is not a party to this proceeding and, therefore, is not entitled to file answers to initial intervention petitions and contentions.

Respectfully Submitted,

A handwritten signature in black ink, reading "Timothy J.V. Walsh". The signature is written in a cursive style with a horizontal line underneath the name.

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing "The Nuclear Energy Institute's Motion to Strike Nevada's Answer to the Nuclear Energy Institute's Petition to Intervene" have been served upon the following persons on this 13<sup>th</sup> day of February, 2009 by Electronic Information Exchange.

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